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THE INDIAN LANDS STUDY: AN EXAMPLE OF THE APPLICATION OF  
GEOGRAPHIC RESEARCH TO THE ANALYSIS OF COMPLEX ENERGY AND  
ENVIRONMENTAL POLICY ISSUES

By

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## ABSTRACT

### THE INDIAN LANDS STUDY: AN EXAMPLE OF THE APPLICATION OF GEOGRAPHIC RESEARCH TO THE ANALYSIS OF COMPLEX ENERGY AND ENVIRONMENTAL POLICY ISSUES

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Douglas Burton Richardson

The Indian Lands Study - a massive \$700,000 research effort mandated by the U.S. Congress under the Surface Mining Act of 1977 - represents a unique and highly significant contribution to contemporary American Indian scholarship and to the understanding of current national energy and environmental policy issues. Indian tribes own and produce a substantial portion of the nation's strippable energy resources. In the aggregate, they own approximately 30% of the low-sulphur strippable coal west of the Mississippi River, and several of the top producing surface coal mines are located on Indian lands.

Mineral resources are among the few significant economic assets the tribes possess. The need for income and the possibility that more viable economies can be based on mining and related activities provide strong incentives to exploit these resources. These incentives are reinforced by the current energy crisis and its emphasis on expanding the nation's energy supply. At the same time, there are important reasons

to proceed cautiously. Most reservations are located in environmentally sensitive areas with ecosystems which, once disturbed, are often difficult to restore to their historically-achieved levels of productivity.

The Indian Lands Study combines several major research topics and cuts across a wide range of geographic subfields in the analysis of numerous policy and land use planning issues related to controlling the environmental impacts and changes which accompany large scale surface mining on Indian lands. The spatial area encompassed by the project includes all twenty-five Indian reservations in the United States which are known to contain coal resources. The subject matter of the study ranged from the physical landscapes of those areas to their political and cultural environments to their interaction with the larger, national region in two key areas--the quest for an expanded energy supply, and the need to prevent environmental damage and degradation.

The Study's final report, entitled The Control and Reclamation of Surface Mining on Indian Lands, brings together for the first time a comprehensive set of data on the contemporary North American Indian setting, and in so doing addresses an important range of the key energy-related issues confronting tribes in their modern environment.

To Everett and Dorothy Richardson,  
to Kate Young,  
and to Suzanne Rodbell.

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Special acknowledgement for assistance on the Indian Lands Study itself is also due to many others. Foremost among them are the participating tribal chairmen and their representatives, who took time from the pressing work and many critical issues which face energy resource tribes today, to help make this study one of the most comprehensive, in terms of direct tribal involvement, of recent years. These tribal chairmen, and the many others who contributed to the study are further acknowledged in the Foreword section of the study's final report, The Control and Reclamation of Surface Mining on Indian Lands, which is appended and to which the reader is referred.

Finally, I would like to express an appreciation that goes beyond professional acknowledgement to my major

professor and the chairman of my graduate committee,  
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professional development; and I am indebted to him both  
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integrity, and humanity which is embodied in his own  
life and work.

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INTRODUCTION

The Indian Lands Study--a \$700,000 research effort<sup>1</sup> mandated by the U.S. Congress under the Surface Mining Act of 1977--represents a unique and highly significant contribution to contemporary American Indian scholarship and to the understanding of current national energy and environmental policy issues.

The study's final report, entitled The Control and Reclamation of Surface Mining on Indian Lands, has been called a landmark document. It brings together for the first time a comprehensive set of data on the contemporary North American Indian setting, and in so doing addresses an important range of the key issues confronting tribes in their modern environment. Peter MacDonald, Chairman of the Navaho Tribe, has characterized the dilemma and the challenge which faces the American Indian today as follows:

We Native Americans face many problems as we try to survive, shape our own destiny and preserve our own culture and traditions. Under our lands lie vast energy resources...We wish to develop these resources in a way that will permit us, and our children, to live without having to be dependent on others. We wish to create industries on our reservations that will in turn create jobs, so that, in time we can attain economic security for our people. But if we are to sell our resources, the only fair



price is that which will ensure a legacy to bequeath to our children when our energy resources are gone. We must also protect the viability of our land to ensure that our children inherit more than the spoils of misguided and wasteful resource extraction.

Economic development, self-determination, environmental protection are our goals. To attain our goals--and to further our nation's energy goals--we must now reach out to the world beyond our reservations, offering our cooperation and soliciting understanding of the Indian's role in the future of our country. <sup>2</sup>

It is this context and this challenge which the Indian Lands Study explores.

The study of these issues was provided for by a special section of the national Surface Mining Act passed by Congress in 1977. This mandate represented the first time that an environmental law of general applicability directly addressed the issues of the relationship of its provisions to Indian lands and communities, and of how its goals might be adapted and implemented within the context of this unique setting. Moreover, this was the first instance in which the Indian tribes to be affected participated in the study and determination of these issues. Consequently, the tribes involved in the study viewed it as both intrinsically important and also as a potentially significant precedent for future legislation in the area of resource development. Allen Rowland, Chairman of the coal-rich Northern Cheyenne Tribe, emphasized this point when he stated that:

Since this is the first time tribes have achieved a legislative mandate to substantially participate in a study of this kind, the precedent which is set...will be an important one for tribes, and for their on-going efforts to achieve similar

mandates in forthcoming natural resources legislation.<sup>3</sup>

The report produced by the Indian Lands Study analyzes a wide range of issues and topics related to energy and natural resources development by Indian tribes. New data was compiled covering such areas as: the mineral resources they are known to possess; the environments they inhabit; their political and cultural institutions which are related to resource development and environmental protection; and, their considered and communally developed attitudes with respect to resource management and development. The collection of these data is an achievement in itself. The existence of this data base now makes possible the meaningful analysis of many new issues which confront tribes in their contemporary environment, the undertaking of further research in many related areas, and the application of some of the fruits of this study to other specific areas such as land use planning.

The study also goes beyond the collection of data to provide the first thorough analysis of the options available to the tribes with respect to the regulation of mineral resource exploitation. It considers the requirements imposed by the Surface Mining Act, the governmental experience of the tribes, the professional expertise they possess or could develop, and the cultural institutions and factors which are likely to have a significant impact on the development and management of tribal mineral resources. And, in the process of carrying out the project, many difficult policy issues were raised and explored.

In the years ahead, as the nation attempts to develop new and larger energy resources, many choices will have to be made. A number of these decisions will affect the ways in which people live and the environments they live in; they will affect various aspects of the man-land relationship. The Indian Lands Study has helped to identify and clarify some of these issues and choices for Indian lands; it is hoped it will aid in the process of making and implementing informed and rational decisions in these same areas.

#### BACKGROUND TO THE STUDY

##### The Significance of Mining on Indian Lands

Indian tribes own and produce a substantial portion of the nation's strippable energy resources. In the aggregate, they own approximately 30% of the low-sulphur strippable coal west of the Mississippi River, and several of the top producing surface coal mines are located on Indian lands. In addition, estimates indicate that Indian tribes own up to 50% of the country's known uranium deposits, much of which is situated in strippable deposits.

Mineral resources are one of the few significant economic assets the tribes possess. The need for income and the possibility that more viable tribal economies can be based on mining and related activities provide strong incentives to exploit these resources. These incentives are reinforced by the current energy crisis and its emphasis on expanding the nation's energy supply.

At the same time, there are important reasons to proceed cautiously, and to emphasize the use of environmentally sound techniques and reclamation measures. Most reservations are located in environmentally sensitive areas, with ecosystems which, once disturbed, are often difficult to restore to their historically achieved levels of productivity. Difficult as it is, reclamation may assume even more importance to the Indian tribes than to many other land owners, however. Mining operations often consume sizeable portions of the limited amounts of land tribes possess, thus reducing the land base available for other activities or forms of development. Moreover, the frequently observable cultural factors which emphasize the value of the land and of the natural environment--traditional man-land relationships of the Indians--often increase the importance of restoring mined lands to the highest possible stage of productivity. Confronted with these factors the tribes recognize the need to develop programs to plan for and control surface mining activities on their lands.

#### The Surface Mining Act and the Indian Lands Study

Prior to the enactment of the Surface Mining Control and Reclamation Act of 1977, the regulation of mining operations was comprised of a patchwork of standards and procedures which varied considerably among states, federal lands, and Indian lands. The passage of the Act mandated significant changes in this area. For the first time, minimum national environmental standards must be met during and

after the completion of all surface mining operations. The Act sets up a system of regulatory standards and procedures to be employed in the process of meeting these environmental requirements. In addition, the Surface Mining Act provides for a greater degree of public involvement in the regulatory process than had previously been the case. The Act also distinguishes between Indian lands and other jurisdictional areas to which it applies, and allows for the possibility of Indian tribes assuming regulatory authority over mining activities on their lands.

During the last few decades, several tribes have shown increasing concern about the possible transformation of their lands into massive strip mining operations--and about the environmental degradation so often attendant on them. These tribes recognized the need for environmental performance standards and strong enforcement mechanisms to minimize the undesirable effects of large-scale mining operations, and some have exercised their existing powers to limit or curtail mining operations.

The tribes' concern about the consequences of mining on their lands was a factor in the drafting of Section 710 of the Surface Mining Act. It is this section which calls for a major national study of mining on Indian lands. One of the goals of this "Indian Lands Study" is to assist in the development of "proposed legislation designed to allow Indian tribes to elect to assume full regulatory authority over the administration and enforcement of surface mining of coal on Indian lands."

In September, 1978, the Office of Surface Mining of the Department of the Interior awarded a contract for the full \$700,000 allocated in the Surface Mining Act for the Indian Lands Study to the Council of Energy Resource Tribes (CERT). During the course of the following year, CERT, in conjunction with the 25 coal-owning tribes and with concerted input from six major coal-owning tribes, conducted a wide-ranging and intensive study of issues pertaining to the regulation of surface mining on Indian lands.\*

Separate field research stations, staffed by tribal members, were organized on the six major coal-owning reservations to assist with data collection and the identification of key issues. Throughout the course of the study, frequent national meetings and workshops were held with the affected tribes. At these meetings, representatives of all 25 coal-owning tribes discussed major aspects of the study, provided input and guidance, considered special issues and possible recommendations for the regulatory program on Indian lands, and eventually unanimously endorsed a set of seven core recommendations for future Indian lands legislation.

#### KEY GEOGRAPHICAL ASPECTS OF THE INDIAN LANDS STUDY

The Indian Lands Study combines several major research topics and cuts across a wide range of geographic subfields. The study's integrative nature is itself geographic, and its

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\* The Principal Investigator and Director of the overall study effort was Douglas Richardson, a geographer who had initiated work on these and similar issues previously for the Northern Cheyenne Research Project in Montana.

comprehensiveness affords numerous opportunities to apply existing geographical knowledge to a new area, to test theories, and to structure additional data subsets and theories.

The spatial area encompassed by the project includes all twenty-five Indian reservations in the United States which are known to contain coal resources. The subject matter ranged from the physical environments of these areas to their political and cultural environments to their interaction with the larger, national region in two key areas--the quest for an expanded energy supply, and the need to prevent environmental damage and degradation. This broad scope coupled with the large-scale data collection effort made it possible for patterns of similarity and diversity among the tribes to emerge clearly--a result which would not have been possible in a smaller scale study or in one which involved a more limited collection of data. Moreover, these features of the study make possible comparisons between this group of ecosystems and others which have been or can be studied in a similar manner.

The study's fundamental focus is on man's relationship to the land which, in the case of the affected tribes, also involves a unique cultural landscape. Within this context, the major topic addressed--large scale surface mining--presents a variety of challenging issues which are particularly geographic in nature. For instance, surface mining--a dramatic illustration of man's role in changing the face of

the earth--often brings with it disruptions to the landscape which run the full gamut of geographic specialties on the continuum between physical and cultural geography. Carried out on a large scale, surface mining has often resulted in drastic changes to an area's geology, landforms, and soils. It has also produced major changes in vegetation, surface and ground water, air quality, and agriculture. The physical changes in themselves are of interest to researchers attempting to predict impacts to a region's environment, to identify interactive relationships among environmental factors, or to compare environmental features and changes among regions.

In addition, there are what might be considered second level changes resulting from surface mining--changes which present a variety of research problems, particularly for geographers interested in relationships between physical and cultural landscapes. Within this second order of changes are disruptions to and adaptations of societal systems and institutions--political, economic, social, and cultural. At a minimum, large-scale surface mining introduces a new use for a certain portion of the area's land-base, and some new societal relationships. Because of its integrative approach and its focus on man-environment relationships, geography, as a discipline, is particularly well-suited to deal with the complex planning and policy issues related to surface mining. The fact that Indian tribes also occupy distinct cultural and socioeconomic niches in their regions adds yet another layer of complexity and geographic interest to the study of surface mining on Indian lands.



The Indian Lands Study addresses a wide range of policy and planning issues related to controlling the environmental impacts and changes which accompany large scale surface mining. The experiences and recommendations of the tribes demonstrate some of the ways in which communities can plan for the introduction of mining so as to minimize its disruptive effects, as well as some of the measures which communities might take to limit the disruptive impacts once they have made themselves known. This information should have applicability to future land use planning efforts.

In many ways, the Indian Lands Study process itself represents a type of land use planning on a large scale. In order to be effective, good land use planning must include the following features: (1) bring together necessary data, (2) present a coherent range of options, well analyzed, (3) involve the affected population in the decision-making process, and (4) follow the research through to its policy implications --all features which characterize various key phases of the Indian Lands Study process.

The study's orientation toward the contemporary Indian geographic setting is also somewhat distinctive. Much geographic and general scholarly research on Indian tribes focuses on Indian traditions; many studies of Indian society and culture stress how tribes have moved away from their presumed cultural foundations. The Indian Lands Study considered evolutionary features of Indian customs and institutions, but did so from the perspective of better understanding how they function today. As a result, the study

report holds an almost unique place in the literature on the North American Indian. It is one of the few comprehensive studies undertaken from a contemporary perspective, utilizing an original, contemporary data base, and directly addressing the critical emerging issues of mineral resource development on Indian lands.

The Indian Lands Study also stressed direct participation of the tribes in the project. To a very large extent, the accuracy and comprehensiveness of the data collection effort undertaken by the study rested upon the direct relationship that was established between the needs of the tribes and the policy implications which are inherent in the research. The tribes' awareness of the importance of the research to their own needs, and the close interactive working relationship which was developed during the course of the study allowed for far greater cooperation and access to significant tribal data than would otherwise have been the case.

In fact, this type of research--on these topics and on this scale--simply could not have been done exclusively from the outside. Increasingly, tribes have become justifiably guarded about their interactions with outside researchers. They have too often seen distortions or stereotypes of their way of life emerge as academic or scholarly research. A recurrent theme of Indian tribal interaction with outside researchers during the past decade has been a strong tribal concern for protecting physical, social and cultural proprietary data, as well as a rejection of those outside interpretations of tribal institutions or societies which do not

incorporate tribal perspectives, values and goals into their analyses. Therefore, if they are to be effective, geographers and others who intend to do research or planning work with Indian tribes today must be able to demonstrate to tribes the significance and usefulness of their work. Quality research will require it, for perhaps in no other U.S. geographic area are existing data sources (including particularly U.S. Government sources) as notoriously inadequate as those which pertain to Indian reservations. Thus, in most cases, if their data and analyses are to be meaningful, geographers conducting research on American Indian issues will need to develop direct links with the tribes.

The Indian Lands Study also deals with several complex geographic issues bearing directly on national energy policy needs. The national energy crisis can only be resolved through a combination of conservation and expanded supply. Increased use of coal is an important part of the effort to expand energy supplies, and within this area there is a premium attached to the use of low-sulfur coal, because it minimizes the resultant air pollution. Thus, the tribes involved in the Indian Lands Study are in a key position with respect to the achievement of a more adequate national energy supply as large-scale owners of strippable, low-sulfur coal. The intricacies of this position, juxtaposing tribal interests in mining and selling their coal with concern for environmental and socio-cultural conditions, and with tribal relationships to the larger communities of: 1) potential users of their coal; and 2) the nation--or at least the federal

government--as advocate of increased domestic energy supplies give rise to a multitude of research topics of geographical import.

For example, tribal relationships with their physical environment--and their concern for the quality of that environment--are in themselves important issues. In contrast to much of the more mobile general population, Indian tribes have significant cultural attachments to their reservation lands. The reservations are homelands to be preserved and protected, and they are too limited in size for the surface mineable portions to be ignored or written off. Their communities are comparatively small and unindustrialized. Subsistence grazing and agriculture are important to the local economy and are often the dominant land use. In contrast to this, in most states where surface mining is now being carried on or is planned for the future, the bulk of the population generally does not live on or center their communal lives on surface mineable lands. Distinctions such as these are important factors to consider during the policy and land use planning stages of a national mineral regulatory program for Indian lands.

The Indian Lands Study carried its congressional mandate through to the production of a set of major policy recommendations for regulatory programs on Indian lands. These recommendations articulate real needs of the tribes as well as the needs of national energy policy, while at the same time addressing positively the substantial issues of environmental

protection. These legislative recommendations--which were included in the study report and submitted to the Interior Department for transmission to the Congress in the form of draft legislation--have critical implications for the geography of energy development on Indian reservations and, consequently for the implementation of national energy policies.

#### THE STRUCTURE AND PROCESS OF THE INDIAN LANDS STUDY

The scope of the Indian Lands Study and the interactive nature of its parts are illustrated in the following section, which considers the structure and process of the research effort undertaken in the study, and highlights some of the issues which were addressed in the course of the project. The study design involved three major research segments. In the first, the focus was on the general objectives of the Surface Mining Act and the ways in which these mesh with the existing array of controls affecting mining on Indian lands. The second part of the study centered on the reservation setting, and analyzed a range of factors relevant to mineral resource development on these lands. And, in the third phase of the project, alternative models for the control and reclamation of surface mining on Indian lands were formulated and considered in light of the analyses which had been done previously.

#### Section I: The Act

The first phase of the study focused on the provisions of the Surface Mining Act and related statutes as they affect

mining control and reclamation on Indian lands. In it, the general objectives at which the Act aims and the ways in which they are to be achieved on state and federal lands are detailed. The Surface Mining Act does not afford much flexibility in the environmental standards it sets; a mining operation must achieve and a regulatory agency must enforce these standards or exceed them. However, considerable allowance is made for variations in the way a regulatory agency is constituted and in the procedures it follows. These provisions were analyzed in detail during the early stages of the project in order to delimit and clarify the framework for subsequent tasks.

Within this first section, Chapter 1 discusses the provisions of the Surface Mining Act in the context of general regulatory schema for Indian lands. At present, there is a unique mix of regulatory agencies exercising jurisdiction on Indian lands: the tribal governments; the tribes' trustee, the Department of the Interior; and those federal agencies responsible for implementing laws "of general applicability."

Like other environmental laws, the Surface Mining Act relies on four mechanisms to accomplish its objectives: (1) a planning process; (2) performance standards; (3) a permit system; and (4) enforcement measures; The purpose of the planning process is to identify and designate lands which are unsuitable for surface mining. The performance standards are designed to ensure that all mining operations, after the law takes effect, are conducted and reclaimed in an environmentally sound manner.

The technical, planning, and interactive man-land relationships which are the focus of many of the requirements of the Act--and which were discussed in Chapters 1 and 2 of the Indian Lands Study Report--should make this law a policy area of key concern to geographers. A number of its procedures, concepts, and processes open up areas which are ripe for geographical research and application. Examples include the Act's planning procedures and its provisions relating to mining on alluvial valley floors, the restoration of mined areas to their approximate original contours, and those sections dealing with hydrologic balance and with top-soil stratification and replacement.

After having analyzed the general objectives and requirements of the Act, the focus of the research shifted to the construction of an initial regulatory program model based on existing state and federal program requirements. These program requirements, referred to as the State Model, were analyzed in Chapter 2 and served as a starting point or reference model for the tribal analyses of alternative regulatory options. In analysing the requirements a regulatory agency must meet, eight core program areas of the Act were delineated in order to provide the tribes with a convenient and common framework for discussion and analysis of the complex criteria.

## Section II: The Regulatory Setting

The second section of the study report focused on the Indian lands setting within which regulation under the Act will take place. In this phase of the study, a wide range

of topics relevant to the potential regulatory setting were studied, and a great deal of new and important data was brought together for the first time for use in the analysis of mine reclamation issues and options.

The first aspect of the setting which was considered was the physical setting of the Indian reservations. Data was collected concerning the geological and ecological conditions of Indian lands, and an overview of these features, accompanied by a series of maps was presented to the tribes for review. It was noted that tribal coal lands in the western United States share the common characteristics of generally poorly developed soils over usually flat-lying to slightly dipping sedimentary rocks, and are located in a semi-arid climate. Within the generally common themes of bedrock geology and arid climate, the twenty-five reservations with which the study is concerned exhibited many variations of landforms, soil types, and vegetation. Grazing for livestock was the dominant land use on most tribal coal lands, but the carrying capacities of the lands varied considerably.

For study purposes, tribal coal lands were grouped into three major coal regions: the Northern Great Plains (nine reservations); Rocky Mountain (twelve reservations); and Interior (four reservations). Of the twenty-five tribes participating in the study, eight had coal deposits which are currently being mined or in which the coal industry has expressed strong interest in mining, and three others had known coal or lignite deposits of more limited current



commercial interest to the coal industry. The remaining fourteen tribes are located in areas in which coal or lignite is known or can be expected to be found, but which are of limited or uncertain value at the present time.

The special ecological problems of western coal mine reclamation were also addressed. Extensive surface mining and systematic attempts to reclaim mined lands in the western United States have only been undertaken in the last seven or eight years. Thus far, reclamation practices have demonstrated that revegetation can achieve short term stability against wind and water erosion, but from the perspective of the longer term, the success of current practices must still be viewed as experimental.

The study emphasized that the potential for reclamation of surface-mined land in the west is highly site-specific, and the development of mining and reclamation practices at individual locations will have to be based on a number of specific factors. Careful pre-mining environmental assessments of proposed sites and detailed planning of mining operations, as required by the Surface Mining Act, were cited as important factors which, when combined with continued research, should enhance the prospects of meeting the difficulties inherent in reclaiming mined lands in the west. The analysis stressed, however, that it may be some years before the establishment of a viable, progressive, self-regenerating ecosystem on reclaimed lands can be achieved, as required by the Act.

After first considering the physical landscape, Phase II of the study then turned to the analysis of the unique institutional setting within which the regulation of surface mining on Indian lands takes place. Indian tribal governments differ from federal, state, and local governments in several important respects, including the scope of their authority, their structures, and in their role in managing community affairs.

The powers of Indian tribes to regulate surface mining activities stem from their well-established status as semi-dependent sovereign nations that possess an inherent right to self-government. Historically, the recognition of tribes as quasi-sovereign entities dates back to their contacts with British, French and Spanish explorers in the 1500's. Treaties negotiated with these countries, particularly during the colonial wars of the Eighteenth Century, reaffirmed the recognition of the tribes' sovereign status. Treaties signed with the United States during and after the Revolutionary War also regarded Indian tribes as "distinct, independent, political communities" under the protection of the U.S. government.

Thus, the current forms and powers of tribal governments have resulted from a series of interactions between the Indians and the United States Government over the course of the past two centuries. The many changes in the tribal land bases which were imposed on the Indians during this time, the social and geographical consolidation of tribes, and the frequently prevailing assumption that the Indians should be "civilized" or assimilated into the general population had

far-reaching implications, some of which continue to influence tribal political and cultural institutions and attitudes.

These factors currently have significant effects on the development of tribal resources generally, and the control of mining in particular. Both the historical influence and current significance of these factors are areas which have great potential for further comparative political and cultural geographical research. Because of these special characteristics of tribal governmental institutions, there are several areas in which a national Indian mine regulatory program would need to accomodate certain structural differences among tribal governments, and would also need to devise approaches which vary from those designed for states.

The structures and basic functions and powers of the governments of the twenty-five tribes which participated in this study are described and compared in Chapter 4, and their salient features are summarized in a series of detailed tables and charts. Chapter 4 also documents recent trends in the area of mineral development activity by tribal governments, and provides data and analyses which should have considerable application to future rural land use planning efforts by the tribes.

The nature of Indian judicial systems is also of particular importance to mining on Indian lands in view of the many potential decisions of a regulatory agency which are subject to judicial review and appeal. The Surface Mining Act designates those courts which have jurisdiction over appeals

of decisions of state and federal agencies. Legislation concerning an Indian lands regulatory program would have to take into account the special role of tribal court systems-- a role which currently preserves a delicate balance between contemporary legal requirements and traditional Indian cultural values.

Phase II of the research effort therefore also undertook an analysis of Indian judicial institutions. Chapter 5 of the study report describes the historical evolution of tribal judicial concepts, provides an analysis of the present formulation of reservation court systems, and explores some of the more significant issues presently confronting those courts.

The notion that disputes relating to Indian lands should be resolved by organs of the tribe under principles of tribal law is fundamental to all American Indian tribes. Tribal judicial systems pre-date the arrival of European institutions in America, and tribal judicial authority has typically rested in communal councils which adjudicated disputes on the basis of consensus and religious principles. From the outset, the United States government recognized the autonomy of each Indian tribe over its own affairs and territory--and implicit in that recognition was an acknowledgement of the tribal courts' jurisdiction over Indian affairs and territory.

The major changes which have occurred in tribal judicial systems over the course of the past two centuries largely parallel those which have occurred in other Indian governmental institutions. Not surprisingly, the merging of tribes

whose judicial systems and traditions differed as did their cultures, the removal of tribes from their traditional lands with the resultant disruption of long-standing man-land relationships, and the intermittent attempts to encourage or to force tribes to adopt European judicial forms had significant effects on Indian judicial practices. Today, Indian judicial systems are composites of traditional tribal institutions and Anglo-American models, reflecting both the impacts of federal Indian policies and the endurance of some traditional tribal judicial concepts and practices.

After examining the structures of Indian courts and the ways in which they function, the study then considered existing tribal laws and regulations which are relevant to natural resource management. Indian tribes have exhibited a strong interest in regulating natural resource activities on their reservations for some time, and, in recent years, have established codes, regulations, and agencies to administer them in a number of areas. From the perspective of assuming larger regulatory functions under the Act, the past experience of the tribes in regulating mining, their existing laws, regulations, and administrative apparatus, and their current activities in analogous natural resource areas are all relevant. The study affirmed that a number of tribes have had significant administrative and regulatory experience of types that would be relevant to the tasks required of a regulatory agency under the Surface Mining Act. In researching this question, a large amount of data relevant to land use

planning and natural resource management was collected from the tribes and compiled for comparative analysis in Chapter 6 of the study report.

Effective regulation of surface mining also requires that the regulatory agency possess a physical resource data base and information system. In order to properly evaluate permit applications, mining and reclamation plans, to identify and designate specific sites as potentially unsuitable for mining, or to reclaim abandoned mined lands such data must be available.

Therefore, the research effort turned next to an analysis of the data bases the tribes maintain, the existence of data concerning reservation resources and environmental factors to which the tribes could have recourse, and the types of information systems which are currently available for their use. Examination of the available data showed that the geographic and natural resources data bases maintained by some tribes are both extensive and sophisticated. For example, one tribe maintains computerized mapping files on a whole range of resource data in such areas as timber, soils, water, range and agriculture, vegetation, and ethnobotany. Most of the tribes have mapped the geographic distribution of a wide range of agriculturally relevant data such as forest stand conditions, soil and range groups, range conditions classes, tree canopy density classes, soil permeability, slope erosion classes, and climate zones.

The study found that the extent of the data coverage and the sophistication of the in-house information varies a

great deal from tribe to tribe. The availability of information pertaining to surface coal mining and its effects, for instance, was related to the degree of experience a tribe has had with mineral resource development. In a similar way, the extent of the systematization of data tended to vary with the needs and functions of the tribal staff who utilized the information. The description and evaluation of tribal data bases and information which was carried out in the study is presented in detail in Chapter 7 of the report.

The last subject to be taken up in the second phase of the research project embodies a classic geographic problem: the resolution of complex land status patterns. The research task here was to identify those areas which, due to the unique evolution of the Indian reservation land base, might have either special or uncertain status under the provisions of the Surface Mining Act. For the purposes of mining regulation under the Act, Indian lands have been defined 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."

The twenty-five coal-owning tribes were requested to identify particular sites which might have special or unique status with respect to criteria and definitions contained in the Surface Mining Act. Examples of the potential "special status lands" identified in Chapter 8 of the report included

non-treaty aboriginal lands; ceded lands; contested homestead areas; checkerboard areas outside the exterior boundaries of the reservation; split estate (mineral and surface) lands; lands acquired by purchase, exchange or claim settlement; various types of allotted lands; and others. The pattern of unresolved land ownership status evident in many of the areas identified underscores the complexity of the historical evolution of the Indian reservation land base.

### Section III: Alternative Models and Tribal Recommendations for Surface Mining Control and Reclamation on Indian Lands

In the last phase of the study, alternative models for regulating surface mining on Indian lands were postulated in light of the analyses conducted earlier. In addition, several other factors relevant to the evaluation of these regulatory models by the tribes were analyzed. Finally, after extensive consideration of the alternative models and the related analysis, tribal recommendations for new legislation were formulated.

The alternative models were designed to provide an analytical framework for the tribal evaluation of regulatory options on Indian lands. They functioned to present a broad range of viable regulatory program options for tribal consideration and to provide a common framework for discussion and analysis of these options. They are set forth in some detail in Chapter 9 of the study report.

The third phase of the study also undertook the analysis of several additional factors which were relevant to a comprehensive evaluation of the program models and to the formulation



of legislative recommendations. For example, an analysis of various practical factors, such as staffing needs and associated costs for tribal mine reclamation programs, was conducted. Also considered were several "special policy issues" which had been identified during the course of the study. The analysis of these special policy issues was organized into three broad categories: 1) Conflict of Interest Issues, 2) Special Cultural-Religious Considerations, and 3) Tribal Proprietary Data Needs.

The concern over whether potential conflicts of interest might inhibit the functioning of tribal regulatory agencies under the Act produced much detailed comparative analysis of Indian and non-Indian man-land relationships. The Surface Mining Act seeks to prohibit mining in places where damages are likely to be severe or not repairable, and to place the onus of reclamation and repair on the owners and operators of mines. These requirements obviously increase the costs of surface mining for mine owners and operators, but have been judged necessary because serious environmental degradation has resulted from years of widespread inattention to environmental considerations and generations of mine operators who disregarded the side effects of their enterprises.

In this context, a question was raised as to whether the coal-owning Indian tribes could be expected to fulfill the requirements of regulatory agencies, when to do so would increase their costs as owners, and in some cases, as mine operators. The analysis conducted in Chapter 11 of the study

concluded that the potential for such a conflict of interest was minimal. Three categories of factors supported this conclusion. First, the relationship of an Indian tribe to its communal lands and the enterprises carried out on them is similar to that of the federal government to federal lands or of state governments to state-owned lands, the major difference being one of scale. Second, the Surface Mining Act provides safeguards against the possibility that environmental considerations might suffer in any conflict among competing interests. Many of the standards set in the Act are beyond the discretion of local implementing authorities, and a regulatory agency which fails to ensure that these standards are maintained faces the withdrawal of approval of its program and suspension of its regulatory authority. Third, and of considerable interest to the geographer's examination of man-land relationships, the coal-owning tribes were found to be more likely than most communities to be concerned about avoiding environmental degradation on the reservations. The limited size of the reservations, the proximity of dwellings and farmlands to mine sites, the cultural significance of the reservation as a tribal homeland, and the results of basic cost-benefit analyses all militate against the possibility that a tribal regulatory agency would acquiesce in environmentally dangerous mining practices. The actions of tribes in recent years to promote more stringent environmental safeguards further reinforced this conclusion.

The study's consideration of cultural and religious considerations which might need to be taken into account in

implementing the Surface Mining Act centered around specific sacred or ceremonial locations on the reservations which tribes might wish to protect, and the preservation of specific ethnobotanical species.

Special tribal concerns regarding the protection of commercially proprietary or culturally sensitive data during the mine regulatory process were also addressed. Examination of examples of what the tribes considered to be proprietary information showed that although its subject matter was sometimes unusual, there should be no major difficulties in devising regulatory mechanisms to insure that this information remains confidential.

The legislative history of the Surface Mining Control and Reclamation Act shows clearly that Congress intended to consider and honor the views and recommendations of the Indian tribes themselves before instituting a regulatory program for Indian lands. The final phase of the Indian Lands Study therefore focused on the formulation of policy recommendations for future Indian lands surface mining legislation.

Chapter 12 of the study report describes the tribal evaluative process of the study and the recommendations that emerged from it. A series of national meetings and workshops were held to provide the twenty-five coal-owning tribes with the analysis and resources they needed to evaluate and comment on the issues being studied. These meetings culminated in the unanimous agreement of the tribes to a set of key legislative recommendations for submission to Congress with

the study report. The level of tribal participation which was achieved during this process has been an instrumental factor to the study's subsequent credibility and acceptance as a legitimate policy and planning document, both within Indian and non-Indian policy making circles.

For a more detailed discussion and analysis of the issues raised in this paper, the reader is referred to the appended final report of the Indian Lands Study, which is entitled The Control and Reclamation of Surface Mining on Indian Lands.<sup>4</sup>

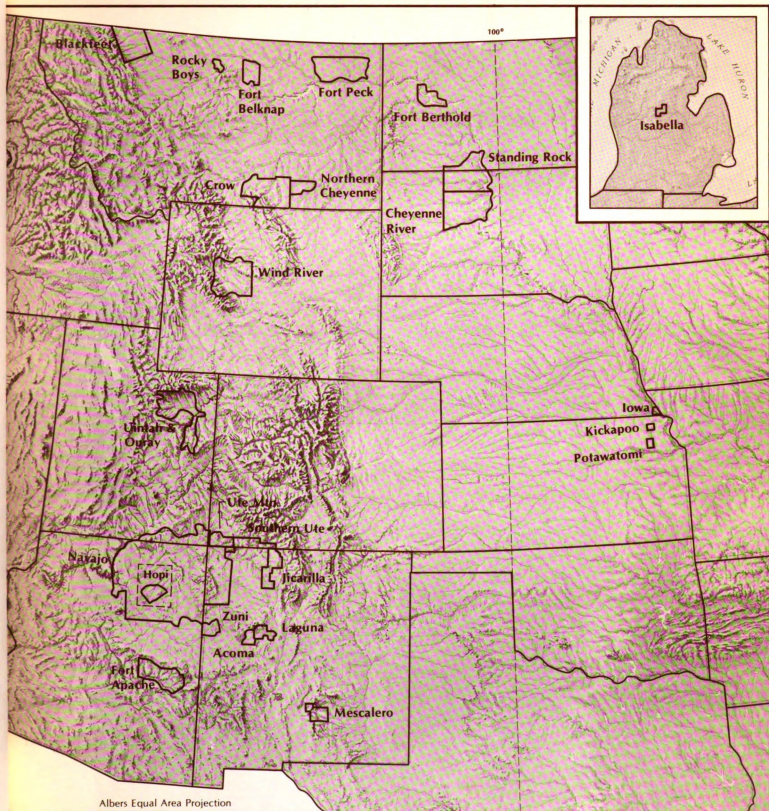
## NOTES

- <sup>1</sup>The Surface Mining Control and Reclamation Act of 1977.  
(P.L. 95-87).
- <sup>2</sup>Peter MacDonald, CERT Annual Report (1978), p. 2.
- <sup>3</sup>Allen Rowland, Letter to Secretary of the Interior  
Cecil Andrus; June 7, 1978.
- <sup>4</sup>Richardson, Douglas (dir.). The Control and Reclamation  
of Surface Mining on Indian Lands. Washington, D.C.:  
Council of Energy Resource Tribes, 1979.

## APPENDIX

### THE CONTROL AND RECLAMATION OF SURFACE MINING ON INDIAN LANDS

# The CONTROL AND RECLAMATION OF SURFACE MINING ON INDIAN LANDS



Report Produced by the COUNCIL OF ENERGY RESOURCE TRIBES for  
The OFFICE OF SURFACE MINING, U.S. Department of the Interior

Douglas Richardson, Project Director

**THE CONTROL AND RECLAMATION OF SURFACE MINING  
ON INDIAN LANDS**

**Report Produced by  
the Council of Energy Resource Tribes**

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Project Director/Principal Investigator  
CERT-OSM Indian Lands Study**

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Submitted by the  
Council of Energy Resource Tribes

To  
The Office of Surface Mining, Reclamation  
and Enforcement  
United States Department of the Interior

Contract # J5180108

September 30, 1979

## FOREWARD

Many people contributed time and effort to this study. Foremost among them are the participating tribal chairmen and their representatives (listed by tribe on the next page), who took time from the pressing work and many other critical issues which face energy resource tribes today to help make this study one of the most comprehensive, in terms of direct tribal involvement, of recent years.

The entire CERT staff deserves special thanks for their contributions, support, and indulgence throughout the various stages of the Indian Lands Study. Particular credit is due to Kathleen Gramp and Bill Roberts; to Maggie Vance Berard, Oran LaPointe, Bill Nagle, Lonnie Von Renner, David Redhorse, Eric Natwig and Carol Wilson. CERT Directors Ellen Brown, Edward Gabriel and Nancy Zidonis provided greatly appreciated insight and guidance throughout the study.

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These contributions, and the help provided by many others not listed here, is sincerely appreciated and gratefully acknowledged.

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Three Affiliated Tribes  
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Hugh Baker, I.L.S. Coordinator

Navajo Tribe, (AZ)  
Peter MacDonald, Chairman  
Harold Tso, I.L.S. Coordinator

Northern Cheyenne, (MT)  
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Blackfeet Tribe, (MT)  
Daniel Boggs, Chairman

Cheyenne River Sioux, (S.D.)  
Melvin Garreau, Chairman

Ft. Belknap Reservation, (MT)  
Gros Ventre and Assiniboine Tribes  
Jack Plummage, Chairman

Ft. Peck Reservation, (MT)  
Assiniboine and Sioux Tribes  
Norman Hollow, Chairman

Iowa Tribe of Kansas and Nebraska, (KA)  
Howard Simmonds, Chairman

Isabella Reservation, (MI)  
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Peter D. Otto, Chairman

Jicarilla Apache, (N.M.)  
Leonard Atole, Chairman

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Ute Mountain Ute, (CO)  
Scott Jacket, Chairman

White Mountain Apache, (AZ)  
Ronnie Lupe, Chairman

Wind River Reservation, (WY)  
Shoshone-Arapahoe  
Robert Harris, Co-Chairman  
Frank Ennos, Co-Chairman

Zuni, (N.M.)  
Robert Lewis, Governor

\* (The Hopi Tribe participated as an observer only.)

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**The Control and Reclamation of Surface Mining  
on Indian Lands:**

**INTRODUCTION AND SUMMARY**

## INTRODUCTION AND SUMMARY

Indian tribes own and control an estimated 15% of the country's coal resources which may be recovered by surface mining, including one-third of the low-sulfur strippable coal of the western United States. This study presents an analysis of the issues associated with the control and reclamation of surface coal mining on these tribal lands and makes recommendations for future legislation in this area.

### BACKGROUND

When the Surface Mining Control and Reclamation Act was passed in 1977, Congress left unresolved the question of how coal mining on Indian lands was to be regulated. Before determining this issue, the legislators wished to know more about the conditions existing on the reservations of coal-owning tribes and about the needs and desires of the tribes.

Congress therefore required the Department of the Interior to undertake a study of surface mining control and reclamation on Indian lands and to provide for substantial participation by the affected tribes in the conduct of the study (Section 710).<sup>\*/</sup> The coal-owning tribes also are to be encouraged to submit separate statements of their views as to how the Act should be implemented on their reservations (Section 710(b)). After completion of the study, the Interior Department is to develop proposed legislation for implementing the Act on Indian lands. This proposed legislation is to be "designed to allow Indian

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<sup>\*/</sup> Section 710 of the Surface Mining Control and Reclamation Act of 1977 (P.L. 95-87). Unless otherwise specified, all section references in this report refer to the Surface Mining Act.

tribes to elect to assume full regulatory authority over the administration and enforcement of regulation of surface mining of coal on Indian lands" (Section 710(a)). The study, the views of the affected tribes, and the legislative proposals are to be submitted to Congress for its consideration in developing a national surface mining control and reclamation program for Indian lands.

The Section 710 Indian Lands Study and special congressional consideration of tribal regulatory programs for Indian lands are unique approaches to Indian natural resources regulatory issues and are highly significant for the tribes.

In the past, environmental laws have neither mandated study of their probable effects on Indian lands and people nor designated which unit of government was to implement their provisions on Indian lands. The result often has been exacerbation of state-tribal jurisdictional conflicts, and an impairment of critically important tribal efforts to plan for and manage the development of their natural resources. Section 710 of SMCRA represents the first attempt by Congress and the tribes to resolve these issues. Allen Rowland, President of the Northern Cheyenne Tribe, stressed this significance of the Section 710 Indian Lands Study to tribes in a letter to Secretary of Interior Andrus on June 7, 1978, stating, "Since this is the first time tribes have achieved a legislative mandate to substantially participate in a study of this kind, the precedent which is set . . . will be an important one for tribes, and for their on-going efforts to achieve similar mandates in forthcoming natural resources legislation."

Tribal control over natural resources activities on Indian reservations is an important issue to the tribes involved in the study. For

# CERT-OSM Indian Lands Study

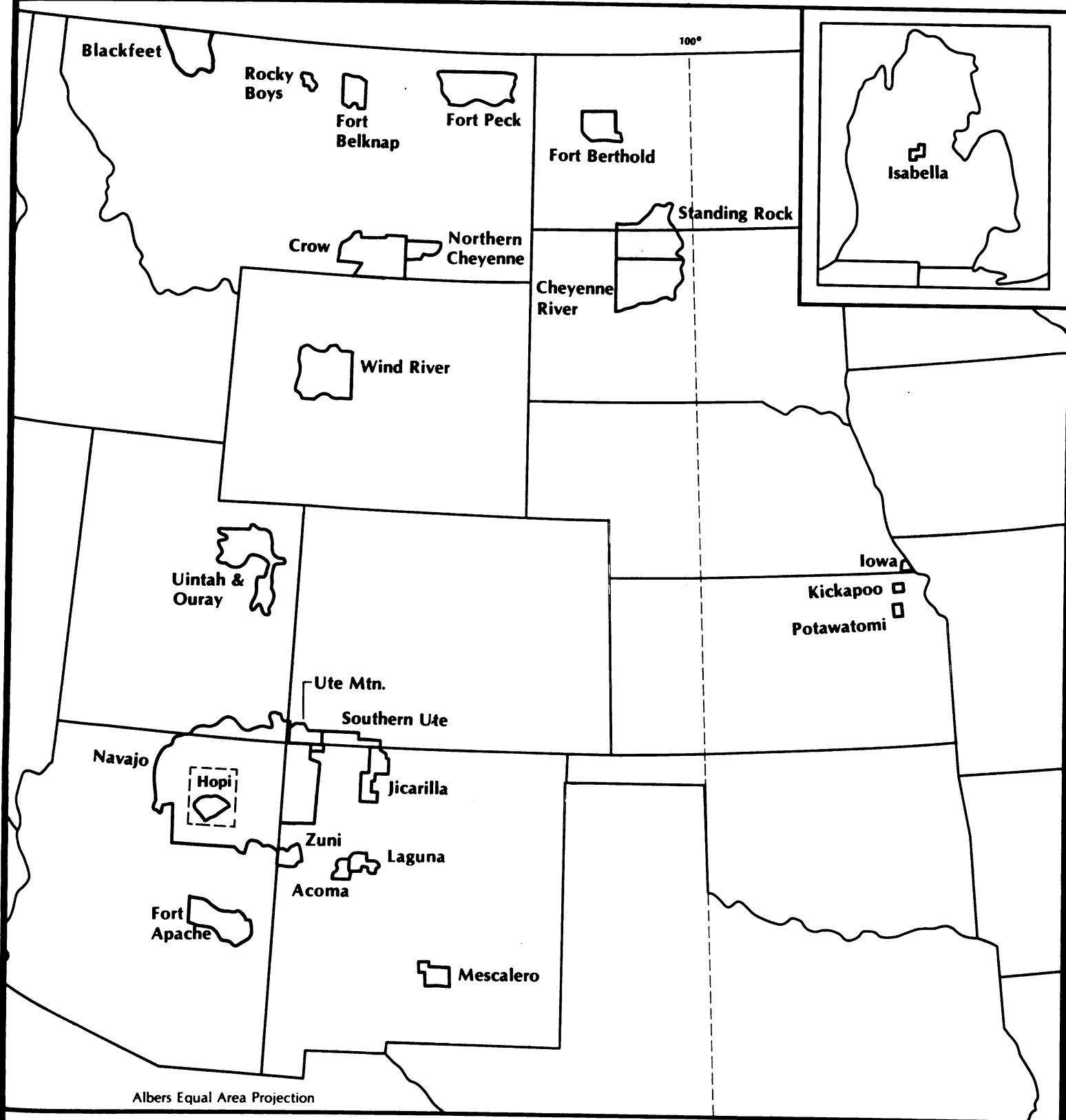


Fig. i-1

Source: U.S. National Atlas, 1968



Sketch Map Showing Approximate Locations  
of Indian Lands Study Reservations

this reason, the coal-owning tribes have exhibited a keen interest in developing an understanding of this law, participating in the evaluation of technical and policy matters, and providing their recommendations on proposed legislation.

The Indian Lands Study was originally scheduled to be submitted to Congress by January of 1978 (Section 710(b)). After a number of delays in its implementation, the Office of Surface Mining (OSM) of the Department of the Interior (DOI) decided to contract the major portion of the required study to the Council of Energy Resource Tribes (CERT) in September, 1978. Over the past year, CERT, in conjunction with the coal-owning tribes and with concerted input from six of the major tribes,\*\*/ has conducted a wide-ranging and intensive study of issues pertaining to the regulation of surface mining on Indian reservations. The study has included detailed analysis of the provisions of the Act, collection of extensive data pertaining to Indian lands and resources, analysis of Indian governmental forms and activities, and consideration of the relationships between them. Throughout the course of the study. Monthly meetings were held with the major coal-owning tribes, and bi-monthly national workshops were held at which CERT and representatives of the 25 coal-owning tribes discussed these factors, considered possible recommendations for regulatory programs on Indian lands, and reached unanimous agreement on seven core recommendations for Indian lands legislation. These recommendations are summarized below. Although individual tribes had additional suggestions and recommendations, the seven described here were considered by all to be the most significant

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\*\*/ The 25 coal-owning tribes are listed at the beginning of this report; the approximate locations of their reservations are indicated on page i-3 (Figure i-1).



and to cover those points which they most urgently wanted to see given legislative form.

## RECOMMENDATIONS

The tribes involved in the Indian Lands Study recommend that DOI's proposed surface mining control and reclamation legislation for Indian lands should include the following features:

1. Provisions which would afford tribes the option, similar to that currently available to states on state lands, of electing to assume full tribal regulatory authority over all mining and reclamation activities on Indian lands which are regulated by the Act. Most tribes consider this recommendation absolutely critical to any acceptable Indian lands program under SMCRA.
2. Provisions which would afford tribes the additional option of electing to assume various partial regulatory programs via cooperative agreement with the federal government.
3. Provisions which would assure adequate federal funding of tribal regulatory programs.
4. Provisions which would establish special training and educational programs designed to assist tribes in acquiring skills and capabilities required for mining regulatory programs.
5. Provisions which would provide for special technical assistance availability to tribal regulatory programs.
6. Provisions which would furnish compensation to tribes for the loss of those tribal coal resources which cannot be mined as a result of the Act's prohibition of mining in alluvial valley floors.
7. Provisions which allow for flexibility in developing and implementing tribal regulatory programs in order to accommodate local or tribe-specific requirements and conditions.

In the first recommendation, the tribes firmly support the principles, embodied in Section 710 of the Act, that tribes should be given

the option of assuming full regulatory authority over coal mining activities on Indian lands. From the point of view of the tribes, the ability to exercise regulatory authority over coal mining on their lands will ensure that they retain control over the development of their natural resources. Earlier experiences with natural resource development over which the tribes had limited control have left them convinced that without this ultimate control their interests will not be as carefully or as fully represented. Some of these tribes have come to the conclusion that it would be better not to develop their coal resources at all unless they can control the process. Several of the major coal-owning tribes have indicated that whatever the legislative outcome, they intend to exercise existing powers, such as leasing and contractual rights, to control the development of their coal resources. For these tribes, legislation affording them the option to assume full regulatory authority over mining on tribal lands under SMCRA would provide for streamlined regulation of mining and would avoid unnecessary jurisdictional conflicts.

Apart from these practical considerations, the tribes believe that important principles are at stake. As quasi-sovereign entities tribes are entitled to exercise regulatory authority over mining activities on their land. Congress has shown, over the course of considering the Act prior to legislation, that it views the tribes as similar to states with respect to this authority. In addition, the enactment of this legislative proposal would affirm the existing responsibilities of tribal governments for their peoples, their lands, and their resources, and would enhance the capability of tribal governments, as demonstrated by this study, to fulfill those responsibilities. Finally, enabling the

tribes to assume full regulatory authority would be consistent with the Congressional practice of assigning regulatory functions to the unit of government best able and most committed to carrying them out. The tribes clearly are most committed to making environmentally and economically sound decisions with respect to mining, because they must live with the consequences of their decisions. The tribes cannot pack up and move elsewhere.

The tribes' second recommendation is that they be enabled to assume regulatory authority over parts of a regulatory program and to enter into cooperative agreements with the federal government for performance of the other parts of such programs. Generally speaking, the reasons for enabling tribes to assume full regulatory authority also apply to enabling them to assume authority over parts of the programs required by the Act. If the tribes were to be treated precisely like states, they would not have the option of assuming regulatory authority over parts of the program, since the Act does not allow approval of partial state programs (Section 503). There are several reasons, however, for avoiding such an all-or-nothing approach to tribal programs.

Some tribes envision a number of circumstances under which assuming partial responsibility for the regulation of mining might be more practical than undertaking full-scale regulatory programs. Where tribes do not already possess full programmatic capabilities, coal development could be hindered unless the tribes are able to phase in their regulatory programs over a period of time. During this period, the tribes would be able to carry out those regulatory functions for which they possess or had developed the necessary capabilities while federal agencies, pursuant to a cooperative agreement, could carry out the

remaining regulatory functions. Thus, the possibility of assuming regulatory authority for parts of the program would enable the tribes to retain the element of control they require while enhancing their regulatory capabilities over time.

The possibility of assuming partial regulatory authority also would be the most practical approach where a tribe was faced with developing sizeable and expensive facilities for one-time use. For example, in cases where a tribe intends to develop only one mine or where extensive technical work is required only for one short phase of the program, it might make more sense for the tribe to enter into an agreement with an agency of the federal government to carry out those parts of the program, rather than for the tribe to spend considerable amounts of time and money performing those functions itself. Precedent for such partial regulatory authority already exists in the Act, which allows the federal government to enter into cooperative agreements with state governments to perform various regulatory functions with respect to mining on federal lands (Section 523).

The third tribal recommendation is that tribes be eligible for sufficient federal funding to ensure that they are able to undertake the degree of regulatory authority over their lands which they elect to assume. Under the Act, states which assume primary regulatory authority are eligible for sizeable federal grants to enable them to carry out the federally-mandated functions. The principle of grants to fund these activities therefore is not in question. However, the tribes are likely to need relatively larger grants than the states for the development and implementation of their surface mining programs. The tribes are not in

the same financial position as states and often do not have the same potential for raising revenues as states. In addition, the tribes, unlike the states, usually have no existing regulatory apparatus for surface mining control and reclamation, and they possess less information about the properties of their lands and resources than do the states. In other words, the tribes have farther to go with fewer funds. They therefore require relatively greater federal funding than the states.

The tribes specifically recommend full funding for the development of tribal programs and full funding for the initial years of administration and enforcement of those programs. The tribes noted, apart from their special need for substantial federal funding, that states are eligible for full federal funding of their incremental costs associated with the interim regulatory program (Section 502(e)(4); CFR 725), and that absent a tribal program, the federal government would bear the full financial burden of regulating surface mining on Indian lands.

In earlier legislative proposals for regulatory programs on Indian lands, it was envisioned that substantial grants would be necessary and available for the development, administration, and enforcement of tribal programs. The enactment of that level of funding now, plus the acknowledgment that tribes could make use of funds available under other related programs, would facilitate the tribes' assumption of regulatory authority over surface mining on their lands.

The tribes' fourth recommendation is that they receive adequate federal technical assistance in developing and implementing their regulatory programs. The Act already includes provisions for such assistance to states because it was recognized that the technical complexity

of the required programs otherwise might impede the establishment of state regulatory programs. Once again, the tribes are likely to require greater technical assistance than states because they have had less experience in both the technical and the professional aspects of the program. In addition, certain regulatory functions require highly specialized technical skills for a short period of time. Tribes may find it worthwhile to rely on technical and professional assistance from an appropriate federal agency in these circumstances. Earlier legislative proposals made provision for necessary technical and professional assistance to the tribes, and similar provision should be made in future legislation.

The fifth recommendation is closely related to the preceding one. It is proposed that tribes be eligible for special assistance in education and training programs. The Act already makes provision for the funding of state mining and mineral resource research institutes, energy resource fellowships, and university and coal research laboratories. Funding of these and other educational facilities and programs for the tribes is of great importance in enabling the tribes gradually to diminish their need for outside technical assistance and to staff their regulatory programs with members of their own communities. Provisions for special education and training programs should allow for considerable flexibility in their implementation so that tribes and tribal members could tailor such programs to meet their specific needs. The availability of education and training funds, furthermore, should not be dependent on the tribe's having an approved regulatory program. The earlier that education and training is available to tribal members, the greater the pool of qualified personnel on which the tribe can draw will be when it assumes regulatory responsibilities.

The sixth tribal recommendation is that tribes be compensated for the loss of coal resources as a result of the Act's prohibition against mining in alluvial valley floors. Provisions for exchanges of coal and coal leases in these circumstances already are included in the Act (Section 510(b)(5)), but this approach alone does not adequately meet tribal needs. Restrictions on the alienation of trust resources via coal exchanges and the reluctance of tribes to fragment ownership of tribal mineral resources means that a more direct form of compensation should be provided for Indian tribes. It is usually the case that the tribes begin with an impoverished economy. Often their aspirations for economic development and ensuing social benefits are based on their ability to develop their limited tribal mineral resources. The tribes have no wish to engage in environmentally unsound resource development, but the impact of this loss of resources will be severe on many tribes. For these reasons, they are entitled to adequate compensation. Direct federal compensation to tribes for losses incurred as a result of the congressional action prohibiting the mining of tribal coal in alluvial valley floor areas is particularly appropriate given the federal-tribal trust relationship in the management of tribal resources. It is specifically recommended, therefore, that affected tribes be given the option of direct monetary compensation, according to the projected value of unmineable coal reserves, or a grant of a transferable federal coal lease for a comparable quantity of coal, or a combination of the two.

The seventh and final recommendation of the tribes is that they be afforded increased flexibility in developing their regulatory programs to accommodate special, local requirements such as cultural values and

local environmental and agricultural conditions. The OSM regulations implementing the Act provide some flexibility for state programs in what is known as the "state window" (30 CFR 731.13). Under this provision, states cannot deviate from the standards set by the Act, but may vary their programs somewhat from federal regulations when they can demonstrate that local conditions justify such variation. The tribes recommend that a similar provision, a "tribal window", be enacted to provide flexibility when local conditions justify deviation from the federal program.

These core recommendations are based on the study which follows and are discussed in greater detail in the final chapter of the study. The tribes also will submit individual statements of their views on the final legislative program which the Department of Interior submits to Congress.

The study report which follows is organized into three parts:

Section I presents an in-depth analysis of the Act and its requirements. It also analyzes OSM's implementing regulations and establishes an initial model based on the requirements for an approvable state program.

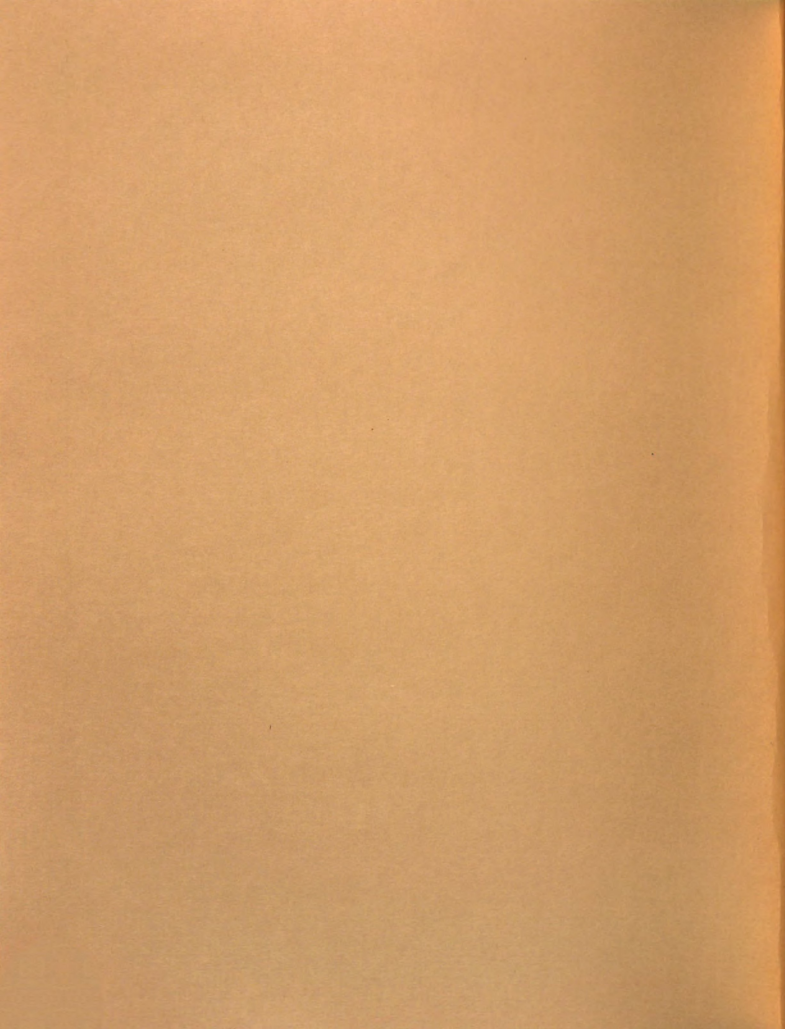
Section II concerns the regulatory setting on Indian lands. The purpose of this part is to provide background information and analysis of tribal lands and institutions relevant to the evaluation of regulatory programs for surface coal mining control and reclamation on Indian lands. It covers the physical characteristics of the lands of coal-owning tribes, the governmental institutions and court systems of those tribes, existing tribal laws and regulations affecting mining activities on their lands, as well as tribal resource data bases and the special status lands.



Section III sets forth alternatives to the state program regulatory model which should be considered in determining the best regulatory program for Indian lands. Analysis of program costs and staff needs associated with these alternative models is provided, and in addition, certain special policy issues with respect to Indian lands are discussed. The tribes' evaluation of the alternative models for mine regulation on Indian lands, in light of this information, is presented in the form of seven core recommendations for legislative action.

SECTION I

THE ACT



## SECTION I: THE ACT

Section I of the Indian Lands Study report presents an analysis of the provisions of the Surface Mining Control and Reclamation Act, (SMCRA) as they relate to potential mining control and reclamation on Indian lands. Its purpose is to document the major elements of the regulatory program created by P.L. 95-87, with particular emphasis on the characteristics of the regulatory agencies that will implement the law. These materials can serve as a working paper and starting point from which a tribe can identify and analyze activities that would be required of a tribe if it were to elect to assume regulatory authority as proposed in Section 710 of the Surface Mining Act.

It should be emphasized, at this point, that the Surface Mining Control and Reclamation Act of 1977 does not currently provide authorization for tribal regulatory programs. This authority will not exist, under the Act, until the completion of the Indian Lands Study and subsequent passage of proposed legislation, "designed to allow Indian tribes to elect to assume full regulatory authority over the administration and enforcement of regulation of surface mining of coal on Indian lands," which is called for in Section 710 of the Surface Mining Act. Until the Indian legislation mandated by Section 710 is passed, the Secretary of the Interior is responsible for implementing specified portions of the Act on Indian reservations on an interim basis.

Thus, the following discussion of how an Indian lands program might relate to the requirements of SMCRA is premised upon the passage of authorizing legislation as mandated in Section 710.

Section I focuses on the requirements of the Surface Mining Act as they may affect mining control and reclamation on Indian lands. The first Chapter puts the Surface Mining Act into the context of general regulatory schema for Indian lands. It analyzes the unique blend of tribal and federal controls over mining on Indian lands, and explains the role of P.L. 95-87 in that mix. Briefly, the Surface Mining Act is important for two reasons: its performance standards govern mining and reclamation on reservations, and when amended as proposed in Section 710, it is expected to offer tribes an additional mechanism for regulating these operations by enabling them to assume responsibility for administering and enforcing this law.

Chapter 1 also describes the different forms of regulatory agencies that have undertaken implementation of the Surface Mining Act on State and Federal lands. Although the Office of Surface Mining (OSM) within the Department of Interior is responsible for overseeing the implementation of the Act nationwide, it is anticipated that in most instances, the agency will delegate primary responsibility for mine regulation on state lands to state regulatory bodies, if certain conditions are satisfied. Congress vested the primary responsibility for regulating mining on federal lands with OSM, although the law includes special provisions for integrating portions of this program with other federal activities and with state regulatory agencies.

Chapter Two introduces the existing "state program model" for regulating mining and, within this context, discusses and analyzes the basic requirements of the Surface Mining Act. The law has imposed comprehensive controls on mining and reclamation operations, and has issued detailed guidelines on how the government should implement them. It specifies the regulatory agency's types of authority (e.g., the

ability to require permits, to establish specific mining performance standards, and to impose civil and criminal sanctions for violations of permit terms). It directs the agency to follow certain administrative procedures when implementing them (e.g, provisions for public participation, written decisions, timely actions). Finally, the law requires regulatory agencies implementing the Act to have sufficient technical support to fill these responsibilities (e.g., staffing, funding, information). The materials in this section may indicate the general range of requirements which a tribal regulatory authority might encounter, as well as special issues that should be addressed by tribes and Congress when considering options for implementation of the Act on Indian lands, as proposed in Section 710.

## **CHAPTER 1**

### **THE REGULATION OF SURFACE MINING ACTIVITIES ON INDIAN LANDS**

## CHAPTER 1

### THE REGULATION OF SURFACE MINING ACTIVITIES ON INDIAN LANDS

#### Introduction

The Surface Mining Act (P.L. 95-87) is a new and important addition to the wide range of controls on mining activities on Indian lands. In the past two decades, several tribes have become concerned about the potential transformation of their lands into massive strip mining operations, with the potential degradation of the quality of the air, water and lands that often are associated with coal production. These tribes recognize the need for environmental performance standards and enforcement mechanisms to minimize this disruption. Some have exercised their tribal powers to control development. The Interior Department and other federal agencies also exercise a wide range of regulatory authority over mining activities on Indian lands.

Public Law 95-87 establishes, for the first time, a comprehensive program for regulating surface mining and reclamation activities. The following section illustrates how this particular Act fits into the spectrum of controls on tribal resource development. It highlights the importance of these operations on Indian lands; the existing sources of authority that regulate them; the basic provisions of the program created by P.L. 95-87; and the tribes' ability to assume further regulatory authority as proposed under Section 710 of the Act.



## THE IMPORTANCE OF SURFACE MINING ACTIVITIES ON INDIAN LANDS

Energy-owning tribes have long been faced with the challenge of managing the operation and reclamation of large-scale surface mines. The pressure to control the impacts of these mining operations derives from at least three factors: (1) the scale of existing or planned production on Indian lands; (2) the fact that most reservations are located in areas that are difficult to reclaim; and (3) the fact that mining operation often consumes a significant portion of a tribe's limited land.

First, together and individually, Indian tribes own and produce a substantial portion of the nation's strippable energy resources. In aggregate, Indian tribes own approximately 30% of the low-sulfur strippable coal west of the Mississippi River. As of 1977, 239,402 acres of tribal lands were under lease for surface coal mining activities; five surface mines, encompassing 154,438 acres, produced 23 million tons of coal in that year. Four of these mines were ranked among the nation's top ten producers in 1977: Navajo Mine (Navajo Tribe) 4th; Kayenta Mine (Navajo Tribe), 5th; Absoloka Mine (Crow Tribe), 8th; and the Black Mesa Mine (Navajo and Hopi Tribes), 10th. A similar situation exists for uranium. Estimates indicate that Indian tribes own up to 50% of the known uranium reserves in the U.S., much of which is in strippable deposits. For example, the world's largest open-pit uranium mine is located on Indian lands. This single mine, situated on the Laguna Reservation, accounted for almost 14% of the total U.S. production of uranium in 1976.

Second, much of the surface mining on Indian lands is in environmentally sensitive areas. For example, adequate reclamation may be more difficult to achieve on some reservations located in the arid Southwest,

because of the unique climatological and environmental conditions of the region. Similarly, surface mines on reservations in the Northern Great Plains require special attention because of their effect on the hydrologic balance in the region, particularly where the operation involves alluvial valley floors.

Third, surface mining activities may significantly reduce the land base available to an individual tribe for alternative forms of resource development. An example of this dilemma occurred on the Northern Cheyenne Reservation: By 1973, permits or leases for coal strip mining had been issued for over one-half of the reservation. The tribe has since taken steps to void these leases and permits. Another example is the huge Laguna uranium mine noted above, which has disturbed over four square miles of the tribe's reservation since it began operation in the early 1950's. Even if the mining operations use only a small portion of the reservation, these lands must be restored to their ultimate productivity for existing and future generations of tribal members.

Confronted with these problems, the energy-owning tribes have initiated programs to plan for and control any surface mining activities on their lands. The various approaches toward managing development on the reservations are discussed below.

#### EXISTING REGULATION OF SURFACE MINING ACTIVITIES ON INDIAN LANDS

The mix of surface mining regulatory controls on Indian lands is unique. Three parties are involved, each to varying degrees: (1) the tribal government; (2) the tribes' trustee, the Department of the Interior; and (3) federal agencies that are responsible for implementing national laws "of general applicability."

An Indian tribe derives its authority to regulate development on its land from three different sources. First, as the resource owner, a tribe has the final say in whether, when and how any minerals will be developed. Contracts for energy development can include any terms or conditions that a tribe feels are necessary to accomplish its objectives. New or renegotiated contracts may include special provisions for environmental standards and for tribal oversight and approval of the operations. Second, a tribe may impose controls on mining activities by exercising its powers as a governmental unit. Examples of such measures include land use, taxation and other ordinances or codes. A third basis for tribal regulatory authority exists when Congress expressly delegates it to the tribes. The Surface Mining Act, if amended as proposed in Section 710, would be an example of this approach.

The Department of the Interior plays an important role in the regulation of mining activities on Indian lands. The Department's involvement stems from a variety of Congressional acts and Supreme Court decisions dating back to the 1700's. These actions require Secretarial approval of any conveyance of the rights to tribal trust assets. The Indian Mineral Leasing Act of 1938 reaffirmed this requirement for all minerals transactions. The Secretary of the Interior has delegated the responsibilities for overseeing contractual arrangements to the Bureau of Indian Affairs (BIA) and the responsibility for administering and enforcing the conditions of the contracts to the Conservation Division of the U.S. Geological Survey (USGS). Both agencies have issued rules and regulations for their activities. The BIA's leasing procedures and terms are in Title 25 of the Code of Federal Regulations (25 CFR 171-183). Those for USGS are in 30 CFR 221 and 30 CFR 231. The BIA and

USGS also are required to assist the tribes in implementing any special contract stipulations they desire. The Secretary of the Interior has recently delegated to the newly created Office of Surface Mining Reclamation and Enforcement (OSM) the responsibility for implementing portions of the Surface Mining Act, as specified in Section 710 (c)(d)(e) and (f) of the Act, on Indian lands.

Finally, mining activities on Indian lands are subject to laws of "general applicability".<sup>\*/</sup> Examples of such laws are the Clean Air Act, the Federal Water Pollution Control Act, the Safe Drinking Water Act, the Resource Conservation and Recovery Act, the Federal Mining Safety and Health Act, and the Surface Mining Control and Reclamation Act. On Indian lands these laws are implemented by the appropriate federal agency unless the Congress has delegated such authority to the tribes. The Surface Mining Act, when amended, is expected to provide for such delegation.

Thus, the Surface Mining Act is of particular importance to tribes for two reasons. First, as a law of general applicability, its performance standards and regulatory mechanisms will govern the mining operations on Indian lands. Section 710 specifically incorporates portions of the law into all existing and future leases and contracts.<sup>\*\*/</sup>

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<sup>\*/</sup> Laws of "general applicability" are those enacted by the Congress that apply to all persons and areas in the United States, including Indians and Indian lands. See FPC v. Tuscarora Indian Nation, 32 U.S. 99, 116 (1960).

<sup>\*\*/</sup> This section of the Act incorporates certain performance standards from Section 515 as requirements for all existing and new leases "on or after one hundred thirty-five days" from enactment. (25 CFR 177, Subpart B). Other requirements enumerated in Section 710(d) will take effect as of February 3, 1980. Provisions of the Act not enumerated in Section 710 do not currently apply on Indian lands.

Second, P.L. 95-87, when amended as proposed in Section 710, would provide Indian tribes with an additional mechanism to regulate the development on their reservations. The basic features of this Act are summarized below.

#### GENERAL PROVISIONS OF P.L. 95-87

The Surface Mining Control and Reclamation Act of 1977 was signed into law on August 3, 1977. Previously, the regulation of surface mining operations was a patchwork of standards and procedures that varied among states, federal lands and Indian lands. After several years of study and debate, Congress determined the need for comprehensive surface mining controls which would set minimum environmental performance standards. Congress also identified a need for greater consistency in the process used to regulate mine operators and for greater public involvement in these decisions. It originally was felt that all surface mines -- coal and non-coal -- should be regulated under the law. However, when the bill finally was adopted, Congress detailed performance standards only for coal mines because of insufficient data on mining other minerals.<sup>\*/</sup> Finally, Congress recognized the need for a gradual transition into the regulatory program, and allowed until June 1980 for the complete programs to be in effect.

Like other environmental laws, this Act relies on four mechanisms to accomplish its objectives: (1) a planning process; (2) performance

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<sup>\*/</sup> As in the case of Indian lands, Congress mandated in SMCRA a study of the question of surface mining regulation of non-coal minerals. This study is being conducted concurrently with the Indian Lands Study by the National Academy of Sciences and the Council of Environmental Quality. Thus, standards for surface mining and reclamation of other minerals may be enacted after Congress receives the recommendations of the NAS-CEQ study, expected in late 1979.

standards; (3) a permit system; and (4) enforcement measures. The purpose of the planning process is to designate any lands that are unsuitable for surface mining. The law sets forth detailed performance standards designed to ensure that after February 3, 1978, all mining operations are conducted and reclaimed in an environmentally sound manner. Subsequently, these standards are to be imposed on operations under a system for processing, evaluating and issuing mining permits. Finally, various procedures are included to enforce compliance with the terms of the permits.

Implementing these mechanisms will require special regulatory bodies. For the purposes of designating regulatory authorities, the law distinguished among three categories of regulated lands:

- (1) "State lands," which are defined as "lands within a State other than Federal lands and Indian lands." (Section 701 (11));
- (2) "Federal lands," which are defined as "any land, including mineral interest, owned by the United States without regard to how the United States acquired ownership of the land and without regard to the agency having responsibility for management thereof, except Indian lands . . ." (Section 701 (4)), and
- (3) "Indian lands", which are defined as "all lands, including mineral interests, within the exterior boundaries of Federal Indian reservations, 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)).

The regulatory authority for activities on state lands will be OSM until the state submits an implementation plan for a complete regulatory program. Once approved by OSM, the state will be delegated primary regulatory authority, subject to continued oversight by OSM. OSM will be the primary regulatory authority for activities on federal lands,

subject to certain limitations imposed by other federal land and mineral management acts, and also subject to cooperative agreements delegating authority to the states. The designation of the primary regulatory authority for activities on Indian lands has not been finalized by Congress.<sup>\*/</sup> However, Section 710(a) establishes the premise that tribes, like States, should be permitted to assume full regulatory authority. Until legislation is enacted to specifically allow tribes to enforce the Act, OSM will serve as the regulatory authority.

#### Tribal Assumption of Regulatory Authority Under P.L. 95-87

Once the Department of the Interior submits the legislative proposals required by Section 710, and if Congress enacts them, Indian tribes will be able to decide whether to pursue the option of regulating mining activities according to regulatory programs resulting from the legislation. A key consideration will be the tribes' willingness and ability to develop the capabilities required of a regulatory authority under this law. Chapter 2 describes requirements of the existing state regulatory program model and the types of capabilities that must be developed before the Secretary of the Interior (through OSM) may delegate authority to a state regulatory agency under the Surface Mining Act. These program requirements, hereinafter referred to as the State Model, may serve as a starting point, or basic reference model, for tribal analysis of alternative model options which are presented in Section III.

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<sup>\*/</sup> Until further legislation is passed, however, the Secretary of the Interior and his designees are responsible for those regulatory activities currently applicable to Indian lands under P.L. 95-87.

## **CHAPTER 2**

### **THE STATE MODEL: EXISTING PROGRAM REQUIREMENTS FOR SURFACE MINING CONTROL AND RECLAMATION**



## CHAPTER 2

### THE STATE MODEL: EXISTING STATE PROGRAM REQUIREMENTS FOR SURFACE MINING CONTROL AND RECLAMATION

#### Introduction

The Office of Surface Mining (OSM) in the Department of the Interior has promulgated regulations providing for optional state implementation of the provisions of the Surface Mining Control and Reclamation Act on state and federal lands through approved state regulatory programs. The general standard OSM will apply in determining the adequacy of a state mining reclamation program is whether its provisions are "in accordance with" those of the Act and are "consistent with" those of the federal regulations (CFR 732.15 and 730.5). Thus, in general, state provisions can be no less stringent than federal provisions. State programs may, however, include provisions more stringent than federal provisions.

To allow for some flexibility in the development of state programs, the Secretary of the Interior included in the final regulations a concept known as the "state window." Under the so-called "state window," states may submit programs containing provisions which embody a different approach than that taken by the federal regulation. (30 CFR 731.13.) The approach still must be "in accordance with" the Act and "consistent with" the federal regulations. It does allow states, however, to adopt different approaches when they are necessary because of "local requirements or local environmental or agricultural conditions." There must be a detailed demonstration by the state that the alternative provision meets these standards. The state window does not apply to the requirements of the Act itself, but only to the provisions of OSM's

federal regulations, which specify in detail how the Act is to be implemented.

The state window was one of the most controversial concepts introduced by the proposed permanent regulations. Critics charged that it would allow states to ignore the federal regulatory schema and still receive program approval. As a result, the state window was modified and restricted considerably in the final regulations. Thus, any variations in state programs from the requirements which are described in this chapter must be necessitated by local requirements or conditions and a strong, detailed justification for the variation must be provided.

#### CRITERIA FOR APPROVAL OF STATE PROGRAM SUBMISSION

To obtain approval, a state must submit a program which demonstrates: (1) legal authority vested in one state agency to perform all required functions; and (2) the state's capability, in terms of resources, to fulfill each of those functions.

##### Legal Authority

To obtain approval, a state must have the legal authority to regulate coal exploration and surface coal mining and reclamation operations in accordance with the Act and in a manner consistent with federal regulations. In the chapter which follows, we discuss what meets this standard in each program area; i.e., the "minimum criteria" for approval of a state program. For example, in the enforcement area, a state program must contain provisions affirming the right of citizens who report violations or hazards to accompany the inspector who investigates the report onto the mine site, etc.

The following eight core program areas have been delineated in order to provide tribes a convenient and common framework for discussion and analysis of these complex criteria:

- \* Performance standards
- \* Permit system
- \* Bonding and insurance requirements
- \* Inspections and enforcement
- \* Administrative and judicial review
- \* Designation of lands unsuitable for mining
- \* Public participation in the regulatory process
- \* Miscellaneous requirements of a state program

### Performance Standards

Performance standards govern the actual mining and reclamation processes to ensure protection of the environment and the public. States must adopt performance standards which are at least as stringent as, and meet the minimum requirements of the Act and its accompanying federal regulations. The Act expresses these performance standards generally as goals which are implemented in detail by the regulations as specific mining procedures and engineering design criteria. While a state may offer a different approach from that taken by the regulations, based on local requirements or local environmental or agricultural conditions, the state must justify its alternative and prove that it is at least as environmentally effective and as enforceable as are the minimum requirements of federal laws. (30 CFR 732.15(b) (1)) (Sec. 515 and 516 of the Act) (30 CFR Chapter VII Subchapter K).

In broad terms, the purpose of the detailed performance standards specified in the Act are to assure that:

- ° all mining and reclamation is conducted in an environmentally sound manner, with particular regard for protecting the hydrologic balance of the area, surface and groundwater quality, and to controlling the disposal of all mine wastes, pilings and spoils;

- ° mined lands are restored to the approximate original contour;
- ° mined lands are restored to a condition that can support uses that are similar or "higher" uses than those before the operation occurred;
- ° mined areas are restored as contemporaneously as practicable with the mining operation;
- ° mined areas are revegetated with appropriate vegetative cover, and
- ° underground mining operations protect against subsidence problems.

The specific content of the environmental standards for surface coal mining operations is discussed in Chapter 3 and is summarized in Appendix C of this report. Briefly, however, these standards for mining and reclamation operations fall into three categories. First the Act establishes several performance objectives that should guide all phases of the operation. These principles include such goals as maximizing the ultimate recovery of the coal, restoring the land-use capabilities of the mined area, restoring the original contours of the site, protecting the fish and wildlife in the area, and using mining and reclamation techniques which are suited to the unique characteristics of the site and which use the most advanced technologies available. Second, the law and regulations specify certain procedures to be followed during the mining and reclamation activities. These include procedures for protecting the hydrologic balance of the area; for developing water impoundments; for limiting erosion and sedimentation problems; for managing all spoils and wastes, especially hazardous and toxic wastes; and for revegetation of the mine site. Finally, there are special provisions which address the unique problems associated with mining prime farm lands, alluvial valley floors and steep slopes.

## Permit System

The above performance standards are implemented through a permit system. This is essentially a license to operate a strip mine on a specific tract of land under specific mining and reclamation conditions. Most coal exploration operations and surface coal mining and reclamation operations must have a valid permit to conduct operations. The objective of such a system is to provide a means of planning the operation to ensure compliance with the performance standards (Sec. 506-508, 510-514), (30 CFR Chapter VII Subchapter G).

States must have a permit system at least as stringent as and meeting the minimum requirements of the system set forth in the Act and implemented in the regulations (30 CFR 732.15(b) (2)).

Coal Exploration Operations: Any person who intends to conduct coal exploration in which more than 250 tons of coal will be removed in the exploration area is required to obtain the permission of the regulatory authority prior to exploration. There are various application, notice, and hearing requirements which must be met (30 CFR 776).

Surface Coal Mining and Reclamation Operations: A valid permit must be obtained prior to conducting surface coal mining and reclamation operations (30 CFR 771). An application must be made to the regulatory authority and it must contain highly detailed information on legal, financial and prior compliance matters relating to the applicant, the environmental resources that may be affected by the mining activities, and the applicant's plan for mining operations and reclamation (30 CFR 778-784). In addition, information must be provided with respect to special problems such as alluvial valley floors (30 CFR 785).

The permit application must be reviewed by the regulatory authority under a process providing for public participation in the form of notice of pending issues, access to information, conferences and hearings, and written comments. Criteria are established for the approval or disapproval of such applications (30 CFR 786). The regulatory authority's decision must be subject to administrative and judicial review (30 CFR 787).

The permit system also must provide for systematic review of outstanding permits by the regulatory authority and for certain controls on the revision or renewal of permits and the transfer, sale, or assignment of rights granted under permits (30 CFR 788).

#### Bonding and Insurance Requirements

Bonding provides backup protection for the environment, in the event the operator does not adequately reclaim the land, and insurance provides backup protection for the public in the event of personal injury or property damage (Sec. 509 and 519) (30 CFR Chapter VII Subchapter J). A state program must provide for bonding and insurance requirements at least as stringent as and meeting the minimum requirements of federal law (30 CFR 732.15(b)(6)).

After permit approval and prior to the commencement of surface coal mining and reclamation operations, the operator must file a performance-bond of a form, amount, and duration to be specified by the regulatory authority according to prescribed criteria. The bond must be for a minimum value of \$10,000. Moreover, it must be set high enough to ensure that the reclamation, restoration and abatement work required of the operator under the Act, the federal regulations, the state program and the permit would be covered if the work had to be performed by the regulatory authority in the event of forfeiture. Forfeiture may occur

where the terms or conditions of the bond are violated, the operator fails to comply with the law, the permit is revoked or the operator is unable to continue in business.

The bond may be released -- upon application by the operator -- only after all work has been completed and it has been determined to be successful. Notice of such application for bond release must be provided to all affected persons and to the public at large. There must be opportunities for written objections, inspection by the regulatory authority, informal conferences, and regulatory authority review and decision. In addition, there must be provisions for administrative and judicial review of the decision.

An operator, at the time of permit application, must submit certification of a public liability insurance policy providing for personal injury and property damage protection in an amount adequate to compensate all persons injured or property damaged as a result of the surface coal mining and reclamation operation, or proof that the operator satisfies other self-insurance requirements under an approved state program.

#### Inspection and Enforcement

Inspection and enforcement are conducted by the regulatory authority to ensure that a strip mine complies with the law (Sec. 517, 518, and 521) (30 CFR Chapter VII Subchapter L).

The minimum criteria for approval of a state program (30 CFR 732.15(b)(5)(7) and (8)) in the area of inspection are as follows:

- ° An average of at least one partial inspection per month of each surface coal mining and reclamation operation;

- ° An average of at least one complete inspection per calendar quarter of each surface coal mining and reclamation operation;
- ° Periodic inspections of all coal exploration operations;
- ° Inspections upon the basis of information (e.g., citizen complaint) giving rise to reasonable belief that a violation or imminent hazard exists;
- ° Inspections conducted on an irregular basis without advance notice;
- ° Right of entry to, upon, and through operations without a search warrant, except with respect to entering buildings;
- ° Access by inspectors to records and monitoring equipment and methods required by law to be maintained, and
- ° Prompt filing of inspection reports.

State programs also must contain enforcement powers and sanctions at least as stringent as the federal provisions and the same or similar enforcement procedures (Sec. 521(d); Sec. 518(i)). There are four basic enforcement tools: citations requiring remedial actions, civil and criminal penalties, permit suspension or revocation, and injunctive relief.

States must provide enforcement sanctions in certain circumstances:

- ° Cessation Order upon observation of a violation or condition or practice which causes or can reasonably be expected to cause an imminent danger to the health or safety of the public or a significant imminent environmental harm to land, air or water.
- ° Notice of Violation upon observing a violation of the state program, providing for remedial action and a reasonable time to abate the violation but not longer than 90 days from the issuance of the Notice of Violation.
- ° Cessation Order upon failure to abate under a Notice of Violation within the abatement period specified.



Inspectors must be able to require remedial action, in interim steps, to abate a Notice of Violation, and to impose affirmative obligations, such as the use of men and equipment, to abate a practice or condition resulting in a cessation order in the most expeditious manner physically possible.

State law must provide for civil penalties, of up to \$5,000 per violation, for violations of the state program requirements or of any permit issued thereunder. Mandatory penalties must be established for violations requiring cessation orders. In addition, state law must provide for a mandatory daily civil penalty of at least \$750 for failure to correct a violation within the abatement period permitted for its correction. The total amount of the penalty must be determined by consideration of the four criteria mentioned in Section 518(a) of the Act: (1) permittee's history of previous violations at that operation; (2) seriousness of the violation; (3) whether the permittee was negligent, and (4) the demonstrated good faith of the permittee in attempting to achieve rapid compliance after notification of the violation. The penalties assessed on the basis of these criteria must be at least as high as those provided for in 30 CFR 845 under the same circumstances.

Civil penalties must be administratively assessed, within the time limits set by Section 518(a-c) of the Act and 30 CFR 845. State law also must provide a permittee with the opportunity for a public hearing on the record regarding the violation and the penalty. However, failure of the permittee to make payment into escrow at the time of requesting a hearing must result in a waiver of all legal rights to contest the violation or the amount of the penalty.

The state also must impose criminal penalties at least as severe as and imprisonment at least as long as provided in Sec. 518(e-g) of the Act for the criminal offenses listed there.

State law must provide for revocation and suspension of permits to mine, where it is found that a pattern of violations of any requirement of the state program exists or has existed and that the violations were willful or were caused by the permittee's unwarranted failure to comply. It also must provide for revocation or suspension of a permit in all circumstances comparable to those mentioned in Section 521(a)(4) of the Act and 30 CFR Sec. 843.13. Finally, state law must provide that the regulatory authority may seek injunctive relief from the state courts in those situations set out in Sec. 521(c) and 30 CFR Sec. 843.19, such as where the operator fails to heed citations issued or to pay penalties assessed.

#### Administrative and Judicial Review

State programs must provide for administrative and judicial review of regulatory authority actions, in accordance with the Act and consistent with federal regulations (30 CFR 732.15 (b) (15)).

This means that administrative review must be provided in at least the following instances:

- ° Permitting and bonding actions (Sec. 514 and 519);
- ° Inspection and enforcement (Sec. 525);
- ° Informal administrative mine-site review of all unabated cessation orders at the request of the operator;
- ° Formal administrative review of citations;

- ° Informal administrative civil penalty conferences and formal administrative review of penalty assessments;
- ° Formal administrative hearings for the suspension or revocation of permits, and
- ° Informal review by the regulatory authority of action on citizen complaints of violations or imminent hazards or of inadequate or incomplete inspections, and formal administrative review.

Informal review is conducted by the regulatory authority itself. Formal review entails, among other things, review by an independent and impartial administrative judge, the right of any person who is or may be adversely affected to initiate proceedings and/or participate as a full party, and the rights to present evidence, cross-examine adverse witnesses, and to conduct discovery, in accordance with provisions of 5 USC 554 and 43 CFR 4.

Judicial review must be available to any aggrieved person who participated in administrative proceedings with respect to all final "action of the State regulatory authority pursuant to an approved State program." (Sec. 526(e)). This includes appeals of decisions in the formal administrative proceedings listed above, and other proceedings of record, such as state rulemaking and proceedings for the designation of lands as unsuitable for mining.

#### Designation of Lands Unsuitable for Mining

A State program must contain a system for designating lands as unsuitable for mining (30 CFR 732.15(b)(9)), (Sec. 522), (30 CFR Chapter VII Subchapter F). States, in other words, must provide a process by which any person who is or may be adversely affected by mining has

the right to petition to designate lands as unsuitable for all or certain types of mining. The regulatory authority must provide for public notice of and hearings on a complete and non-frivolous petition within certain time frames. The petition must be granted if reclamation is not technologically and economically feasible, and it may be granted upon consideration of other factors such as historic, cultural or esthetic reasons.

In connection with this petition system, the state must develop a data base and inventory system, accessible to the public, to permit evaluation of reclamation feasibility (30 CFR 762 and 764).

Congress already has designated certain areas as unsuitable for mining. (Exceptions are made for those operations existing on August 3, 1977, or for lands subject to valid existing legal rights to mine.)

These Congressionally-mandated unsuitable areas include:

- ° Lands within the boundaries of the National Park System, the National Wildlife Refuge Systems, the National System of Trails, the National Wilderness Preservation System, the Wild and Scenic Rivers System, including study rivers designated under Section 5(a) of the Wild and Scenic Rivers Act and National Recreation Areas designed by Act of Congress;
- ° Federal lands within the boundaries of any national forest, with exceptions;
- ° Lands where mining will adversely affect any publicly-owned park or places included in the National Register of Historic Sites, with exceptions;
- ° Lands within 100 feet of the outside right-of-way line of any public road, with exceptions, and
- ° Lands within 300 hundred feet from any occupied dwelling, unless waived by the owner thereof, or within 300 feet of any public building, school, church, community, or institutional building, public park, or within 100 feet of a cemetery.

In reviewing permit applications, the state must determine whether the permit must be denied, limited, or conditioned because of operations

on these lands. In some cases mining is allowed in areas designated unsuitable by Congress provided certain conditions are met, usually involving special hearing or findings by agencies with jurisdiction over the affected area (30 CFR 761).

#### Public Participation in the Regulatory Process

The general principle for the approval or disapproval of state programs with respect to citizen rights is stated at 30 CFR 732.15(b)(10). The State regulatory authority must have the authority under state laws and regulations and the state program must include provisions to:

"Provide for public participation in the development, revision and enforcement of State regulations and the State program, consistent with public participation requirements of the Act and this Chapter. . ."

Thus, no state program can be approved which does not provide at least the same level of citizen participation in all phases of the state program as do the federal statute and regulations. To be approved, therefore, a state program must provide for public participation in the development and revision of state statutory provisions, state regulations and standards, permits and reclamation plans.

There also must be provision for public participation in the enforcement of state laws, programs and permits, in accordance with the Act and the Secretary's regulations, including: the right to an inspection where information gives rise to reasonable belief that a violation or imminent hazard exists; the right to accompany the state inspector onto the mine site; and the right to informal review of state inaction (failure to inspect or to issue citations).

The public must be afforded at least the same access to the administrative review process as provided under Section 518 and 525 of the Act, 30 CFR Parts 842, 843 and 845 and 43 CFR Part 4, and at least the same access to the state courts for judicial review, citizen suits and damage suits as is provided under Section 520 and 526 of the Act. The state, moreover, must provide for the award of costs and expenses incurred for public participation in state administrative and judicial proceedings, as provided under Section 520(d) and 525(e) of the Act and 43 CFR 4.

Citizens' rights to initiate or to participate in the process of the designation of lands unsuitable for mining must be in accordance with the Act and consistent with federal regulations, including the right of "any person having an interest which is or may be adversely affected to petition for the designation of lands unsuitable for mining".

Finally, to make possible the exercise of all these rights, the public must be afforded as much access to program information and records as is permitted under the Act and regulations.

#### Miscellaneous Requirements of a State Program

In addition to the major core elements of a state program discussed above, there are a number of other miscellaneous features which a state regulatory program must adopt. These include the following:

- ° States must require the training, examination and certification of blasters (30 CFR 732.15(b)(12)).
- ° States must monitor, review and enforce prohibitions against direct and indirect financial interests in coal mining operations by employees of the state regulatory authority (30 CFR 732.15(b)(11)).

- ° States must have a small operator assistance program (30 CFR 732.15(b)(13)).
- ° States must provide certain protections for employees of the regulatory authority (30 CFR 732.15(b)(14)).
- ° Coal mining incidental to government-financed construction may be exempted only if certain procedures are followed (30 CFR 732.15(b)(4)).
- ° States must provide for cooperation and coordination with the federal government in certain respects (30 CFR 732.15(b)(16)).

#### OPTIONAL PROGRAM ELEMENTS

We have discussed the requirements for an approved state regulatory program. There are also optional programs developed under the Act in which a state may participate: (1) research and education programs and (2) the abandoned mined lands reclamation program. States are not required to participate in these "ancillary" programs in order to have an approved state regulatory program. To participate in these other programs, however, a state must meet certain eligibility requirements.

#### Research and Education Programs

The Act authorizes funds "to assist states in carrying on the work of a competent and qualified mining and mineral resources research institute." The institute is to be located at an existing qualified state institution or other institution as provided in the Act. The purpose of these institutes is to "conduct research, investigations, demonstrations and experiments . . . and to provide for the training of mining engineers and scientists through such research . . ." (Sec. 301). Separate funds may be provided for individual research projects (Sec. 302) (30 CFR 890).

The Act also provides funds for university coal research laboratories. There are to be ten universities selected for the program. They are to provide facilities for interdisciplinary research projects in "any discipline which is related to the development of adequate energy supplies in the United States." These laboratories are to also have a "test lab for coal characterization" and "provide research and development activities for students engaged in advanced study." (Sec. 801).

Finally, energy resource graduate fellowships are designated for students in acceptable Masters degree programs. The fellowships provide up to \$10,000 per year for up to two years and also allow for \$500 for each of the recipient's dependents (Sec. 901).

#### Abandoned Mined Lands Reclamation Program

Under the abandoned mined lands reclamation program, the Federal government levies a reclamation fee on all coal mines to reclaim lands that were mined for coal or which were affected by mining, wastebanks, coal processing or other coal mining activities, and abandoned or left in an inadequate reclamation status prior to the passage of the Act (30 CFR Chapter VII, Subchapter R) (Title IV of Act).

States with approved state regulatory programs may apply for an approved state abandoned mine reclamation program under which 50% of the funds collected in reclamation fees from mines in the state are allocated to that state. The balance of the funds also may be granted to a state with an approved abandoned mine reclamation program at the discretion of the federal government.



A state must meet the following requirements for an approved abandoned mine reclamation program:

- It must have an approved regulatory program;
- It must have the legal authority and capability to implement the program;
- It must submit a State Reclamation Plan and plan of annual projects, and
- The State Reclamation Plan must identify areas to be reclaimed, identify the purposes for which the reclamation is proposed, identify the relationship of the lands to be reclaimed and the proposed reclamation to surrounding lands, and identify the specific criteria for ranking projects to be funded.

A state can request federal aid for the abandoned mines program and for specific projects by submitting annual requests. The allowable costs include the actual construction costs, operating and maintenance costs, planning and engineering costs, construction inspection costs and necessary administrative costs.

#### DEMONSTRATED CAPABILITY TO IMPLEMENT THE PROPOSED PROGRAM

A state must demonstrate its capability to implement, administer and enforce the proposed state program in the areas identified above, showing sufficient technical and administrative personnel and sufficient funding. To meet this general requirement, the state must demonstrate in detail its capabilities in a number of areas, including the administrative systems the state has developed to implement, administer and enforce the extensive regulatory requirements of the program, the organizational structure of the state's regulatory agency, the personnel the state has employed to staff the program, and the physical resources the state has available for use in the program (See generally 30 CFR 732.15 and 731.14).

In each area, the state must show that it has the capability to carry out the purposes of the Act and successfully implement the state program. For example, it is necessary to show the state's capability to conduct the minimum number of complete inspections required. For this task, it is necessary to indicate the number of qualified inspectors on hand, the number to be hired and trained, the availability of technical equipment such as water quality monitoring devices, sufficient mobile vehicles and adequate office space and support staff. The actual requirements in these categories depend upon the numbers and sizes of the mines, the distances involved and other factors.

#### Administrative Procedures

After specifying the controls that must be imposed on mining operations, the Surface Mining Act sets guidelines for the way that regulatory authorities implement them. It does so by prescribing certain administrative procedures that must be followed in the agency's decision-making process for each of the program elements described above, and the agency regulating the surface mining of coal must adopt rules and regulations which ensure that these procedures will be followed.

In general, the administrative procedures required in P.L. 95-87 are characteristic of all government regulatory programs. The decision-making process must be open. Decisions must be based on findings of fact and issued in writing. They should be timely. The persons being regulated and other interested and affected parties must be provided with opportunities for hearings prior to final determinations, and for

administrative and judicial appeals of the decisions. Also, the officials of the regulatory agency must remain free of potential conflicts-of-interest as they carry out their duties. The Congress has provided guidelines of these processes throughout the Act.

#### Technical Capabilities

The implementation of a regulatory program under P.L. 95-87 also will require sufficient staffing, funding and related technical support. Evidence of these capabilities is a condition for approval of state regulatory programs under the Act. The purpose of this section is to identify briefly the provisions in the Act that specify standards for staffing, data systems and funding. These issues, as they relate to the Indian regulatory setting, will be analyzed further in later Chapters.

Two features of the Act are important to understanding these requirements. First, the Act is very flexible in this matter. There are no measures of the types or levels of capability that should be present. Instead, the adequacy of a proposed program will be judged by criteria developed by OSM. This lack of specificity in the Act sharply contrasts with the detailed prescriptions for performance standards and administrative procedures. Second, the Act provides for substantial federal assistance to states to lessen the financial and other burdens which the law imposes on them. These grants and technical assistance measures also help to ease the transition to a full regulatory program within the time frame established in the Act. Thus, many needed capabilities in a proposed program may be developed with the help of federal aid.

#### Staffing

The Surface Mining Act states that the regulatory authority must have sufficient administrative and technical personnel to effectively

implement the regulations. Further, Section 517(g) stipulates that employees of the regulatory agency must have no direct or indirect financial interest in coal operations programs. No other standards or criteria are given.

OSM will exercise its judgment in determining the types of skills needed for the tasks implied by the regulatory process (e.g., processing petitions and permit applications, doing the technical analysis of the petitions and applications, performing inspections, presiding over hearings and issuing decisions, etc.). In addition to identifying the types of skills, OSM will judge the level of staffing needed to meet the workload for each activity (e.g., the number of inspections needed for a given set of mines). The provision prohibiting conflicts of interest requires employees of the agency to file financial statements which will be maintained and enforced by the Secretary of the Interior and the regulatory authority. These activities also are subject to oversight by Congress.

#### Data Systems

The regulatory programs created by the Surface Mining Act require the analysis of a wide range of data and information. For example, Section 522 (regarding the program for designating lands unsuitable for surface mining) states that the regulatory authority must base its decisions upon "competent and scientifically sound data and information." However, Congress recognized that such data is not widely or easily accessible at this time. Therefore, the Act does not require that this capability be fully developed at the time of state program approval, and it also provides for federal assistance in developing it. For example:

- ° Section 522(a)(4) (for designating lands unsuitable for surface mining) only requires that the regulatory authority "has developed or is developing . . . a data base and an information system which will permit proper evaluation of the capacity of different land areas . . . to support and permit reclamation of surface coal mining lands." (Emphasis added);
- ° Virtually all of the data and information needed to evaluate permit applications must be provided by the applicant. The regulatory agency is responsible only for information on the hydrology of the area surrounding the proposed site, and
- ° Section 201(c)(8) directs OSM to "develop and maintain an information and data center on surface coal mining, reclamation, and surface impacts of underground mining . . . (and to) make such data available to the public and the Federal, regional, State, and local agencies conducting or concerned with land use planning and agencies concerned with surface and underground mining and reclamation operations."

#### Funding

Finally, the regulatory authority must demonstrate that it has sufficient funding to implement a program that is consistent with the Act. Here again, Congress opted for case-by-case determinations of funding needs in lieu of prescribing dollar amounts. Further, the law provides two sources of revenue to help cover program costs - permit fees and grants-in-aid from the federal government.

First, Section 507(a) requires all prospective permittees to submit a fee with their applications. In general, the size of the fee and the payment schedule are left to the discretion of the regulatory agency. The fees may be less than or equal to "the actual or anticipated cost of reviewing, administering, and enforcing" permits issued by the regulatory authority. However, the fee cannot exceed these costs.

Second, the Surface Mining Act provides supplemental funding for implementing state regulatory programs. Section 705 authorizes the

Secretary of the Interior to make annual grants to states. These grants may cover up to 80% of the total costs incurred by a state in the first year; 60% of the total cost of the second year, and 50% of the total costs incurred during each of the following years that the program is in effect. The Act also provides for federal funding in certain limited instances where the state performs an activity that would otherwise be required of the federal government. This situation arose during the start-up or "interim" phase of the program when states could be reimbursed for performing inspections. A state can also receive federal funds when it undertakes certain enforcement responsibilities on federal lands pursuant to a "cooperative agreement" with the federal government.

**SECTION II**

**THE REGULATORY SETTING**





## SECTION II

### THE REGULATORY SETTING

The preceding section of this study has discussed the requirements of the Act; it has detailed the general objectives at which it aims, and the ways in which they are to be achieved on state and federal lands. In addition, it has considered the areas of flexibility in the Act. The Act does not afford much flexibility in the standards it sets; a regulatory authority must achieve those standards or stricter ones. It does, however, allow for some variations in the way a regulatory agency is constituted and in the procedures it follows.

The coal-owning tribes do not necessarily differ from other actual or potential regulatory authorities in those respects which are crucial to the Act. The tribes can and would maintain the standards set by the Act or more stringent ones. They can and would observe those practices and procedures which the Act stipulates in order to ensure that regulatory actions are open and equitable. There are, however, some ways in which Indian tribes differ from other communities, and some of these differences might be reflected in those areas of regulatory action where the law allows for flexibility. In other instances, unique conditions or special needs may be provided for in new legislation specifically designed to establish an Indian lands programs under SMCRA.

This section of the study focuses on the Indian lands regulatory setting itself. It discusses those physical and institutional characteristics of Indian lands which are relevant to surface mining control and reclamation in order to analyze how Indian regulatory authorities

would function and what special needs and unique factors should be considered.

The first chapter in this section presents an overview of the general physical characteristics of the Indian lands with which this study is concerned. These 25 reservations comprise the Indian Lands Study regulatory setting -- those Indian lands which contain coal resources and where surface mining reclamation and regulation are most likely to occur. The reservations of the coal-owning tribes share some physical characteristics with each other, and with other mining areas in the states in which they are located. Although many characteristics are common, there is also great diversity among the coal-owning tribes and within their reservations. The second chapter of this section examines the governmental institutions of the coal-owning tribes. Thus, whereas the first chapter introduces the general physical setting of the study, this chapter introduces the governmental and institutional setting in which the Act will be administered. Together these two chapters set forth the background from which other parts of the study proceed and are considered.

The three chapters which follow -- Chapters Five, Six and Seven -- consider other aspects of the tribal regulatory setting which are of special significance to mine regulation: the tribes' institutional and technical capabilities from the point of view of the Act's requirements. Chapter Five discusses the tribal court systems, because it is critical to the administration of the Act that a community have a court system to which issues can be taken and appeals made. Chapter Six describes the existing tribal laws and regulations which are relevant to the Surface Mining Act and notes those which can be used and those which can be amended for use in the process of administering the Act. This chapter

also discusses existing tribal administrative procedures and experience, and takes note of those which are relevant to the regulatory procedures stipulated by the Act. Chapter Seven surveys the data and information systems which the tribes already possess or to which they have access. In numerous ways, the compilation and storage of data pertaining to physical resources are required for surface mining reclamation and regulation, and it is important to determine which types of data the tribes already possess and which they can readily obtain, if needed. Finally, the Eighth Chapter identifies those Indian lands which may have special or uncertain status with regard to surface mining regulation under the existing definitions and provisions of the Surface Mining Act.

## CHAPTER 3

### GENERAL CHARACTERISTICS OF TRIBAL COAL LANDS

## CHAPTER 3

### GENERAL CHARACTERISTICS OF TRIBAL COAL LANDS

This chapter presents a brief and highly generalized overview of the study area's physical setting. The potentially proprietary nature of detailed information on the extent and quality of tribal coal resources, as well as of some other physical characteristics of the reservations, necessitates a general treatment of these features in this report.<sup>1/</sup>

#### Introduction

Of the 25 Indian reservations that contain coal or lignite resources (Figure 3-1), nine are located in the Northern Great Plains Coal Province, 12 in the Rocky Mountain Coal Province, and four in the Interior Coal Province of the Midwest (U.S. Bureau of Mines, see Figure 3-2). Eight of the tribes have deposits of coal which are being actively mined or in which there is definite interest by the coal industry to mine (Crow, Northern Cheyenne, Fort Berthold, Navajo, Hopi, Southern Ute and Northern Ute, and the Ute Mountain Ute), three tribes have known coal or lignite deposits of more limited current interest to the coal industry (Fort Peck, Mescalero Apache and Zuni Pueblo), and the remaining 14 tribes are located in areas in which coal or lignite is known or can be expected to be found, but is of more marginal or uncertain value at the present time.

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<sup>1/</sup> CERT supports tribal efforts to maintain the confidentiality of commercially sensitive data, and has adopted a firm policy that such information be made available only at individual tribal discretion.

# CERT-OSM Indian Lands Study

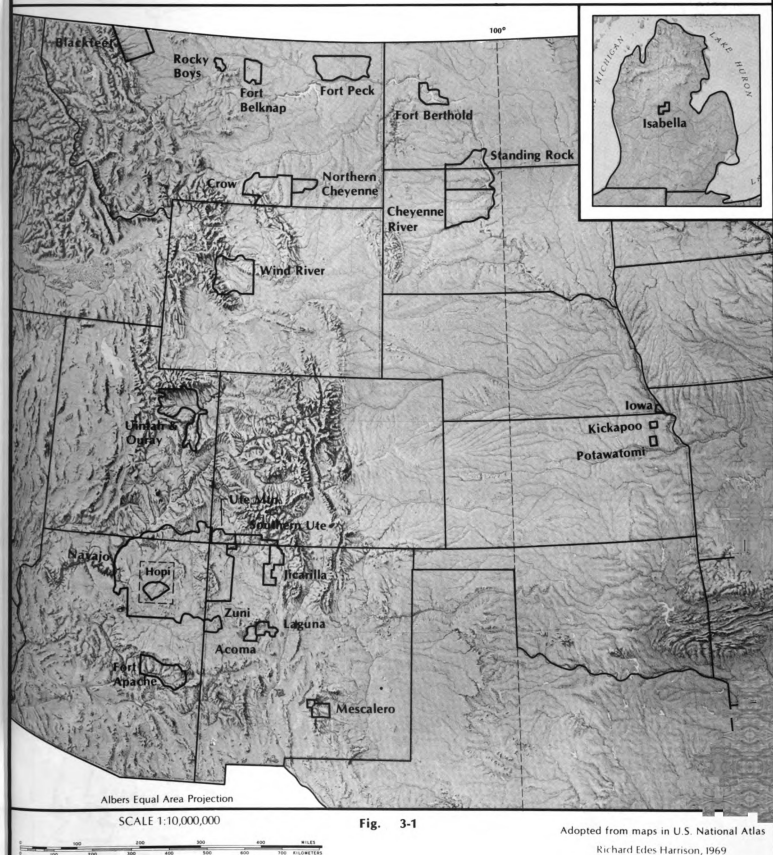
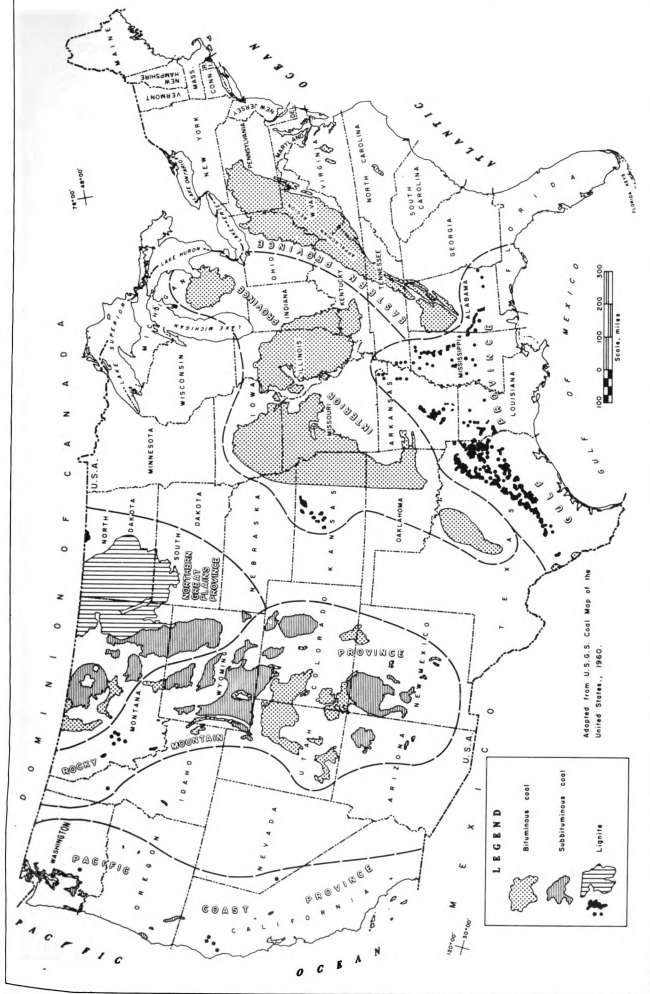


Fig. 3-1

Adopted from maps in U.S. National Atlas  
Richard Edes Harrison, 1969

Approximate Location and Generalized Relief  
of Indian Reservations containing Coal Resources



Generalized Coal Provinces of the  
United States (U.S. Bureau of Mines)

## COMMON PHYSICAL CHARACTERISTICS OF WESTERN TRIBAL COAL LANDS

Tribal coal lands in the Western United States share the common characteristics of generally poorly developed soils over usually flat-lying to slightly dipping sedimentary rocks, and an arid or semi-arid climate. Most tribal coal lands receive less than 16 inches annual precipitation and in some areas very arid conditions exist where precipitation is less than 8 inches. A corollary characteristic that is related to the arid climate is the general scarcity of surface water<sup>2/</sup> and common reliance on groundwater as a source of water for human and livestock use.

Within the generally common themes of bedrock geology and arid climate, the 25 reservations exhibit many variations of landforms, soil types, and vegetation. Current vegetation on tribal coal lands, for example, ranges from the desert shrublands of the Navajo and Hopi to the dryland wheat fields and grazing lands of the Fort Berthold Reservation in North Dakota and the ponderosa pine forests on portions of the Crow and Northern Cheyenne Reservations. Grazing for livestock is the dominant land use on most tribal coal lands, but carrying capacities vary widely, from over 200 acres per animal unit annually in some of the pinyon-juniper areas of the southwest, to 10 acres or less per animal unit in North Dakota (Ogden 1977).

## NORTHERN GREAT PLAINS COAL PROVINCE

The Northern Great Plains Coal Province, as delineated by the U.S. Bureau of Mines, coincides roughly with the northern portion of the

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<sup>2/</sup> It should be noted, however, that a number of tribal coal lands are located near or adjacent to major reservoirs. For example: Yellow-tail Reservoir (Crow), Fort Peck Reservoir (Fort Peck), Boysen Reservoir (Wind River), Lake Sakakawea (Fort Berthold) and Lake Oahe (Standing Rock and Cheyenne River).



Great Plains Physiographic Division (Figure 3-3), and includes the Powder River Basin, the Williston Basin and the Sweet Grass Arch as major geologic features. The topography of the province basically consists of stream-dissected rolling hills and plains, with breaks or sharply eroded hills in some places. Table 3-1 compares some of the general physical characteristics of tribal coal lands in this region.<sup>3/</sup>

#### Coal Resources

Detailed information on the extent and quality of tribal coal resources in the Northern Plains is considered proprietary, but as Figure 3-4 shows, a number of reservations are underlain by substantial areas of coal-bearing rocks. The Northern Cheyenne and Crow reservations contain by far the largest surface-mineable coal resources of any of the tribes in the region. Coal seams of the two reservations are sub-bituminous and strippable reserves rank on the order of billions of tons. These coal deposits are located in nearly horizontal sedimentary rocks of early Tertiary (Paleocene) age.

Coal deposits of the Ft. Union region of northeastern Montana, North Dakota and South Dakota are lignites of Cretaceous and Paleocene age. The Ft. Berthold and Ft. Peck Reservations of this area contain fairly substantial strippable lignite reserves, and the Standing Rock Sioux and the Cheyenne River Sioux in South Dakota have lignite deposits of more marginal current value.

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<sup>3/</sup> This table and Tables 3-2 and 3-3 are drawn primarily from the National Atlas of the United States. These tables, and the accompanying discussion are intended to show broad similarities and differences between tribal coal lands; it should be realized that detailed site specific factors even within a limited geographic area within a reservation can vary greatly.



# CERT-OSM Indian Lands Study

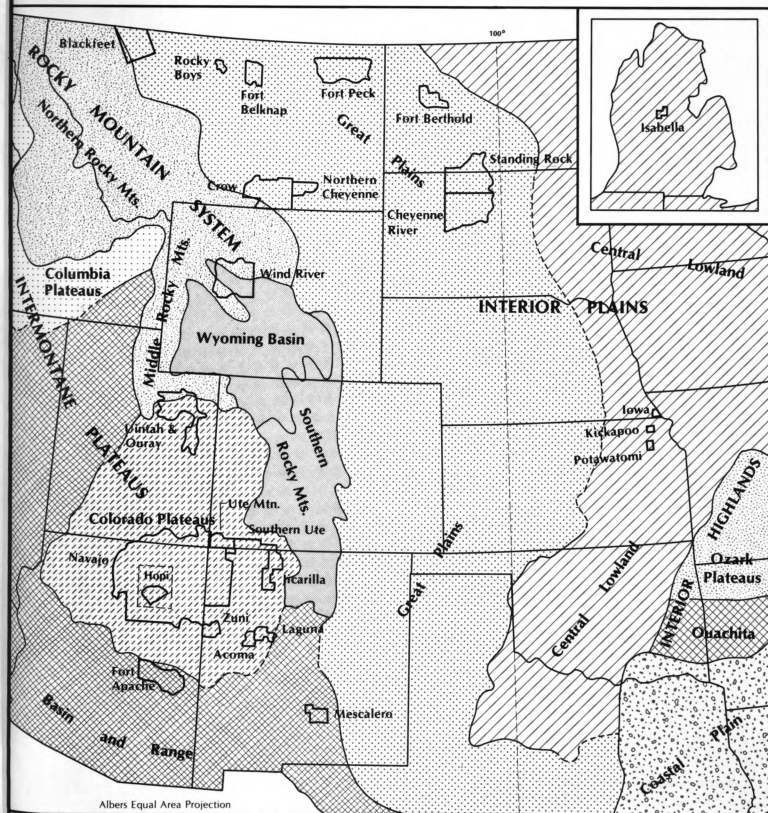


Fig. 3-3

Source:

Nevin M. Fenneman  
1928

Approximate Location of Indian Lands Study Reservations  
in Relationship to Major Physiographic Divisions

# CERT-OSM Indian Lands Study

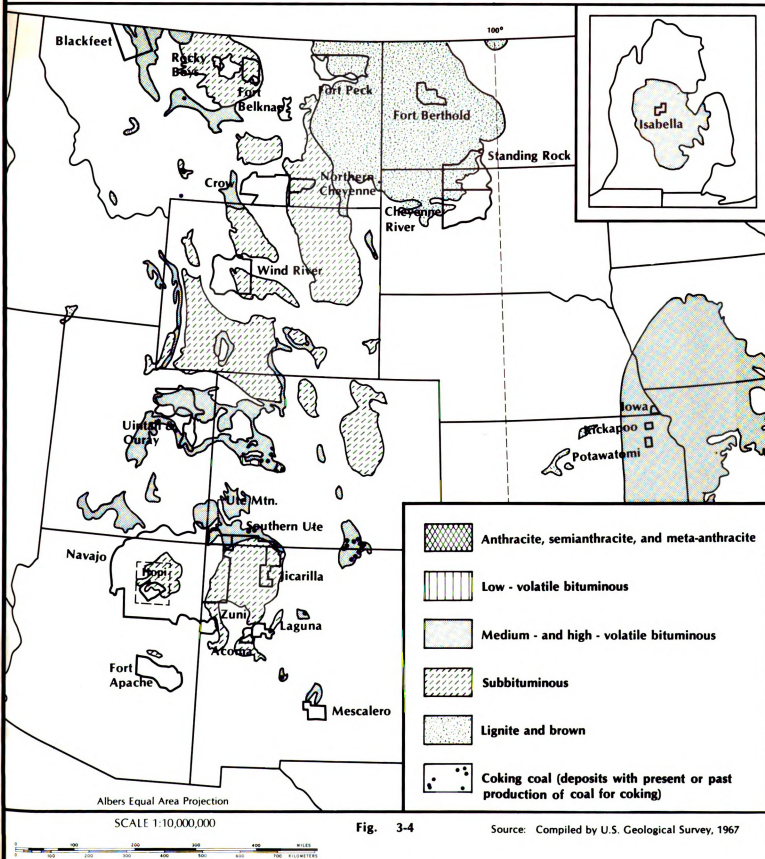


Fig. 3-4

Source: Compiled by U.S. Geological Survey, 1967

**Location of Indian Lands Study Reservations in relationship to major Bituminous and Subbituminous Coal and Lignite Fields of the Conterminous United States**

TABLE 3-1. General Physical Characteristics of Tribal Coal Lands in the Northern Great Plains Coal Province

| <u>Reservation</u>      | <u>State</u> | <u>Coal Resources</u> | <u>Geologic Age</u>     | <u>Physiographic Division</u> | <u>Climate</u>                                                                                                                                                        | <u>Typical Soils</u>                      |
|-------------------------|--------------|-----------------------|-------------------------|-------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------|
| Blackfeet               | MT           | Bituminous            | Cretaceous              | Great Plains                  | Average annual precipitation generally ranges from 12 to 16 inches with significant annual variations from this mean. The region is moderately vulnerable to drought. | Argiborolls<br>Haploborolls               |
| Cheyenne River<br>Sioux | SD           | Lignite               | Paleocene<br>Cretaceous | Great Plains                  |                                                                                                                                                                       | Ustorthents<br>Argiustolls                |
| Crow                    | MT           | Subbituminous         | Paleocene               | Great Plains                  |                                                                                                                                                                       | Ustorthents<br>Argiborolls<br>Cryoborolls |
| Fort Berthold           | ND           | Lignite               | Paleocene<br>Cretaceous | Great Plains                  |                                                                                                                                                                       | Argiborolls<br>Ustorthents                |
| Fort Belknap            | MT           | Subbituminous         | Cretaceous              | Great Plains                  |                                                                                                                                                                       | Argiborolls<br>Natrargids                 |
| Fort Peck               | MT           | Lignite               | Paleocene               | Great Plains                  |                                                                                                                                                                       | Argiborolls<br>Ustorthents                |
| Northern Cheyenne       | MT           | Subbituminous         | Paleocene               | Great Plains                  |                                                                                                                                                                       | Ustorthents<br>Argiborolls<br>Argiustolls |
| Rocky Boy's Res.        | MT           | Subbituminous         | Cretaceous              | Great Plains                  |                                                                                                                                                                       | Argiborolls<br>Ustorthents                |
| Standing Rock<br>Sioux  | ND/SD        | Lignite               | Paleocene<br>Cretaceous | Great Plains                  |                                                                                                                                                                       | Ustorthents<br>Argiustolls                |

The reservations of north-central and northwestern Montana contain coal bearing formations of both late Cretaceous and early Tertiary age. The Fort Belknap and Rocky Boy's Reservations in this region have sub-bituminous coals and the Blackfeet Reservation bituminous coal, although in many places the seams are discontinuous or too thin to be of immediate commercial importance, other than as a source of local fuel. Additional exploration of these coal lands is needed to determine their full commercial potential.

#### Soils, Vegetation and Land Use

Soils in the Northern Great Plains are predominately prairie soils, or "Mollisols" (e.g., Argiborolls, prairie soils of cool regions with a surface layer high in organic matter and a clay-enriched B horizon) and "Entisols" (e.g., Ustorthents, poorly developed soils on recent erosional surfaces), with some forest soils (Cryoboralfs) on parts of the Crow and Northern Cheyenne Reservations. Soils over most of the Northern Plains tribal coal lands have fair to good suitability as a replacement cover for reclaiming mined lands.

Most Indian coal lands in the Northern Plains support a short or mid-short grass prairie, but some parts of the Northern Cheyenne and Crow Reservations have eastern ponderosa pine forests. Grazing of cattle is the primary use of tribal coal lands. Dryland wheat farming is also an important agricultural use on reservations in North Dakota and on the glaciated Indian coal lands north of the Missouri River in Montana. Sub-irrigated alluvial valley floors are very important to the agricultural economy of the region and are especially important to the Crow and Northern Cheyenne Reservations. During a good growing season, with supplemental surface irrigation, three crops of alfalfa can be

harvested, and the cow-calf industry depends on hay productions from these areas to sustain livestock through the winter and periods of drought. Next to sub-irrigated alluvial valley floors, upland prairie soils are among the most productive tribal lands found in the West. These areas often support a near native grassland vegetation with high species diversity, and as such, are excellent grazing lands. Timber is also an important resource on some of the coal lands owned by the Northern Cheyenne and Crow. However, productivity of the forest and woodland areas for wood products is moderate and has not been extensively developed.

#### Climate and Water Resources

Average annual precipitation on most tribal coal lands in the Northern Plains ranges from 12 to 16 inches. Soil moisture deficits exist for much of the growing season due to inadequate rainfall and poor distribution of precipitation over the year, since snowfall and spring run-off is usually not available to plants. All tribal lands in the region are subject to infrequent droughts of up to several years in duration.

All tribal coal lands in the Northern Plains are located within the Missouri River Basin. The Missouri, Bighorn and Tongue Rivers are the major perennial streams near tribal coal lands; many of the smaller tributaries are intermittent. Most tribal coal lands of the Northern Plains are near or adjacent to major perennial streams or rivers, and the extent and legal status of related Indian water rights in the region is an issue that concerns tribes greatly. Alluvial deposits associated with perennial streams are the most productive near surface aquifers in the region, and tribal coal lands associated with such streams have good sources of groundwater. On the Crow and Northern Cheyenne coal lands,

coal seams often lie in close proximity to important shallow aquifers. Locally groundwater may be highly mineralized. The Madison Limestone (and associated carbonate rocks of Pennsylvanian age) is the major deep aquifer in the region. It is extensively used as a source of groundwater in North and South Dakota and has a largely undeveloped potential on the Crow and Northern Cheyenne Reservations.

#### THE ROCKY MOUNTAIN COAL PROVINCE

The twelve reservations containing coal in the Rocky Mountain Coal Province exhibit considerably more diversity than do coal lands in the Northern Great Plains, although they share the common characteristic of being more arid than the Northern Plains. Most Indian reservations containing coal resources in the Rocky Mountain Coal Province lie within the Colorado Plateaus Physiographic Division. The exceptions are the coal fields of the Fort Apache in Arizona and the Mescalero Apache in southern New Mexico, which lie in the Basin and Range Physiographic Division, and those of the Wind River Reservation which are located in the Wyoming Basin. The Colorado Plateau is a roughly circular area covering approximately 130,000 square miles of Arizona, New Mexico, Colorado and Utah. For the most part the rocks are horizontal or nearly horizontal sedimentary strata that form wide plateaus and up-lifts and broad basin areas. In many places the landscape is highly dissected into canyons, mesas and buttes. Table 3-2 summarizes the general physical characteristics of reservation coal lands in the Rocky Mountain Coal Province.

#### Coal Resources

The majority of tribal coal lands in the Rocky Mountain Coal Province are located in the south-central portion of the Colorado Plateau



TABLE 3-2. General Physical Characteristics of Tribal Coal Lands in the Rocky Mountain Coal Province.

| <u>Reservation</u> | <u>State</u>   | <u>Coal Resources</u>           | <u>Geologic Age</u>     | <u>Physiographic Division</u>              | <u>Climate</u>                                                                                                                                                                                                                                                       | <u>Typical Soils</u>                       |
|--------------------|----------------|---------------------------------|-------------------------|--------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------|
| Acoma              | NM             | Subbituminous                   | Cretaceous              | Colo. Plateaus                             | <p>Most tribal coal lands receive an average annual precipitation between 8 and 16 inches. Parts of some reservations in Arizona and New Mexico receive less than 8 inches. The climate is arid and vulnerable to occasional droughts of several years duration.</p> | Torriorthents<br>Haplargids                |
| Fort Apache        | AZ             | Subbituminous                   | Cretaceous              | Basin & Range                              |                                                                                                                                                                                                                                                                      | Argiustolls<br>Haplargids                  |
| Jicarilla Apache   | NM             | Subbituminous                   | Cretaceous              | Colo. Plateaus                             |                                                                                                                                                                                                                                                                      | Haplargids<br>Cryoboralfs<br>Torriorthents |
| Laguna             | NM             | Subbituminous                   | Cretaceous              | Colo. Plateaus                             |                                                                                                                                                                                                                                                                      | Haplargids<br>Torriorthents                |
| Mescalero Apache   | NM             | Bituminous                      | Cretaceous              | Basin & Range                              |                                                                                                                                                                                                                                                                      | Argiustolls<br>Calciorthids                |
| Navajo             | AZ<br>NM<br>UT | Subbituminous                   | Cretaceous              | Colo. Plateaus                             |                                                                                                                                                                                                                                                                      | Natragids<br>Torriorthents<br>Haplargids   |
| Southern Ute       | CO             | Bituminous and<br>Subbituminous | Cretaceous              | Colo. Plateaus                             |                                                                                                                                                                                                                                                                      | Torriorthents<br>Ustorthents               |
| Uintah and Ouray   | UT             | Bituminous                      | Cretaceous              | Colo. Plateaus<br>and Middle<br>Rocky Mts. |                                                                                                                                                                                                                                                                      | Torrifluvents<br>Argixerolls               |
| Ute Mountain       | CO, NM<br>UT   | Bituminous                      | Cretaceous              | Colo. Plateaus                             |                                                                                                                                                                                                                                                                      | Torriorthents<br>Ustorthents               |
| Wind River         | WY             | Subbituminous                   | Cretaceous<br>Paleocene | Wyoming Basin                              |                                                                                                                                                                                                                                                                      | Torriorthents<br>Haplargids                |
| Zuni               | NM             | Subbituminous                   | Cretaceous              | Colo. Plateaus                             |                                                                                                                                                                                                                                                                      | Torriorthents<br>Haplargids                |

Physiographic Division. The coal beds associated with this region are located generally in Upper Cretaceous rocks and in New Mexico the coal seams are usually sub-bituminous. Coal mined at the Black Mesa mine on the Navajo and Hopi Reservations in Arizona is high rank sub-bituminous coal that may grade into bituminous coal in places, and coal on the Southern Ute and Ute Mountain Reservations in southwestern Colorado and northwestern New Mexico is generally bituminous in rank. Mineable reserves on those reservations located near the Four Corners area are very substantial and are generally accessible by surface mining methods.

Coal lands of the Uintah and Ouray Reservation in northeastern Utah are located within the Uinta Basin. The main coal-bearing rocks in this region are late Cretaceous in age. Most of the coal is bituminous, and because of the depth of cover, strip mining potential is currently limited, so most mining will have to be by underground methods.

The Mescalero Apache Reservation of the Basin and Range Physiographic Division contains bituminous coal seams located in the Upper Cretaceous Mesaverde Group. Some coals in the isolated deposits of the Basin and Range Province have produced excellent quality coking coal as well as anthracite. However, the geologic structure of most of these fields is quite complex, and difficult mining conditions caused by faulting and igneous intrusions have discouraged large scale mining.

The Wind River Reservation, located in the Wyoming Basin, includes both Cretaceous and Tertiary coal-bearing formations. Coal beds are usually sub-bituminous, and although they may reach a maximum of 17 feet in thickness, they are often steeply dipping, again creating difficult mining conditions.

### Soils, Vegetation and Land Use

The soils of the Colorado Plateau are primarily "Entisols" (e.g., Torriorthents, soils with poorly developed soil horizons formed on recent erosional surfaces). They are often shallow to bedrock (less than 20 inches) and are dry for long periods of time. In the Four Corners area arid soils (e.g., Haplargids) are also common. These are desert soils that do not have water available for long periods, but have well developed soil horizons, including a clay enriched "B" horizon. Prominent soils in the Black Mesa area are also "Aridisols" (Natragids), which are poorly developed and often badly eroded. Organic matter content and plant nutrients tend to be very low in these soils (Thames and Verma, 1975). Forest soils (Cryoboralfs) are found at some higher elevations in the region. Specific soil types on different coal lands often vary greatly, even within a small area. Los Alamos County in northwestern New Mexico, for example, has over 50 distinct soil types mapped within its boundaries.

Vegetation on the Uintah and Ouray Reservation in northeastern Utah also varies widely, ranging from salt-bush-greasewood and sagebrush to pinyon juniper and mountain mahogany oak at higher elevations. In the central Colorado Plateau region, grama-galleta grass steppes and great basin sagebrush are common vegetative cover. At higher elevations pinyon-juniper woodland and bushland are found.

The dominant use of tribal coal lands in the Rocky Mountain Coal Province is for grazing sheep and cattle. The productivity of these lands for range is generally lower than in the Northern Plains due to the greater aridity. Different ecosystems in the region vary greatly in grazing capacity, ranging from about 240 acres per animal unit per year

for pinyon juniper through 100 acres for sagebrush to 60 acres for desert grasslands (Ogden 1977). Rangelands are sometimes in poor condition due to past overgrazing and related soil erosion.

#### Climate and Water Resources

Most of the tribal coal lands in the Rocky Mountain Coal Province receive an annual precipitation of between 8 and 16 inches, but some areas in the Four Corners region may receive less than 8 inches. Rainfall in any given year is extremely variable and periods of drought where rainfall is below average are more common than years where rainfall is above average. Areas receiving less than 8 inches of precipitation have very sparse vegetation, while those regions that receive between 8 and 16 inches generally support grasslands. A few areas at higher elevations receive 16 or more inches annually and support some trees.

The Uintah and Ouray Reservation in Utah is located in the Green River drainage basin. Much of the smaller tributary drainage is intermittent, and the dissolved solids content of most tributary waters is high, particularly during low flow, with sodium, sulfate and chlorine being the major ions. During high flows the sediment loads of both the major and tributary streams in the area is very high. Alluvial aquifers are the source of most groundwater supplies in the region, though in some areas the water quality is poor, especially below irrigated areas. Small supplies of groundwater can be found in bedrock aquifers.

The San Juan River is the main perennial stream that drains the reservations located in the Four Corners area. The river has moderate to high sodium and sulfate content, especially below irrigated lands, and during low flows the dissolved solids content of parts of the San Juan and many of its tributaries exceeds 1000 mg/l. Some of the highest

erosion rates in the country are found in this region and during high flow the San Juan and many tributaries may carry suspended sediment in excess of 50,000 ppm. Groundwater is obtained from stream alluvium and a few bedrock aquifers. The river alluvium yields moderate to large supplies of groundwater, but in many areas it is of poor quality. Yields from bedrock aquifers are generally moderate.<sup>4/</sup>

#### TRIBAL COAL LANDS IN THE INTERIOR COAL PROVINCE

Four small reservations in the Midwest are located in areas where, geologically, coal can be expected to occur. The Iowa Tribe of Kansas and Nebraska, and the Kickapoo and Prairie Potawatomie tribes, both of Kansas, are located in the western region of the Interior coal province where coal seams are generally thinner and of poorer quality (higher ash and sulfur) than are the main producing fields of this province, which are located in Illinois, southwestern Indiana and western Kentucky. The Isabella (Saginaw Chippewa) Reservation is located in Michigan where the coal deposits, which are thin and discontinuous, are even more marginal.

Coal fields in the Midwest are Pennsylvanian in age and bituminous in rank. There is a limited amount of surface mining in southeastern Kansas, outside of the areas where the reservations are located. Michigan has no active commercial coal mining.

All midwestern tribal coal lands are located in the Central Lowland Physiographic Province which has a generally flat to rolling topography of gentle relief. Soils in Kansas and Nebraska are predominantly prairie soils (Argiudolls and Argiustolls) with a dominant natural

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<sup>4/</sup> The slurry pumping system from the Black Mesa Mine to the Mohave Station has been using fairly large (3,200 acre ft/yr. +) quantities of good groundwater annually for several years.

TABLE 3-3. General Physical Characteristics of Tribal Coal Lands in the Interior Coal Province.

| <u>Reservation</u>  | <u>State</u> | <u>Coal Resources</u> | <u>Geologic Age</u> | <u>Physiographic Division</u> | <u>Climate</u> | <u>Typical Soils</u>      |
|---------------------|--------------|-----------------------|---------------------|-------------------------------|----------------|---------------------------|
| Iowa                | KS/NB        | Bituminous            | Pennsylvanian       | Central Lowlands              | Subhumid       | Argiudolls<br>Argiustolls |
| Isabella            | MI           | Bituminous            | Pennsylvanian       | Central Lowlands              | Humid          | Hapludalfs<br>Haplorthods |
| Kickapoo            | KS           | Bituminous            | Pennsylvanian       | Central Lowlands              | Subhumid       | Argiudolls<br>Argiustolls |
| Prairie Potawatomie | KS           | Bituminous            | Pennsylvanian       | Central Lowlands              | Subhumid       | Argiudolls<br>Argiustolls |

vegetation of bluestem prairie. The climate is sub-humid bordering on semi-arid, and is not subject to long-term droughts. Reservations in Kansas are part of the central feed grazing and livestock region which is one of the outstanding grain producing regions of the world. Crops and grazing are the dominant use of the land. The Isabella Reservation in Michigan is generally overlain by glacial deposits on which forest soils (Hapludalfs) are dominant; vegetation is generally northern hardwood forest with some pine.

All tribal coal lands in the Midwest are located east of the 100th Meridian, and consequently, the period of liability for revegetation under SMCRA would be five years rather than the minimum of ten years required in the West. Also, the restrictions on alluvial valley floor mining, which were designed for areas west of the 100th Meridian, would not apply to mining on these tribal coal lands. Any disturbed coal lands on reservations in the Midwest that previously had been in crop production, however, probably would have to be restored under the special provisions in the Act for prime farmland.

#### TRIBAL COAL LANDS AND THE PERFORMANCE STANDARDS IN SMCRA

Section 515 of the Surface Mining Control and Reclamation Act of 1977 specifies 25 performance standards that must be met by coal mining and reclamation operations. Since tribal coal lands cover the range from the most unfavorable to the most favorable general physical characteristics for mining and reclamation in the West, the Act's performance standards for protection of the environment should provide the same environmental benefits to the tribes as will be provided to mined

private and federal lands in the West. A sample of performance standards in the Act that are of importance in the West include:<sup>5/</sup>

1. Postmining land use. Mined land must be restored so that it can support its original use or an approved higher or better use. It is possible that effective reclamation and proper management after mining is completed could improve the productivity of degraded rangelands. In most productive areas it is important that the long-term productivity of the land be restored.
2. Restoration of Topsoil. Topsoil, or subsoil better able to support vegetation, must be selectively removed and replaced after regrading has been completed. Even though soils are often poorly developed on tribal coal lands, the surface soil is generally the best medium for plant growth for biogeochemical reasons (Curry, 1975). Where soils are highly saline at the surface, selective replacement of more suitable topsoil material may improve plant growth.
3. Burial of Toxic Materials. Toxic materials must be treated, buried and compacted or otherwise disposed of in a manner to prevent contamination of ground or surface waters. Toxic materials that would most likely occur on tribal coal lands would be overburden with a high sodium absorption ratio, which is detrimental to plant growth (Sandoval and Gould, 1978), or possibly toxic levels of some micronutrients such as selenium, boron and molybdenum (Bauer, Berg and Gould, 1978).
4. Protection of the Hydrologic Balance. Mining and reclamation must be conducted in such a way as to minimize disturbance of the prevailing hydrologic balance including the quality and quantity of surface and groundwater. In the West where surface and groundwater are scarce resources, this standard, which necessitates careful monitoring and evaluation of surface and groundwater, before, during and after mining is completed, is extremely important.
5. Alluvial Valley Floors. The Act requires that the essential hydrologic functions of alluvial valley floors in the West be preserved throughout the mining and reclamation process. This standard is particularly important for tribal coal lands in the Northern Plains.

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<sup>5/</sup> See Appendix C for a more complete tabular listing of the performance standards.



6. Revegetation. A diverse, effective and permanent vegetation cover of the same seasonal variety native to the area of land to be affected and capable of self-regeneration and plant succession must be established in all lands affected by mining. As discussed in the following section, this performance standard may be more difficult to achieve in the West. The coal operator assumes responsibility and liability for vegetation for ten years after the last year of augmented seeding, fertilizing, irrigation or other work. However, as pointed out by the Mining Task Force of the National Coal Policy Project, this period of time may not be sufficient to encompass a complete drought cycle in parts of the West (Murray 1978, p. 124).
7. Prime Farmlands. Prime farmlands must be restored to an equal or higher productivity than existed before mining. The only tribal coal lands in the West that are likely to have significant areas of land that would qualify as prime farmland under the Act are the reservations in North and South Dakota and northern Montana where dryland wheat farming is practiced.
8. Fish and Wildlife Protection. Disturbances and adverse impacts of mining and reclamation operations on fish, wildlife and related environmental values must be minimized and operations are to achieve enhancement of such resources where it is practicable. This provision will be especially important for tribal coal lands that are habitat for big game species such as deer, antelope and elk. The Jicarilla Apache Reservation in New Mexico, for example, contains deer winter ranges and preferred elk range (Bureau of Land Management, 1979) and parts of the Crow Reservation include critical winter range for antelope and winter range for mule deer (U.S. Geological Survey and Montana Department of State Lands, 1979).

#### RECLAMATION POTENTIAL OF TRIBAL COAL LANDS IN THE WEST

The National Academy of Sciences (1974) has summarized the special ecological problems of western coal lands, which apply also to tribal coal lands in the West:

Droughts are common and annual precipitation is more often below the average than above it. When precipitation does occur, it may come as high intensity, short duration storms or as snowfall when plants are dormant. Extreme fluctuations in both annual and seasonal temperatures are to be expected. Daytime soil temperature may reach levels that will dessicate seedling plants. Only hardy organisms that tolerate temperature extremes can survive the summer heat and the winter cold. Wind, unimpeded by dense vegetation, drives sand and soil particles into tender plants and dries the soil.

Soil is poorly developed in most arid sites. Rock is slow to weather. Little organic material is provided by decay of sparse vegetation and the breakdown of plants to humus is retarded by low moisture regimes and low temperatures. The result is a loose, undifferentiated soil profile with poor capacity for holding moisture. Only the hardiest plants survive, and consequently, the soil surface is poorly protected. (p.11)

Extensive mining and systematic attempts to reclaim mined land in the West have occurred only in the last seven or eight years. In the Northern Plains reclamation practices have successfully demonstrated that revegetation, usually involving fertilization and intensive management, can provide short term stability (three to five years) against wind and water erosion, but in terms of the long-term success of reclamation, current practices are still in an experimental stage (Murray 1978). This is also true in the Rocky Mountain Coal Region where greater aridity further increases difficulties in reclamation. In this region more intensive water management practices such as irrigation and/or water harvesting are needed to establish vegetation (Packer and Aldon, 1978; Ries and Day, 1978). Proper post-mining management of reclaimed land is also essential because grazing by livestock can destroy reclamation efforts in a short time (Aldon and Springfield, 1977).

The potential for reclaiming surface-mined land in the West is highly site specific and mining and reclamation practices at a specific

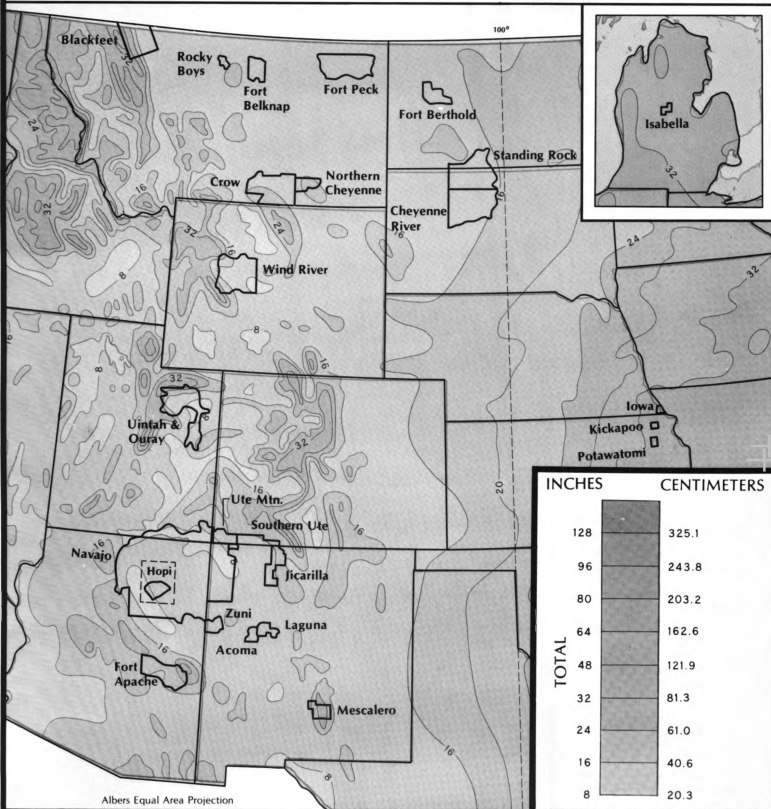
location will have to be developed based on a number of factors, including:

- ° Adequate evaluation of the detailed ecological and physical conditions at the site.
- ° Careful planning for the land use that is chosen for the site after mining is completed.
- ° Availability and appropriate selection of technology and reclamation techniques to deal with potential environmental problems at the site.
- ° Skillful application of the required technology and practices.

Careful site-specific premine environmental assessments and detailed planning of mining operations, as required by the Surface Mining Control and Reclamation Act of 1977, combined with continued research, should be able to overcome the difficulties inherent in reclaiming mined land in the West. However, it may be a number of years before establishment of a viable, progressive, self-regenerating ecosystem on reclaimed land, as required by the Act, can be considered proven.

A general overview of some environmental conditions on Indian coal lands which are relevant to the reclamation and revegetation of surface mined lands is presented in the map series which follows. (Figures 3-5 through 3-13). Reservation borders are approximate and in some cases are schematically drawn to improve clarity.

# CERT-OSM Indian Lands Study



Albers Equal Area Projection

SCALE 1:10,000,000

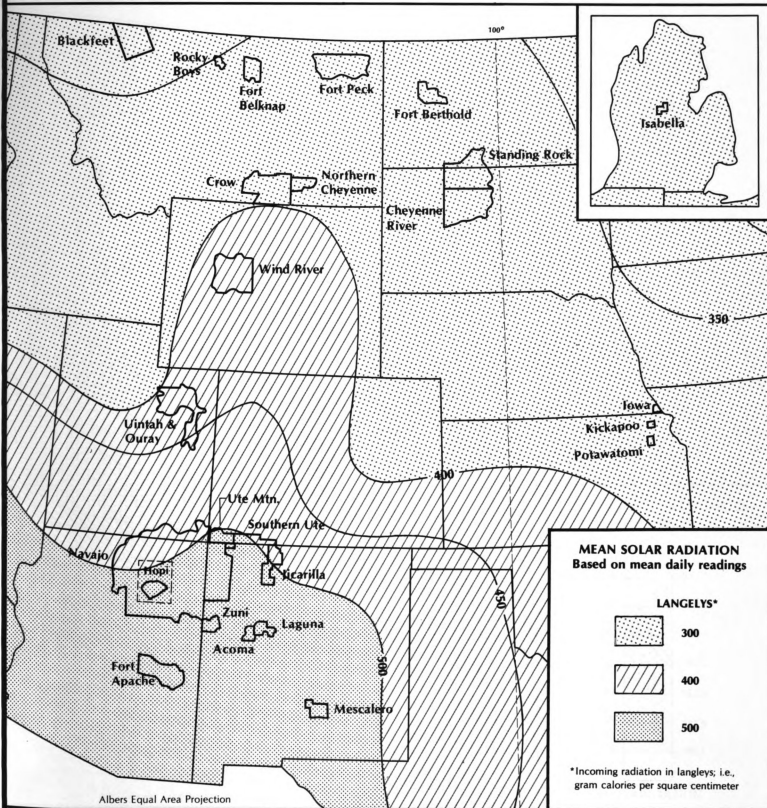
Fig. 3-5

Adapted from a 1:10,000,000-scale map by  
Environmental Data Service, Environmental Science Services Administration  
for the period 1951-1960



Mean Annual Precipitation on Indian Reservations  
Containing Coal Resources

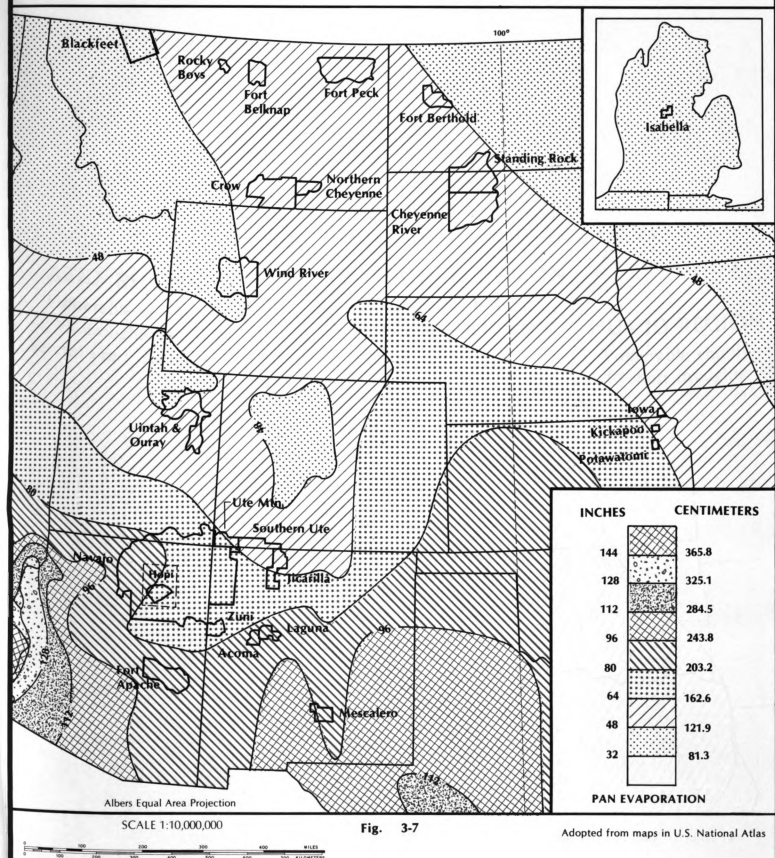
# CERT-OSM Indian Lands Study



Indian Lands Study Reservations:  
Annual Solar Radiation

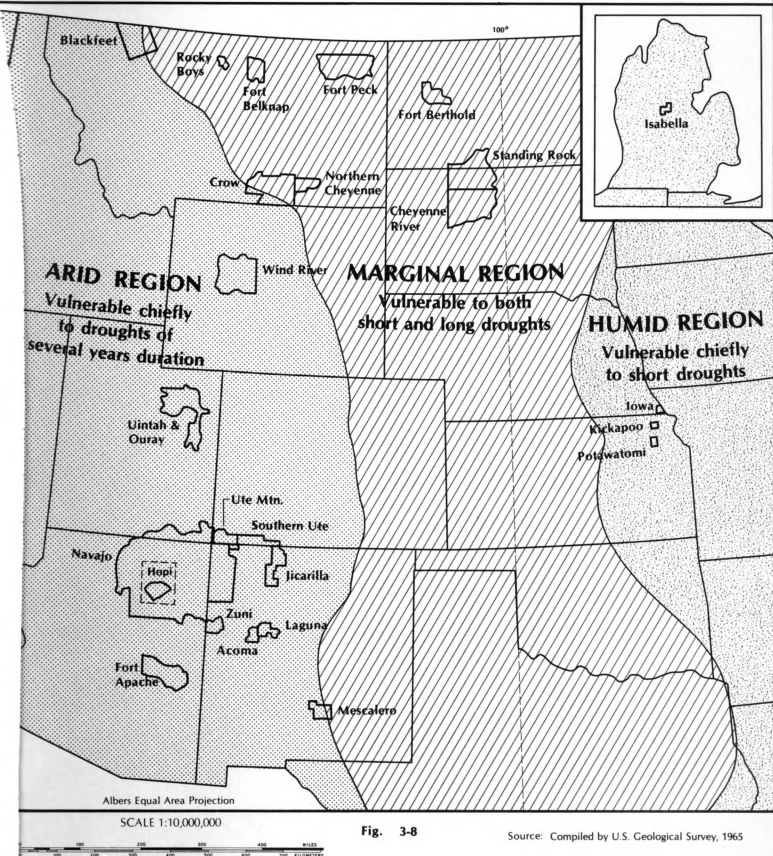


# CERT-OSM Indian Lands Study



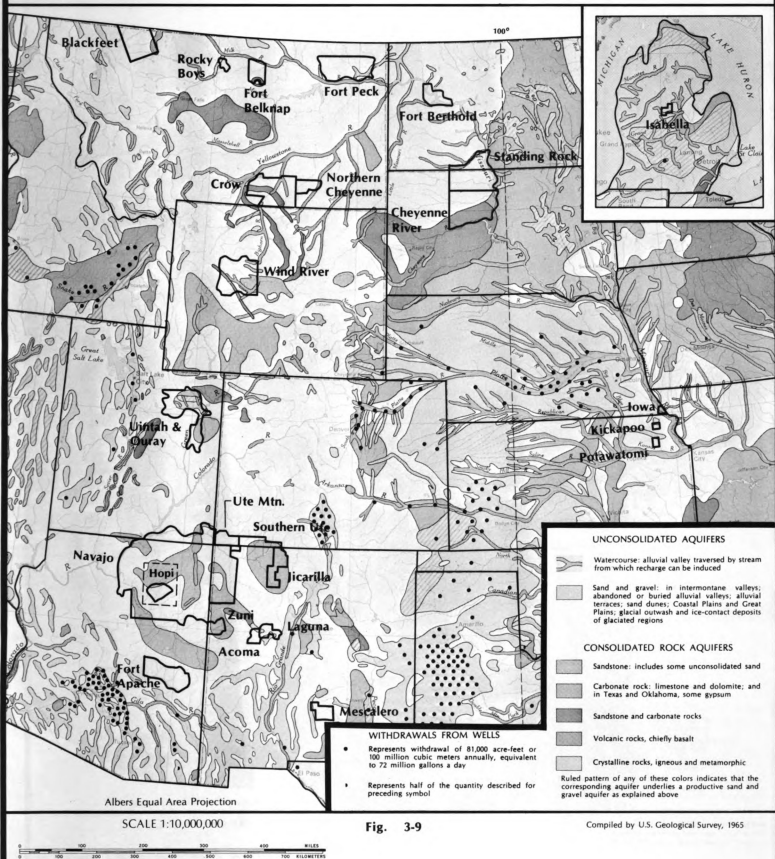
Indian Lands Study Reservations:  
Mean Annual Evaporation

# CERT-OSM Indian Lands Study



Significance of Drought Hazard on Indian Reservations containing Coal Resources



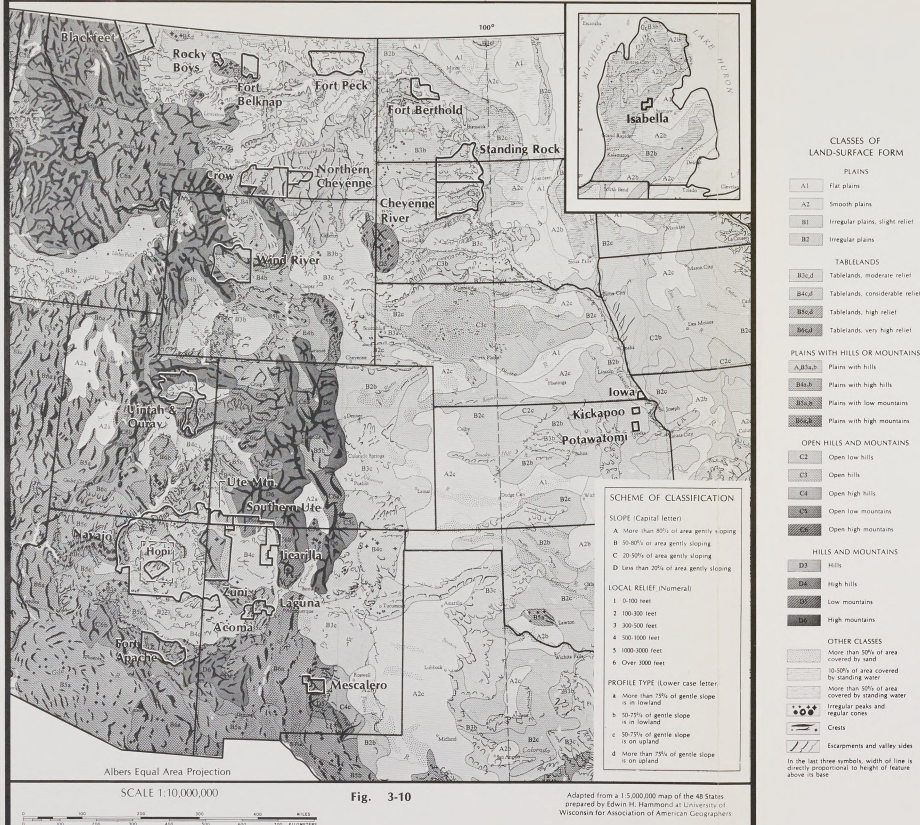
**CERT-OSM Indian Lands Study**

**Fig. 3-9**

Compiled by U.S. Geological Survey, 1965

## Generalized Ground Water Characteristics of Indian Reservations containing Coal Resources

# CERT-OSM Indian Lands Study



Landscape Characteristics of Indian Reservations  
containing Coal Resources

Adapted from a 1:5,000,000 map of the 48 States  
prepared by Edwin H. Hartshorn and University of  
Wisconsin for Association of American Geographers

# CLASSES OF LAND-SURFACE FORM

## PLAINS

|    |                                 |
|----|---------------------------------|
| A1 | Flat plains                     |
| A2 | Smooth plains                   |
| B1 | Irregular plains, slight relief |
| B2 | Irregular plains                |

## TABLELANDS

|       |                                 |
|-------|---------------------------------|
| B3c,d | Tablelands, moderate relief     |
| B4c,d | Tablelands, considerable relief |
| B5a,b | Tablelands, high relief         |
| B6a,b | Tablelands, very high relief    |

## PLAINS WITH HILLS OR MOUNTAINS

|         |                            |
|---------|----------------------------|
| A,B3a,b | Plains with hills          |
| B4a,b   | Plains with high hills     |
| B5a,b   | Plains with low mountains  |
| B6a,b   | Plains with high mountains |

## OPEN HILLS AND MOUNTAINS

|    |                     |
|----|---------------------|
| C2 | Open low hills      |
| C3 | Open hills          |
| C4 | Open high hills     |
| C5 | Open low mountains  |
| C6 | Open high mountains |

## HILLS AND MOUNTAINS

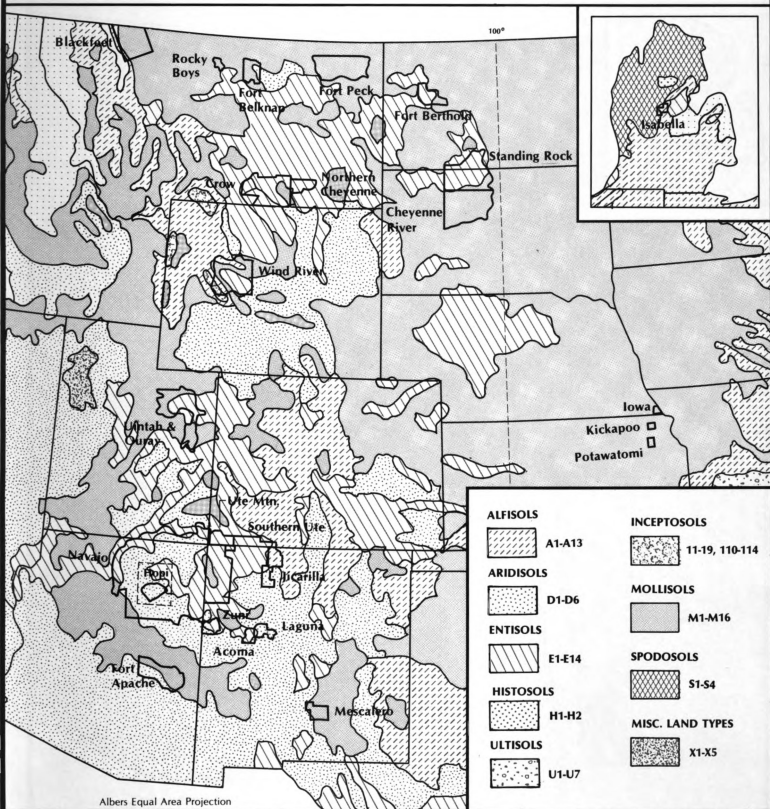
|    |                |
|----|----------------|
| D3 | Hills          |
| D4 | High hills     |
| D5 | Low mountains  |
| D6 | High mountains |

## OTHER CLASSES

|    |                                                 |
|----|-------------------------------------------------|
| E1 | More than 50% of area covered by sand           |
| E2 | 10-50% of area covered by standing water        |
| E3 | More than 50% of area covered by standing water |
| E4 | Irregular peaks and regular cones               |
| E5 | Crests                                          |
| E6 | Escarpments and valley sides                    |

In the last three symbols, width of line is directly proportional to height of feature above its base

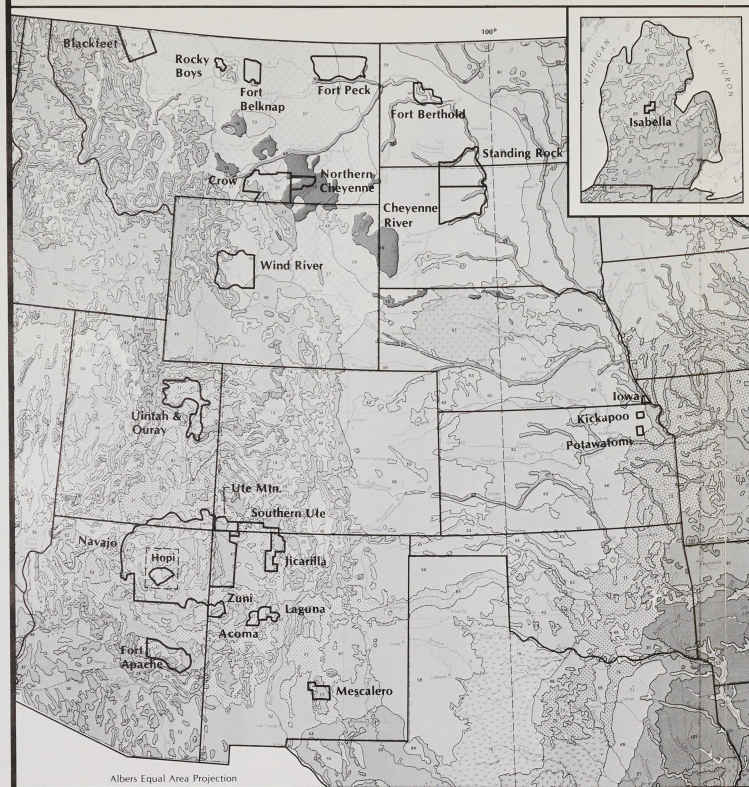
# CERT-OSM Indian Lands Study



Dominant Soil Types on Indian Reservations containing Coal Resources



**CERT-OSM Indian Lands Study**



Albers Equal Area Projection  
SCALE 1:10,000,000

**Fig. 3-12**

A. W. Küchler  
University of Kansas

Revised edition of 1965  
based on the author's map at a scale of 1:3,168,000  
published 1964 by American Geographical Society

### POTENTIAL NATURAL VEGETATION

## WESTERN FORESTS

## NEEDLELEAF FOREST

- | NEEDLELEAF FORESTS |                                                               |
|--------------------|---------------------------------------------------------------|
| 1                  | Spice-hemlock-hemlock forest<br>(Picea-Thus-Thuja)            |
| 2                  | Cedar-hemlock-Douglas fir forest<br>(Thuja-Thuja-Pseudotsuga) |
| 3                  | Silver fir-Douglas fir forest<br>(Abies-Pseudotsuga)          |
| 4                  | Fir-hemlock forest<br>(Abies-Thuja)                           |
| 5                  | Mixed conifer forest<br>(Pseudotsuga-Larix-Abies)             |
| 16                 | Black Hills pine forest<br>(Pinus)                            |
| 17                 | Pine-Douglas fir forest<br>(Pinus-Pseudotsuga)                |
| 18                 | Aspen-pine forest<br>(Pinus)                                  |
| 19                 | Spice-Douglas fir forest<br>(Picea-Abies-Pseudotsuga)         |
| 20                 | Southwestern spruce-fir forest<br>(Abies-Abies)               |
| 21                 | Juniper-pine woodland<br>(Juniperus-Pinus)                    |

## BROADLEAF FORESTS

- | TROPICAL FORESTS |                                                     | BROADLEAF FORESTS |                                    |
|------------------|-----------------------------------------------------|-------------------|------------------------------------|
| 6                | Knowwood Forest<br>(Sequoia/Pseudotsuga)            | 23                | Oregon oaks<br>(Quercus)           |
| 7                | Red fir forest<br>(Abies)                           | 24                | Marquette bosques<br>(Pseudotsuga) |
| 8                | Lodgepole pine-sitka spruce forest<br>(Picea-Tsuga) |                   |                                    |
|                  | Pine-spruce forest                                  |                   |                                    |

## BROADLEAF AND NEEDLELEAF

- | BROADLEAF AND NEEDLELEAF FORESTS |                                                         |
|----------------------------------|---------------------------------------------------------|
| 10                               | Western ponderosa forest (Pinus)                        |
| 11                               | Douglas fir forest (Pseudotsuga)                        |
| 12                               | Cedar-hemlock pine forest (Thuja-Thuja-Pinus)           |
| 13                               | Grand fir-Douglas fir forest (Abies-Pseudotsuga)        |
| 14                               | Western spruce fir forest (Picea-Abies)                 |
| 15                               | Eastern ponderosa forest (Pinus)                        |
| 16                               | Mosaic of numbers 2 and 22                              |
| 17                               | California mixed evergreen (Quercus-Arabis-Pseudotsuga) |
| 18                               | California oakwoods (Quercus)                           |
| 19                               | Oak-juglone woodland (Quercus-Juglans)                  |
| 20                               | Transition between 27 and 3                             |

## WESTERN SHRUB AND GRASSLAND

## 948U

- SHRUB 23 Desert; vegetation largely absent

## GRASSLAND

- 20 Chapter 1  
1-Adenine-2-Guanine-3-Cytosine-4-Thymine-5-Deoxyribose-6-Phosphate-7-Grass

## SHRUB AND GRASSLAND

- [illegible]

## BRASSIANI

- | CAUSLAND |                                                     |    |                                                          |
|----------|-----------------------------------------------------|----|----------------------------------------------------------|
| 00       | Footbills, prairie<br>Agropyron spicatus Styl.      | 00 | Whetlogs, bladders, meadow<br>Agropyron Andropogon Styl. |
| 01       | Corn, meadow, bladders<br>Footbills Styl. Agropyron | 01 | Whetlogs, bladders, meadow<br>Agropyron bladders Styl.   |
| 02       | Corn, bladders, prairie<br>Footbills Styl. Styl.    | 02 | Bladders, prairie, prairie<br>Footbills Styl. Styl.      |
| 03       | Whetlogs, meadow, prairie<br>Agropyron Styl.        | 03 | Sedgely, meadow, prairie<br>Antennaria Andropogon        |
|          |                                                     | 04 | Shrubby<br>(Quercus, Andropogon)                         |
|          |                                                     | 05 | Northern, corn, prairie<br>Dactylis spicata              |

## CENTRAL AND EASTERN GRASSLAND

## GRASSLAND AND FORES.

- [illegible]

# POTENTIAL NATURAL VEGETATION

## WESTERN FORESTS

### NEEDLELEAF FORESTS

- 1 Spruce-cedar-hemlock forest  
(*Picea-Thuja-Tsuga*)
- 2 Cedar-hemlock-Douglas fir forest  
(*Thuja-Tsuga-Pseudotsuga*)
- 3 Silver fir-Douglas fir forest  
(*Abies-Pseudotsuga*)
- 4 Fir-hemlock forest  
(*Abies-Tsuga*)
- 5 Mixed conifer forest  
(*Abies-Pinus-Pseudotsuga*)
- 6 Redwood forest  
(*Sequoia-Pseudotsuga*)
- 7 Red fir forest  
(*Abies*)
- 8 Lodgepole pine-subalpine forest  
(*Pinus-Tsuga*)
- 9 Pine-cypress forest  
(*Pinus-Cupressus*)
- 10 Western ponderosa forest  
(*Pinus*)
- 11 Douglas fir forest  
(*Pseudotsuga*)
- 12 Cedar-hemlock-pine forest  
(*Thuja-Tsuga-Pinus*)
- 13 Grand fir-Douglas fir forest  
(*Abies-Pseudotsuga*)
- 14 Western spruce fir forest  
(*Picea-Abies*)
- 15 Eastern ponderosa forest  
(*Pinus*)
- 16 Black Hills pine forest  
(*Pinus*)
- 17 Pine-Douglas fir forest  
(*Pinus-Pseudotsuga*)
- 18 Arizona pine forest  
(*Pinus*)
- 19 Spruce-fir-Douglas fir forest  
(*Picea-Abies-Pseudotsuga*)
- 20 Southwestern spruce-fir forest  
(*Picea-Abies*)
- 21 Juniper-pinyon woodland  
(*Juniperus-Pinus*)
- 22 Oregon oakwoods  
(*Quercus*)
- 23 Mesquite bosques  
(*Prosopis*)
- 24 Mosaic of numbers 2 and 22
- 25 California mixed evergreen forest  
(*Quercus-Arbutus-Pseudotsuga*)
- 26 California oakwoods  
(*Quercus*)
- 27 Oak-juniper woodland  
(*Quercus-Juniperus*)
- 28 Transition between 27 and 31

### BROADLEAF FORESTS

- 22 Oregon oakwoods  
(*Quercus*)
- 23 Mesquite bosques  
(*Prosopis*)
- 24 Mosaic of numbers 2 and 22
- 25 California mixed evergreen forest  
(*Quercus-Arbutus-Pseudotsuga*)
- 26 California oakwoods  
(*Quercus*)
- 27 Oak-juniper woodland  
(*Quercus-Juniperus*)
- 28 Transition between 27 and 31

### BROADLEAF AND NEEDLELEAF FORESTS

- 22 Oregon oakwoods  
(*Quercus*)
- 23 Mesquite bosques  
(*Prosopis*)
- 24 Mosaic of numbers 2 and 22
- 25 California mixed evergreen forest  
(*Quercus-Arbutus-Pseudotsuga*)
- 26 California oakwoods  
(*Quercus*)
- 27 Oak-juniper woodland  
(*Quercus-Juniperus*)
- 28 Transition between 27 and 31

- Juniperus spp. (juniper, red cedar)
- Sequoia wellingtonia (giant sequoia)
- Yucca brevifolia (Joshua tree)

## WESTERN SHRUB AND GRASSLAND

### SHRUB

- 29 Chaparral  
(*Adenostoma-Arctostaphylos-Ceanothus*)
- 30 Coastal sagebrush  
(*Salvia-Eriogonum*)
- 31 Mountain mahogany-oak scrub  
(*Cercocarpus-Quercus*)
- 32 Great Basin sagebrush  
(*Artemisia*)
- 33 Blackbrush  
(*Coleogyne*)
- 34 Saltbush-greasewood  
(*Atriplex-Sarcobatus*)
- 35 Creosote bush  
(*Larrea*)
- 36 Creosote bush-bur sage  
(*Larrea-Franseria*)
- 37 Palo verde-cactus shrub  
(*Cercidium-Opuntia*)
- 38 Ceniza shrub  
(*Leucophyllum-Larrea-Prosopis*)

### GRASSLAND

- 39 Desert vegetation largely absent
- 40 Fescue-oatgrass  
(*Festuca-Danthonia*)
- 41 California steppe  
(*Stipa*)
- 42 Tule marshes  
(*Scirpus-Typha*)
- 43 Fescue-wheatgrass  
(*Festuca-Agrophyron*)
- 44 Wheatgrass-bluegrass  
(*Agropyron-Poa*)
- 45 Alpine meadows and barren  
(*Agrostis-Carex-Festuca-Poa*)
- 46 Fescue-mountain muhly prairie  
(*Festuca-Muhlenbergia*)
- 47 Grama-galleta steppe  
(*Bouteloua-Hilaria*)
- 48 Grama-lobosa prairie  
(*Bouteloua-Hilaria*)

### SHRUB AND GRASSLAND COMBINATIONS

- 49 Sagebrush steppe  
(*Artemisia-Agrophyron*)
- 50 Wheatgrass-needlegrass shrubsteppe  
(*Agropyron-Stipa-Artemisia*)
- 51 Galleta-threeawn shrubsteppe  
(*Hilaria-Aristida*)
- 52 Grama-lobosa shrubsteppe  
(*Bouteloua-Hilaria-Larrea*)
- 53 Trans-Pecos shrub savanna  
(*Flourensia-Larrea*)
- 54 Mesquite-acacia savanna  
(*Andropogon-Setaria-Prosopis-Acacia*)
- 55 Mesquite-live oak savanna  
(*Andropogon-Prosopis-Quercus*)

## CENTRAL AND EASTERN GRASSLANDS

### GRASSLAND

- 56 Foot-hills prairie  
(*Agropyron-Festuca-Stipa*)
- 57 Grama-needlegrass-wheatgrass  
(*Bouteloua-Stipa-Agrophyron*)
- 58 Grama-buffalo grass  
(*Bouteloua-Burchardia*)
- 59 Wheatgrass-needlegrass  
(*Agropyron-Stipa*)
- 60 Wheatgrass-bluestem-needlegrass  
(*Agropyron-Andropogon-Stipa*)
- 61 Wheatgrass-grama-buffalo grass  
(*Agropyron-Bouteloua-Burchardia*)
- 62 Bluestem-grama prairie  
(*Andropogon-Bouteloua*)
- 63 Sandhills bluestem prairie  
(*Artemisia-Andropogon*)
- 64 Shinnery  
(*Quercus-Andropogon*)
- 65 Northern cordgrass prairie  
(*Dichelis spartina*)

- 66 Bluestem prairie  
(*Andropogon-Panicum-Sorghastrum*)
- 67 Nebraska Sandhills prairie  
(*Andropogon-Calamagrostis*)
- 68 Blackland prairie  
(*Andropogon-Stipa*)
- 69 Bluestem sacahuista prairie  
(*Andropogon-Spartina*)
- 70 Southern cordgrass prairie  
(*Spartina*)
- 71 Palmetto prairie  
(*Serenoa-Aristida*)

### GRASSLAND AND FOREST COMBINATIONS

- 72 Oak savanna  
(*Quercus-Andropogon*)
- 73 Mosaic of numbers 66 and 91
- 74 Cedar glades  
(*Quercus-Juniperus-Sporobolus*)
- 75 Cross timbers  
(*Quercus-Andropogon*)
- 76 Mesquite-buffalo grass  
(*Bouteloua-Burchardia-Prosopis*)
- 77 Juniper-oak savanna  
(*Andropogon-Quercus-Juniperus*)
- 78 Mesquite-oak savanna  
(*Andropogon-Prosopis-Quercus*)
- 79 Savanna prairie  
(*Andropogon-Burchardia*)
- 80 Blackbelt  
(*Liquidambar-Quercus-Juniperus*)
- 81 Live oak sea oaks  
(*Quercus-Liquidambar*)
- 82 Express savanna  
(*Passiflora-Marrubium*)
- 83 Everglades  
(*Marrubium and Magnolia Persea*)

# CERT-OSM Indian Lands Study

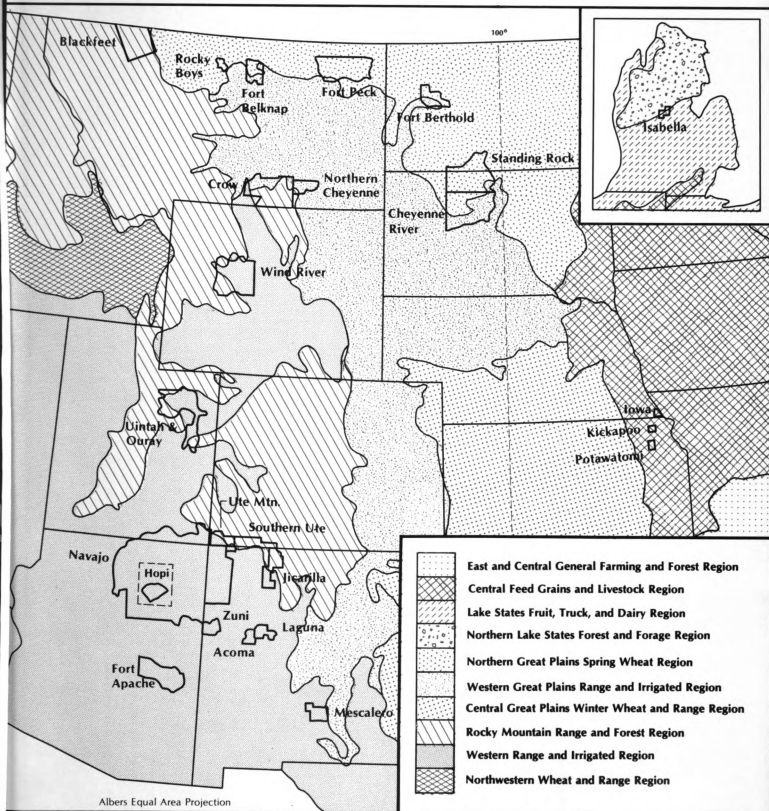


Fig. 3-13

Source: Adapted from U.S. Soil Conservation Service, *Land resource regions and major land resource areas of the United States*, Aug. 1965 ed., Hyattsville, Md., U.S. Dept. of Agric., 1965,





## CHAPTER 4

### TRIBAL GOVERNMENTAL INSTITUTIONS



## CHAPTER 4

### TRIBAL GOVERNMENTAL INSTITUTIONS

#### Introduction

The regulation of surface mining on Indian lands takes place in a unique institutional setting. Indian tribal governments differ from federal, state, and local governments in the scope of their authority, their structure, and their role in managing community affairs. Possible amendments to the Surface Mining Control and Reclamation Act (SMCRA) that would enable tribes to assume regulatory authority under the law will need to accommodate the special features. This Chapter provides background information on the characteristics of the governments of the coal-owning tribes which are relevant to such regulatory programs.

This Chapter consists of three parts. The first section introduces the basic principles that determine all tribal government activities -- the tribes' inherent powers of self-government and a unique Tribal-Federal relationship. It also briefly illustrates how these factors may affect tribal regulatory programs. The second part explains the formal basis of the existing tribal organizations. It describes how the reservations were established, how the governmental institutions were created, their authorities, and who exercises these authorities. The final section presents a perspective on how the tribal governments actually implement programs relating to resource management. It identifies the types of activities being undertaken, their institutional setting within the governmental administration and special implementation issues. The general overview provided by this Chapter is complemented by a series of appendices which provide background on the governments of the individual tribes participating in this study. (See CERT, Tribal Governmental Organization. Appendices. April 1979).

## PRINCIPLES OF TRIBAL GOVERNMENT

Indian tribes' powers to regulate surface mining activities stem from their well-established status as dependent-sovereign nations that possess an inherent right to self-government. The recognition of tribes as quasi-sovereign entities dates back to their contact with British, French and Spanish colonists in the 1500's. It was affirmed in treaties negotiated with those nations, particularly in the mid-1700's when tribes were valued as military allies in the various colonial wars. Treaties signed with the United States during and after the Revolutionary War likewise treated Indian tribes as "distinct, independent, political communities"<sup>1/</sup> under the protection of the U. S. Government. Subsequent treaties, statutes, executive orders, and court decisions have carved a unique framework for tribal exercise of the power of self-government. Two basic principles -- tribes' inherent sovereign powers of self-government and the unique Tribal-Federal relationship -- are summarized below; highlights of their effect on mining regulatory programs also are noted.

### Inherent Sovereign Powers of Tribes

The first principle was articulated by the renowned Indian legal scholar, Felix Cohen, when he stated:

"those powers which are lawfully vested in an Indian tribe are not, in general, delegated by express acts of Congress, but rather inherent powers of a limited sovereignty which never has been extinguished."<sup>2/</sup>

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<sup>1/</sup> Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559 (1832).

<sup>2/</sup> Cohen, Felix. Handbook of Federal Indian Law. University of New Mexico Press (ed.) 1971, p. 122.

The Courts have recognized this fact and have long supported tribes' right to be governed by their own political systems. Various treaties, executive orders and statutes adopted by the federal government have provided tribes with a land and resource base with which to maintain and develop their livelihood and culture, under their own political system.

Like other governments, the structure and powers of tribal governing bodies derive from the express will of the tribal members. The rights of self-government are vested in the members of the tribes and it is their prerogative to determine how to exercise them. They determine the selection of tribal officials, their duties and authorities, and the procedures that must be followed for their actions to be valid. At the time that treaties were being negotiated, many Indian tribes already had developed methods of self-government through centuries of both written and oral tradition. Since then, tribes have continued to adapt their systems of government to their changing environments. Virtually all of the tribes participating in this study have adopted written Constitutions, By-Laws, and Codes to define their governmental systems.

#### Tribal-Federal Relationship

The second principle of tribal government is two-fold: 1) the tribes are subject to the plenary powers of the Congress, but 2) the Federal Government has a "trust" responsibility to protect and assist Indian tribes. This unique relationship generally restricts a state's role in tribal government.

The plenary powers of Congress over Indian affairs derive primarily from the Commerce Clause in Article I of the U. S. Constitution. This

provision assigns Congress the exclusive authority for regulating commerce "with foreign nations, and among states and with the Indian Tribes." This grant of power involves three types of actions: engaging in warfare, entering into treaties, and regulating commerce. Congress has used treaties and statutes to cement a Tribal-Federal relationship that recognizes tribes' independent right to govern their internal affairs subject to Congressional limitations. For example, tribes are restricted from exercising certain powers which are reserved to the Federal government (e.g., international relations). Until 1871,<sup>3/</sup> Congress negotiated treaties with Indian tribes which established peaceful relations between the government and the tribes, and often provided (or reduced) territories to be reserved for the exclusive use of the tribe. The commerce powers have been invoked to influence Indian lands in a variety of areas, including trade (the Trade and Intercourse Acts); resource ownership (reservation establishment and the General Allotment Act); tribal government (e.g., the Indian Reorganization Act (IRA), and the Indian Civil Rights Act (ICRA)); and the application of national laws to tribes (e.g. the Surface Mining Control and Reclamation Act). Finally, this Tribal-Federal relationship imposes limits on state involvement in Indian affairs: treaties and state enabling laws often explicitly preclude state jurisdiction; the Tribal-Federal link usually prevails in the implementation of laws of general applicability (e.g., SMCRA) on Indian lands.

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<sup>3/</sup> Congress discontinued the use of treaties in dealing with the tribes in an Appropriations Act passed in 1871. Importantly, the Act specifically reinforced the validity of treaties signed prior to that date.

The federal government's trust responsibility to Indian tribes largely derives from Court and Congressional interpretations of treaties and the Constitution dating back to a decision by Chief Justice Marshall in 1831. Although the scope and instruments of the relationship have varied since that time, the Courts have not wavered in upholding the Government's trust responsibility. This relationship imposes both general and specific obligations on the Government. Initially, Indian affairs involved treaty and trade matters and were handled by the War Department. Upon the inception of the Department of the Interior (DOI) in 1849, these responsibilities were transferred to that Department. Subsequently, the Congress granted the Secretary of DOI broad discretionary authority over tribal affairs, a power which was used as a vehicle for Secretarial approval of a wide range of tribal decisions regarding their governments. Congress has since taken steps to narrow the scope of federal discretionary control over the internal affairs of tribes (e.g., the IRA and the Indian Self-Determination Act), but also has acted to reinforce the trustee's obligation to protect tribal assets (e.g. the Mineral Leasing Acts and the Indian Financing Act). State laws are preempted by federal laws in matters involving trust assets.

The current environment of Tribal-Federal relations reflects the mutual commitment of both parties to uphold these principles. The following expressions of Congressional policy may exemplify this spirit.

- ° From the Indian Self Determination Act (P.L. 93-638)  
25 U.S.C. 450(a):

(a) The Congress hereby recognizes the obligation of the United States to respond to the strong expression of the Indian people for self-determination by assuring maximum Indian participation in the direction of educational as well as other Federal services to Indian communities so as to render such services more responsive to the needs and desires of those communities.

(b) The Congress declares its commitment to the maintenance of the Federal Government's unique and continuing relationship with and responsibility to the Indian people through the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from Federal domination of programs for and services to Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services.

- ° And from the Indian Financing Act of 1974 (P.L. 93-262) 25 U.S.C. 1451:

It is hereby declared to be the policy of Congress to provide [financial assistance] to develop and utilize Indian resources, both physical and human, to a point where the Indians will fully exercise responsibility for the utilization and management of their own resources. . . .

It is in this policy context that the Congress adopted Section 710 of the Surface Mining Control and Reclamation Act (SMCRA).

#### Relationship to the Regulation of Surface Mining

These two principles may serve as the initial point of reference when developing programs to regulate surface mining activities on Indian lands under SMCRA. Figure 4-1 illustrates the general framework of tribal regulatory authorities. Because of the special characteristics of tribal powers, there may be areas in which Indian regulatory programs must differ from those designed for states. Furthermore, the Indian lands programs may need to accommodate certain structural differences among the individual tribal governments. For example:

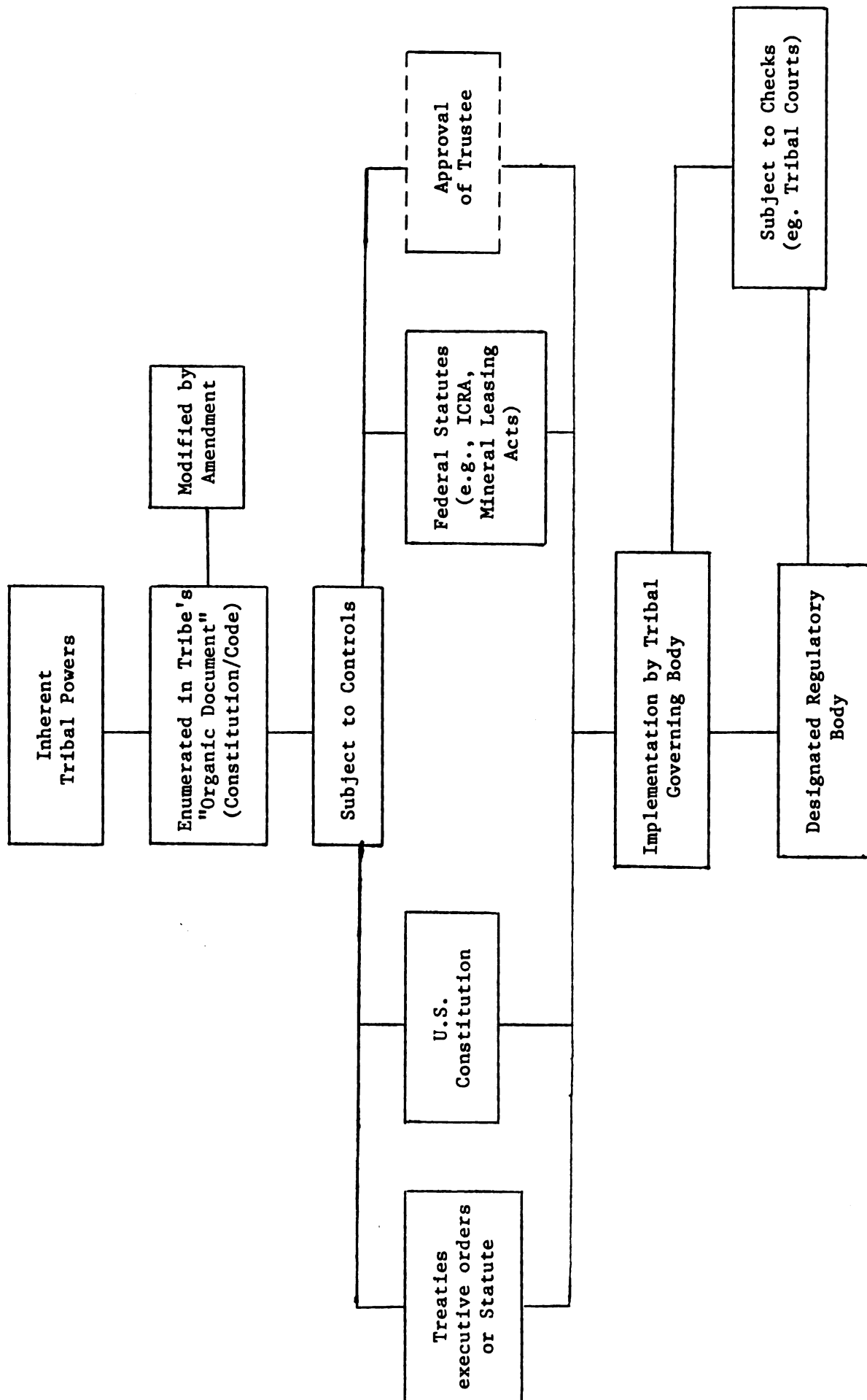
#### General Factors

- ° Treaties, executive orders, and statutes have affirmed tribes' inalienable right to determine how to develop and use their coal. Hence, all programs under P.L. 95-87 - be they federal or tribal - must incorporate tribal approvals over actions involving the disposition of the coal (e.g., unsuitability designations, permits, bonds, etc.).



FIGURE 4-1

DERIVATION OF AUTHORITIES AFFECTING A HYPOTHETICAL TRIBAL REGULATORY BODY



- ° The regulation of mining activities also fits within the general ambit of tribes' powers of self-government. Tribal regulatory programs which may result from an amendment to SMCRA could supplement this inherent right.
- ° Congress has enacted a series of laws, beginning with the Trade and Intercourse acts in the 1700's that prohibit the conveyance (e.g., by lease) of tribal resources without the concurrence of the federal government. The Mineral Leasing Acts passed in the 1920's and 1930's compel the Secretary of the Interior to act as trustee for tribal mineral resources. This trust responsibility has been exercised by both the BIA and GS.<sup>4/</sup> Consequently, potential Indian programs (Tribal or Federal) under SMCRA also must incorporate the approvals of the trustee in all decisions affecting mineral and other resources.

#### Tribe-Specific Factors

Each tribe has a unique basis for exercising its governmental authority. These differences produce variations among tribal regulatory activities. For example:

- ° The land and resources promised in treaties, executive orders, and statutes differ from tribe to tribe. The impact of the General Allotment Act of 1887 which, until 1934 fragmented reservation lands for tribal members, also varied among and within reservations. Thus, in some mine areas a tribe may act as both the owner and a government, but in other areas it may regulate using its governmental powers only.
- ° All tribal regulatory programs will derive their authority from an enabling clause in the organic document (e.g., Constitution or Code) approved by the tribe. Although all of the necessary powers inherently reside in the tribes, the authorities explicitly granted to the governing bodies vary. In some cases, the documents may have to be amended to clarify the grant of authority for such programs.

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4/ BIA is responsible for the economic, environmental, and other terms of the agreement (e.g., lease); GS is responsible for inspections and enforcing the development stipulations.

- ° Tribes may be expected to vary in how regulatory agencies are established, to whom the officials are accountable, and how decisions are reviewed. These organizational decisions may be determined by the powers assigned to each "branch" of government in the enabling documents and/or related resolutions.
- ° The formal "checks and balances" among tribal officials will differ from tribe to tribe depending on the form of government instituted in the Constitution or Code.
- ° The grant of authority to the Secretary of the Interior to review or approve tribal decisions, including ordinances, will differ among the tribal Constitutions and Codes.

The following two sections present a summary perspective on the organization and administration of the governments of the coal-owning tribes participating in this study. More detailed individual reports on the governments of the major coal-owning tribes are included in CERT's Tribal Governmental Organization (April 1979).

#### TRIBAL GOVERNMENT ORGANIZATION

The evolution of tribal governments began long before the inception of the American political system. Tribes differed widely in their approaches to self-governance. At one end of the spectrum, it is noteworthy that the "Five Nations" of Iroquois adopted a formal Constitution before the Continent was discovered by Columbus. They established such principles as initiative, recall, referendum, equal suffrage, and the accountability of the government to both present and future generations.<sup>5/</sup> The Plains tribes have been characterized by one specialist as

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<sup>5/</sup> Cohen, Felix. op. cit. p. 128.

being "democratic, one-man-one-vote societies" that emphasized "agreement by consensus, inhibition against speaking or acting for another, and a justice system that [made] the well-being of the group more important than retribution against the erring individual."<sup>6/</sup> On the other hand, many of the southwestern tribal organizations are based on theocratic customs, rituals and oral traditions, with key decisions rendered by religious elders of the tribe.<sup>7/</sup>

Since the time that they negotiated treaties with the U.S., tribal governments have changed in response to changing circumstances. For example, many tribal systems were altered when they were moved to reservations that could not support their way of life. In some cases, the reservations were shared by more than one tribe, thus forcing a merger of different traditions. The Allotment Act and the Homesteading Acts weakened some tribal governments by reducing their land and resource base; by replacing the Indian concept of community property with that of individual ownership, and by increasing the population of non-Indian residents on the reservation. Similarly, the Indian Reorganization Act spurred the adoption of Constitutions and By-Laws based on American models of government. Consequently, present-day tribal governments reflect each tribe's unique approach to accommodate these forces within their traditional framework.

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<sup>6/</sup> McNickle, D'Arcy. "Tribal Government and the Indian Reorganization Act: Government by Consent." in Tribal Constitutions: Their Past - Their Future, ed. by James J. Lopach, Margery H. Brown, Kathleen Jackson. Missoula: University of Montana Press, August 1978, p. 11.

<sup>7/</sup> Sekaquaptewa, Abbott. "What is Good Tribal Government?" in Tribal Constitutions: Their Past - Future, ed. by James J. Lopach, Margery H. Brown, Kathleen Jackson. Missoula: University of Montana Press, August 1978, p. 36.

The following materials summarize certain key aspects of the current organizational structure of the twenty-five tribal governments participating in this study. (See Table 4-1). The discussion includes background information on the following characteristics: (1) the establishment of reservations; (2) the formal basis of the government (e.g., Constitutions or similar "organic" documents); (3) the authorities that may be exercised by the government; and (4) the structure of the government (e.g., governing bodies and officials).

The following discussion should be viewed with two caveats. First, few generalizations can be made with accuracy about "tribal government organizations." Each one is unique, and should be analyzed on an individual basis (See the full report on Tribal Governmental Organizations for more complete profiles). And second, these materials should not be construed as a legal interpretation of tribal government powers or procedures. Such analysis can only be done on a tribe-by-tribe basis by qualified attorneys.

#### Reservation Establishment

One precondition to self-government is a geographic base to support the livelihood of the people. The principles of Indian territorial rights date back to the original treaties between tribes and the colonial governments. Since that time, the land and resources reserved for tribes have been defined and modified by a series of treaty revisions, executive orders, statutes, and acquisitions.

Early treaties recognized Indian claims to the territory of the Continent. Declarations regarding "Indian Country" respected tribal sovereignty within those areas. However, after the colonial wars ended, the American sentiment was that the Indians would be absorbed into the general population.

TABLE 4-1  
TRIBES PARTICIPATING IN THE STUDY

| <u>Major Coal-Ownng Tribes</u> | <u>Reservation Name</u> | <u>State</u> | <u>County</u>                             |
|--------------------------------|-------------------------|--------------|-------------------------------------------|
| Crow                           | Crow                    | Montana      | Big Horn, Yellowstone, Treasure           |
| Navajo                         | Navajo                  | Arizona      | Apache, Navajo, Coconino                  |
|                                |                         | New Mexico   | San Juan, McKinley                        |
|                                |                         | Utah         | San Juan                                  |
| Northern Cheyenne              | Northern Cheyenne       | Montana      | Big Horn, Rosebud                         |
| Mouache & Capote Ute           | Southern Ute            | Colorado     | LaPlata, Archuleta, Montezuma             |
| Mandan, Hidasta, Arikara       | Fort Berthold           | North Dakota | Dunn, McLean, McKenzie, Mountrail, Mercer |
| Ute                            | Uintah & Ouray          | Utah         | Uintah, Dushesne, Grand                   |
| <u>Other Affected Tribes</u>   |                         |              |                                           |
| Blackfeet                      | Blackfeet               | Montana      | Glacier, Pondera                          |
| Sioux                          | Cheyenne River Sioux    | South Dakota | Perkins, Dewey, Ziebach                   |
| Chippewa-Cree                  | Rocky Boy               | Montana      | Choteau, Hill                             |
| Gros Ventre, Assiniboine       | Fort Belknap            | Montana      | Blaine, Phillips                          |
| Assiniboine, Sioux             | Fort Peck               | Montana      | Valley, Roosevelt, Daniels, Sheridan      |
| Hopi                           | Hopi                    | Arizona      | Coconino, Navajo                          |
| Iowa                           | Iowa                    | Kansas       | Brown                                     |
| Saginaw, Chippewa              | Isabella                | Michigan     | Isabella                                  |
| Jicarilla Apache               | Jicarilla               | New Mexico   | Rio Arriba, Sandoval                      |
| Kickapoo                       | Kickapoo                | Kansas       | Brown                                     |
| Mescalero Apache               | Mescalero               | New Mexico   | Otero                                     |
| Prairie Band of Potawatomi     | Potawatomi              | Kansas       | Jackson                                   |
| Keresan                        | Pueblo of Acoma         | New Mexico   | Valencia                                  |
| Keresan                        | Pueblo of Laguna        | New Mexico   | Valencia, Bernalillo, Sandoval            |
| Sioux                          | Standing Rock           | North Dakota | Sioux                                     |
|                                | Ute Mountain            | South Dakota | Corson, Dewey, Ziebach                    |
|                                |                         | Colorado     | Montezuma, LaPlata                        |
|                                |                         | New Mexico   | San Juan                                  |
|                                |                         | Utah         | San Juan                                  |
| White Mountain Apache          | Fort Apache             | Arizona      | Apache, Gila, Navajo                      |
| Shoshone & Arapaho             | Wind River              | Wyoming      | Fremont, Hot Springs                      |
| Zuni                           | Zuni Pueblo             | New Mexico   | McKinley, Valencia                        |

Source: U.S. Department of Commerce. Federal and State Indian Reservations and Indian Trust Areas.

By the late 1700's the federal government was confronted by conflicts between the development of the western frontier and the interest in maintaining peaceful relations with the tribes. One initial response was to regulate trade between non-Indians and the tribes. A series of "Trade and Intercourse" laws were enacted to maintain order by requiring federal licensing and approval of any transactions involving Indian lands or resources. Importantly, the Act of 1796 contained the first statutory reference to Indian Country and the government's commitment to protect tribal rights under the treaties.

Within the next two decades, another approach toward Indian lands emerged: the "removal" of Indians from the eastern states to either small reservations in the east or to "Indian Territory" in the western frontier. This policy resulted from two divergent thoughts: a Jacksonian demand for tribal lands, and a Jeffersonian sentiment that tribes would fare better if isolated from the non-Indian community. Tribes were transported from east to the midwest; some midwestern tribes were transported to the Northern Rockies and the Pacific Northwest. Many tribes were "consolidated" during this process, despite their divergent cultures and often intense opposition to being merged.

By the 1850's, the expanse of the designated Indian Territory was being carved into individual states. It was during this period that reservations first were established. The precedent set in California of using treaties for establishing reservations continued until 1871, when Congress halted all new treaty-making with the tribes. Executive orders, statutes and other federal authorizations were used instead. For this reason, many of the present-day reservations derive from a series and combination of agreements and federal actions. Table 4-2

indicates the manner in which the reservations of the twenty-five tribes were established.

Tribal reservations underwent further modification in response to federal assimilationist policies in the 1880's. The enactment of the "Dawes Bill" -- the General Allotment Act -- in 1887 opened reservation lands for land grants to tribal members. It resulted in the fragmentation of many reservations until the passage of the Indian Reorganization Act (the "Wheeler-Howard Act") in 1934. Between 1887 and 1934, 90 million acres of tribal lands were transferred into individual ownership:<sup>8/</sup> Table 4-2 also indicates whether any of the acreage within the exterior boundaries of the twenty-five reservations is allotted.

The IRA reflected a dramatic shift in the federal policy toward tribes. It reasserted the principles of tribal sovereignty and the sanctity of the treaties. Among other things, the act put an end to any further allotments of reservation lands. It also authorized the Secretary of the Interior to acquire lands on the behalf of tribes that chose to organize under the IRA. Because of these two provisions, Indian lands actually increased by more than four million acres.<sup>9/</sup>

#### Formal Basis For The Exercise Of Tribal Authority

The powers exercised by present day tribal governments derive from a fusion of cultural traditions and adaptations to the American political system. Traditional systems of tribal government came under

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<sup>8/</sup> Getches, David H., Daniel M. Rosenfelt and Charles F. Wilkenson. Cases and Materials on Federal Indian Law (Draft) Volume I. August, 1977, p. 119.

<sup>9/</sup> McNickle, D'Arcy, op. cit. p. 8.



TABLE 4-2

## ESTABLISHMENT OF RESERVATIONS

| <u>Reservation</u>                    | <u>How the Reservation<br/>Was Established</u>                            | <u>Key Dates</u>                                                    | <u>Does the Reservation<br/>Have Allotted Land?</u> |
|---------------------------------------|---------------------------------------------------------------------------|---------------------------------------------------------------------|-----------------------------------------------------|
| <u>Crow</u>                           | Treaty, Executive Order                                                   | May 7, 1868, October 20, 1875                                       | Yes                                                 |
| Fort Berthold                         | Treaty, Act of Congress                                                   | September 17, 1851, July 27, 1866                                   | Yes                                                 |
| Navajo                                | Treaty, Executive Order                                                   | 1868, October 29, 1878, January 6, 1880                             | Yes                                                 |
| Northern Cheyenne                     | Executive Order                                                           | November 26, 1884                                                   | Yes                                                 |
| Southern Ute                          | Treaty, Executive Order                                                   | March 2, 1868, November 22, 1875                                    | Yes                                                 |
|                                       |                                                                           | March 3, 1891                                                       |                                                     |
| Uintah & Ouray                        | Executive Order                                                           | October 31, 1861                                                    | Yes                                                 |
| -----                                 |                                                                           |                                                                     |                                                     |
| Blackfeet                             | Treaty, Act of Congress                                                   | October 17, 1855                                                    | Yes                                                 |
| Cheyenne River Sioux                  | Act of Congress                                                           | March 2, 1889                                                       | Yes                                                 |
| Rocky Boy (Chippewa-Cree)             | Executive Order                                                           | September 7, 1916                                                   | No                                                  |
| Fort Belknap                          | Executive Order                                                           | July 15, 1873, April 13, 1875                                       | Yes                                                 |
| Fort Peck                             | Executive Order                                                           | December 1886, May 1, 1888                                          | Yes                                                 |
| Hopi                                  | Executive Order                                                           | December 16, 1882                                                   | Yes                                                 |
| Iowa                                  | Executive Order                                                           | August 15, 1883                                                     | Yes                                                 |
| Isabella                              | Executive Order, Treaty                                                   | October 18, 1864, August 2, 1855                                    | Yes                                                 |
| Jicarilla Apache                      | Executive Order                                                           | March 25, 1874, July 18 1876,<br>August 21, 1880, February 11, 1887 | No                                                  |
| Kickapoo                              | Treaty                                                                    | May 18, 1854                                                        | Yes                                                 |
| Mescalero Apache                      | Executive Order                                                           | May 29, 1873, February 2, 1874                                      | No                                                  |
| Prairie Potawatomi                    | Treaties                                                                  | July 22, 1846, November 15, 1861                                    | Yes                                                 |
|                                       |                                                                           | February 27, 1867                                                   |                                                     |
| Pueblo of Acoma                       | Treaty, Act of Congress,<br>Land Patent                                   | September 30, 1856, December 22, 1858                               | Yes                                                 |
| Pueblo of Laguna                      | Spanish land grant, confirmed by Court of Private<br>Claims; Land Patent. | November 19, 1877                                                   |                                                     |
| Standing Rock                         | Treaties, Act of Congress                                                 | April 20, 1898, November 15, 1909                                   | Yes                                                 |
| Ute Mountain                          | Executive Order                                                           | October 17, 1882, January 3, 1883                                   | Yes                                                 |
| Fort Apache(White<br>Mountain Apache) | Executive Order                                                           | February 17, 1879, January 15, 1882                                 | Yes                                                 |
| Wind River                            | Treaty, Executive Order, Statute                                          | 1871, June 7, 1897                                                  | No                                                  |
| Zuni                                  |                                                                           | May 24, 1887                                                        | Yes                                                 |
|                                       |                                                                           | March 16, 1897, May 1, 1883,<br>March 3, 1885                       | Yes                                                 |

Source: Kappler, Charles J., Indian Affairs, Laws & Treaties, Volumes I & II, 1904-1941. Carrick, Hazel, Bureau of Indian Affairs, Albuquerque Area Office, Realty Office. Bureau of Indian Affairs, Billings Area Office, Tribal Operations.

pressure soon after the Revolution. Federal support for the principle of tribal sovereignty was buffeted by the assumption that Indians gradually would be absorbed into the American culture. Various educational and agricultural programs were developed to "civilize" the tribes. Also, as previously noted, the removal program caused further disruption of tribal societies.

The creation of reservations in the mid-1800's defined specific territories which would be for the exclusive use of the tribes. However, efforts to use this opportunity to rebuild tribal organizations were hampered by two factors. First, the newborn Office of Indian Affairs in the Department of the Interior took over most functions of the reservation government. Both the headquarters officers and local agencies used their "trust" role to exert control over tribal decisions, including those relating to the structure and powers of the tribal governing body. Second, by dissolving the tribal land base, the General Allotment Act weakened the foundations of tribal self-government.

Congressional concern about Interior Department abuses of power and the erosion of tribal societies due to allotment led to the enactment of the IRA in 1934. The law reasserted the principle of tribal self-government and sought to narrow the Department of the Interior's discretionary authority in tribal affairs. It did not expand or limit any tribal powers, but it articulated certain minimum prerogatives and posed some limitations on the Interior Secretary's discretionary control over tribal affairs. If tribes chose to organize their government in a manner consistent with procedures specified in Section 16 of the Act, then the tribe was to be eligible for certain federal supports, such as the acquisition of lands by DOI for the tribe. Also, IRA tribes could receive federal charters for tribal business enterprises.

The Indian Reorganization Act allowed each tribe to decide whether the Act would apply to its reservation. Section 18 required that all tribes vote on this option within one year after the law went into effect. Although a majority of tribes chose to be organized under the Act, many tribes, including some participating in this study, elected not to come under the Indian Reorganization Act of 1934.

The Act specified that tribes choosing to organize under the IRA were to adopt a Constitution and By-Laws to define the powers of their government. Several tribes already had written Codes or Constitutions, and met this requirement easily. Many tribes had functioned on unwritten rules, and used the model Constitution prepared by the Interior Department as a "boiler-plate" in drafting their own.

The development of tribal Constitutions under the IRA spurred a trend toward written specifications of the powers of tribal governments. Between 1934 and 1960, virtually all of the twenty-five tribes adopted formal, written documents which enumerated the powers of their governing bodies. Table 4-3 indicates the official title of each document and whether the tribe elected to organize itself under the IRA.

The procedures followed for adopting and amending these documents differ depending on the tribes' status under the IRA. Tribes organized under the 1934 Act agreed to the procedures specified in the law:

- Constitutions and By-Laws became effective upon ratification by a majority vote either of the adult members of the tribe or of the adult Indians residing on the reservation.
- Such vote occurs at a special election authorized and called by the Secretary of the Interior.
- The Secretary of the Interior has the authority to approve/disapprove the Constitutions and By-Laws.

TABLE 4-3  
FORMAL BASIS OF TRIBAL GOVERNMENT AUTHORITY

| Tribe                     | Official<br>Governing<br>Document | Under The<br>IRA | Organized<br>Date |
|---------------------------|-----------------------------------|------------------|-------------------|
|                           |                                   |                  | Approved          |
| Crow                      | Constitution                      | No               | June 24, 1948     |
| Fort Berthold             | Constitution                      | Yes              | June 29, 1936     |
| Navajo                    | Navajo Tribal Code                | No               | *                 |
| Northern Cheyenne         | Constitution                      | Yes              | November 23, 1935 |
| Southern Ute              | Constitution                      | Yes              | November 1, 1938  |
| Uintah & Ouray            | Constitution                      | Yes              | January 19, 1937  |
| -----                     |                                   |                  |                   |
| Blackfeet                 | Constitution                      | Yes              | December 13, 1935 |
| Cheyenne River Sioux      | Constitution                      | Yes              | December 27, 1935 |
| Rocky Boy (Chippewa-Cree) | Constitution                      | Yes              | July 25, 1936     |
| Fort Belknap              | Constitution                      | Yes              | December 13, 1935 |
| Fort Peck                 | Constitution                      | No               |                   |
| Hopi                      | Constitution                      | Yes              | December 19, 1936 |
| Iowa                      | Constitution                      | Yes              | November 6, 1978  |
| Isabella                  | Constitution                      | Yes              | May 6, 1937       |
| Jicarilla Apache          | Constitution                      | Yes              | February 13, 1969 |
| Kickapoo                  | Constitution                      | Yes              | February 26, 1937 |
| Mescalero Apache          | Constitution                      | Yes              | January 19, 1965  |
| Prairie Potawatomi        | Constitution                      | Yes              | February 19, 1976 |
| Pueblo of Laguna          | Constitution                      | Yes              | December 21, 1949 |
| Pueblo of Acoma           | Not Written                       | No               | November 10, 1938 |
| Standing Rock             | Constitution                      | No               | N/A               |
| Ute Mountain              | Constitution                      | No               | April 24, 1950    |
| White Mountain Apache     | Constitution                      | Yes              | June 6, 1940      |
| Wind River                | Constitution                      | Yes              | May 29, 1958      |
| Zuni                      | Constitution                      | No               | *                 |
|                           |                                   | Yes              | August 13, 1970   |

Source: Kappler, Charles, Indian Affairs, Laws & Treaties, Volumes I & II.  
 Simmons, Patricia. Personal Communication, Office of Tribal Governments, Bureau of Indian Affairs,  
 Department of the Interior.

\*Connotes data not available

- ° The Constitutions and By-Laws may be revoked or amended under the same procedures followed for ratification.

The procedures followed by non-IRA tribes remain the discretion of the members of the tribe. However, the Secretary of the Interior has interpreted the broad trust authority in 25 USC as authorizing the Department of Interior's approval or disapproval of these documents.

The powers and structures of the governments that have been defined in these documents are described below.

#### Powers of Tribal Government

Constitutions and Codes enumerate those powers of the tribe which may be exercised by their government. All actions of the government must be within the scope of a grant of authority from the membership. Importantly, the process of defining governmental powers in no way limits the scope of authorities inherent in the tribes' rights of self-government. Most of the documents set forth three classes of authority: the enumerated powers of the government, future powers of the government, and reserved powers.

First, the Constitutions and Codes differ in their manner of expressing enumerated powers. Some use a limited number of very broad, all encompassing statements while others spell-out the powers in very specific terms. An interpretation of the authorities conveyed by each item is a very sensitive and legal matter. In light of this constraint, generalizations about the scope of existing tribal regulatory authorities could be misleading if not erroneous. Therefore, Table 4-4 simply illustrates two different approaches in expressing powers: The very broad grants of authority adopted by the Crow Tribe and the more lengthy enumeration of powers adopted by the White Mountain Apache Tribe.

TABLE 4--4

EXAMPLES OF THE ENUMERATED POWERS OF THE TRIBAL GOVERNMENT \*/

| Broad Grant of Authority: Crow Tribe                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 | Detailed Grant of Authority: White Mountain Apache Tribe                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <ul style="list-style-type: none"> <li>-levy, assess, and collect taxes and license fees upon non-members of the Crow Tribe doing business on the reservation</li> <li>-establish its own rules of procedure</li> <li>-establish, own, operate, maintain and engage in any business or business enterprise</li> <li>-shall perform the duties assigned under the Constitution and have such powers as may be necessary to achieve the Council's effective operation and realize its objectives</li> <li>-act as the voice of the Crow Tribe in all official matters</li> <li>-sponsor legislation with State, Federal &amp; local governments on behalf of the Crow Tribe</li> </ul> | <ul style="list-style-type: none"> <li>-represent the Tribe and act in all matters that concern the welfare of the Tribe</li> <li>-negotiate, make and perform contacts and agreements of every description</li> <li>-employ legal counsel</li> <li>-veto the sale, disposition, lease or encumbrance of Tribal lands interests in lands or other Tribal assets</li> <li>-protect and preserve the wildlife, natural resources and water rights of the Tribe</li> <li>-regulate the uses and disposition of tribal property</li> <li>-manage all economic affairs and enterprises of the Tribe</li> <li>-borrow money from any source and pledge or assign chattels or future income as security</li> <li>-enact ordinances covering the granting of surface leases</li> <li>-levy and collect taxes and license fees upon members and non-members doing business within the reservation</li> <li>-enact ordinances establishing and governing Tribal courts and law enforcement</li> <li>-enact ordinances governing the activities of voluntary associations consisting of members of the Tribe</li> <li>-appoint subordinate committees, boards, Tribal officials and employers and regulate same for economic purposes</li> <li>-exercise such further powers as may be delegated by members of the Tribe or the Secretary of the Interior or any duly authorized official or agency of State or Federal Government</li> </ul> |

\*Note: These examples are abstracted from the Tribal Constitutions and cannot be used as a legal representation of the Tribal authorities.

Source: Tribal Constitutions.

Second, the Constitutions and Codes include a clause authorizing future expansion of the powers expressed in the document. Usually this is to be done by following the procedures for amending the appropriate Constitution, Code, or By-Laws.

Third, these documents include a clause which emphasizes that the process of enumerating powers of the government does not abridge any of the rights or powers of the tribe itself. All other authorities may be exercised upon the appropriate amendments to the Constitution, Code, or By-Laws.

Finally, it should be noted that several federal laws, especially the IRA, underscore some of the inherent powers of the tribe. Very often these authorities are referenced either explicitly or indirectly in the documents. Examples of the powers specified by Section 16 of the IRA are as follows:

- ° to prevent the sale, disposition, lease or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe;
- ° to negotiate with the Federal, State, and local governments, and
- ° to employ legal counsel, the choice of counsel and fixing fees which are subject to the approval of the Secretary of the Interior.

#### Structure of Tribal Governments

The structure of the tribal governing bodies established by these documents will be an important factor in determining who has the authority to adopt reclamation ordinances or codes, to implement a program, and to enforce it. All of the tribal Constitutions or Codes designate a governing body. They define who is eligible to serve in official capacities, the manner in which they are selected, and their relationship

to other governing officials and the tribal members. Here again, the tremendous variations among tribal systems defy any accurate generalizations: some followed models offered by the Interior Department; some incorporated their traditional methods; others merged tradition with the DOI approach; and still others adopted Interior's model for the purposes of the Constitution but retained their traditional system apart from the IRA structure. Also, because many official duties are set forth in tribal resolutions and ordinances, the analysis of government structures must go beyond the Constitutional framework. The full report on tribal government elaborates on the form adopted by each of the major coal-owning tribes. The following patterns may be noted.

Governing Bodies. Most tribes have created a collegial forum (e.g., Councils or Committees) to serve as their primary governing body. Table 4-5 lists the designated governing body of each tribe participating in this study, and indicates how they are constituted. Virtually all of the powers over the internal and external affairs of the tribe are vested in these bodies. For example, in addition to their "legislative" authority (e.g., enacting ordinances), the Councils also may be assigned "executive" functions (e.g., negotiating and entering into agreements with other governments, establishing agencies, etc.) and establishing and managing tribal business enterprises. The Councils are responsible for all trust-related decisions, (e.g., vetoing the sale or encumbrance of tribal lands and approving leases). Table 4-6 illustrates the types of powers vested in the governing bodies of the coal-owning tribes.

Executive Officers. All of the Constitutions and Codes designate the executive officers of the tribe. In some cases the chief officers



## GOVERNING BODIES OF THE PARTICIPATING TRIBES

| <u>Tribe</u> <u>*/</u>     | <u>Governing Body</u>         | <u>Number of Members</u>    | <u>Manner of Selection</u>       | <u>Length of Term</u> |
|----------------------------|-------------------------------|-----------------------------|----------------------------------|-----------------------|
| Crow                       | Tribal Council**              | entire membership           | enrollment in Tribe              | Life                  |
| Fort Berthold              | Tribal Business Council       | 10                          | at-large vote                    | 2 years               |
| Northern Cheyenne          | Tribal Council                | 21                          | by district                      | 2 years               |
| Southern Ute               | Tribal Council                | 7                           | at-large vote                    | 3 years               |
| Uintah & Ouray             | Tribal Business Committee     | 6                           | 2 members from each band of Utes | 4 years               |
| -----                      |                               |                             |                                  |                       |
| Blackfeet                  | Tribal Business Council       | 9                           | popular vote                     | 2 years               |
| Cheyenne River Sioux       | Tribal Council                | 18                          | by district                      | 4 years               |
| Chippewa-CreeChippewa-Cree | Business Committee            | 8 at-large vote             | 4 years                          |                       |
| Ft. Belknap                | Ft. Belknap Community Council | 12                          | popular vote                     | 4 years               |
| Ft. Peck                   | Tribal Executive Board        | 16                          | by district                      | 2 years               |
| Hopi                       | Tribal Council                | based on village population | each village decides             | 2 years               |
| Iowa                       | General Council***            | entire membership           | enrollment in Tribe              | Life                  |
| Isabella                   | Tribal Council                | 10                          | popular vote                     | 2 years               |
| Jicarilla Apache           | Tribal Council                | 8                           | at-large                         | 4 years               |
| Kickapoo                   | Tribal Council                | 7                           | popular vote                     | 2 years               |
| Mescalero Apache           | Tribal Council                | 8                           | popular vote                     | 1-4 yrs.              |
| Prairie Potawatomi         | Tribal Council                | 7                           | popular vote                     | 2 years               |
| Pueblo of Laguna           | Tribal Council                | 21                          | customs of Pueblo                |                       |
| Standing Rock Sioux        | Tribal Council                | 15                          | by district                      | 1 year                |
| Ute Mountain Ute           | Tribal Council                | 7                           | by district                      | 2 years               |
| White Mountain Apache      | Tribal Council                | 11                          | popular vote                     | 1-3yrs.               |
| Zuni                       | Tribal Council                | 8                           | at-large                         | 2 years               |
|                            |                               |                             |                                  | 4 years               |

\*Data are not available at this time on Navajo, Pueblo of Acoma, or Wind River Tribes.

\*\*The Tribal Council elects an Executive Council, consisting of 2 members from each district and 2 members from off-reservation members.

\*\*\*The General Council elects an Executive Committee, consisting of 5 members elected at-large.

Source: Tribal Constitutions.

TABLE 4-6  
EXAMPLES OF DUTIES OF THE GOVERNING BODY

|                       | IRA Powers<br>(Leasing) | Enact<br>Ordinances | Establish/<br>Manage<br>Government<br>Offices | Establish/<br>Manage<br>Businesses | Law & Order |
|-----------------------|-------------------------|---------------------|-----------------------------------------------|------------------------------------|-------------|
| Crow                  | X                       | X                   | X                                             | X                                  |             |
| Fort Berthold         | X                       | X                   | X                                             | X                                  | X           |
| Northern Cheyenne     | X                       | X                   | X                                             | X                                  | X           |
| Southern Ute          | X                       | X                   | X                                             | X                                  | X           |
| Uintah & Ouray        | X                       | X                   | X                                             | X                                  | X           |
| Blackfeet             | X                       | X                   | X                                             | X                                  | X           |
| Cheyenne River Sioux  | X                       | X                   | X                                             |                                    | X           |
| Chippewa-Cree         | X                       | X                   | X                                             | X                                  | X           |
| Ft. Belknap           | X                       | X                   | X                                             |                                    | X           |
| Ft. Peck              | X                       | X                   | X                                             |                                    | X           |
| Hopi                  | X                       | X                   | X                                             |                                    | X           |
| Iowa                  | X                       | X                   | X                                             |                                    | X           |
| Isabella              | X                       | X                   | X                                             | X                                  | X           |
| Jicarilla Apache      | X                       | X                   |                                               | X                                  | X           |
| Kickapoo              | X                       | X                   | X                                             | X                                  |             |
| Mescalero Apache      | X                       | X                   |                                               | X                                  |             |
| Prairie Potawatomi    | X                       | X                   |                                               | X                                  | X           |
| Pueblo of Laguna      | X                       | X                   | X                                             |                                    | X           |
| Standing Rock Sioux   | X                       |                     |                                               | X                                  | X           |
| Ute Mountain Ute      | X                       | X                   |                                               |                                    | X           |
| White Mountain Apache | X                       | X                   | X                                             | X                                  | X           |
| Zuni                  | X                       | X                   | X                                             | X                                  | X           |

Source: Tribal Constitutions

are selected from among the members of the tribal councils; in others, they are elected by popular vote. Table 4-7 indicates the formal title of the chief executive officer of the tribes and their manner of selection. Several tribes have created a "strong" role for the Chief Executive, but in most instances the expressed duties of the executive are limited to such matters as presiding at Council or Committee meetings, voting in the case of ties, and carrying out the directives of the governing body. Table 4-8 contrasts the enumerated responsibilities of the executive officer for two tribes: One favoring a limited role (the Chippewa-Cree Tribe) and one favoring a stronger position for the Chief Executive (the Jicarilla Apache Tribe).

Judicial Branch.<sup>10/</sup> Most of the Constitutions and Codes express the tribal government's responsibility to ensure the safety and well-being of the people. They usually authorize the Tribal Council to enact ordinances as required to maintain law and order on the reservation. In most cases, the Council is directed to establish courts to adjudicate matters arising from these and other civil and criminal ordinances. Table 4-9 indicates which tribal courts operate under a Constitutional or Code mandate, and the levels of appeal provided within the tribal system.

Formal Checks and Balances. The exercise of power by the tribal governing bodies is subject to a series of internal and external checks. Most of the Constitutions and Codes include four different types of formal controls. These are reinforced by the numerous informal checks that arise in the operation of an open, consensus-oriented decision-making process in such relatively small, tightly knit communities.

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<sup>10/</sup> See the Chapter on Tribal Court Systems for a full description of existing tribal court systems.

TABLE 4-7

## EXECUTIVE OFFICERS OF THE PARTICIPATING TRIBES

| <u>Tribe</u> <sup>*/</sup> | <u>Executive Officer</u> | <u>Manner of Selection</u>           | <u>Length of Term</u> |
|----------------------------|--------------------------|--------------------------------------|-----------------------|
| Crow                       | Chairman                 | Elected by Tribal Council            | 2 years               |
| Fort Berthold              | Chairman                 | Popular Vote                         | 2 years               |
| Navajo                     | Chairman                 | Popular Vote                         | 4 years               |
| Northern Cheyenne          | President                | Popular Vote                         | 4 years               |
| Southern Ute               | Chairman                 | Popular Vote                         | 3 years               |
| Uintah & Ouray             | Chairman                 | Elected by Tribal Business Committee | 4 years               |
| -----                      |                          |                                      |                       |
| Blackfeet                  | Chairman                 | Elected by Tribal Council            | 2 years               |
| Cheyenne River Sioux       | Chairman                 | Popular Vote                         | 4 years               |
| Chippewa-Cree              | Chairman                 | Popular Vote                         | 4 years               |
| Ft. Belknap                | President                | Elected from Council                 | 4 years               |
| Ft. Peck                   | Chairman                 | Popular Vote                         | 2 years               |
| Hopi                       | Chairman                 | Popular Vote                         | 4 years               |
| Iowa                       | Chairman                 | Elected by General Council           | 1 year                |
| Isabella                   | Tribal Chief             | Elected by Tribal Council            | 2 years               |
| Jicarilla Apache           | President                | Popular Vote                         | 4 years               |
| Kickapoo                   | Chairman                 | Elected by Tribal Council            | 2 years               |
| Mescalero Apache           | President                | Popular Vote                         | 2 years               |
| Prairie Potawatomi         | Chairperson              | General Council (enrolled members)   | 3 years               |
| Pueblo of Laguna           | Governor                 | Pueblo Custom                        | 1 year                |
| Standing Rock Sioux        | Chairman                 | Popular Vote                         | 2 years               |
| Ute Mountain Ute           | Chairman                 | Elected by Council                   | 1 year                |
| Zuni                       | Governor                 | Popular Vote                         | 4 years               |

<sup>\*/</sup> Data are not available at this time on the Pueblo of Acoma or Wind River Tribes.

Source: Tribal Constitutions

TABLE 4-8

## EXAMPLES OF DUTIES OF THE EXECUTIVE OFFICER\*

| Limited Role: Chippewa-Cree Tribe                          | Strong Role: Jicarilla Apache Tribe                                                                                                                                                                                                                            |
|------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| -Presides over all meetings of the Business Committee      | -serves as presiding Officer of Tribal Council and Executive Committee                                                                                                                                                                                         |
| -performs all duties of Chairman                           | -votes only in the case of a tie vote in the absence of the Vice President                                                                                                                                                                                     |
| -exercises any authority delegated to him by the committee | -appoints all non-elective officials and employees of the Executive Department                                                                                                                                                                                 |
| -votes only in the case of a tie                           | -subject to the approval of the Tribal Council, the President may establish boards, committees, commissions required by the business of the Executive Department and the President shall serve as Ex-Officio member of any such committee, board or commission |
|                                                            | -shall serve as Contracting Officer for the Tribe following approval by the Tribal Council of all contracts, leases and agreements                                                                                                                             |
|                                                            | -has veto power over any enactment or ordinance of the Tribal Council before it becomes effective - to be presented to the President five days following the date of passage                                                                                   |
|                                                            | -shall direct the Tribal police, ensuring the enforcement of ordinances enacted by the Council                                                                                                                                                                 |

\*Note: These examples are abstracted from the Tribal Constitutions and cannot be used as a legal representation of these authorities.

Source: Tribal Constitutions

TABLE 4-9

## JUDICIAL SYSTEM AUTHORIZED BY THE CONSTITUTIONS OR CODES

| <u>Tribe</u>          | <u>Are Courts Authorized In<br/>Constitution or Code?</u> | <u>Has The Tribe Created<br/>A Court of Appeals?</u> |
|-----------------------|-----------------------------------------------------------|------------------------------------------------------|
| Crow                  | NO                                                        | NO                                                   |
| Fort Berthold         | YES                                                       | YES                                                  |
| Northern Cheyenne     | YES                                                       | YES                                                  |
| Southern Ute          | YES                                                       | YES                                                  |
| Uintah & Ouray        | YES                                                       | YES                                                  |
| Blackfeet             | YES                                                       | YES                                                  |
| Cheyenne River Sioux  | YES                                                       | YES                                                  |
| Chippewa-Cree         | YES                                                       | NO                                                   |
| Ft. Belknap           | YES                                                       | YES                                                  |
| Ft. Peck              | YES                                                       | YES                                                  |
| Isabella              | NO                                                        | *                                                    |
| Hopi                  | YES                                                       | YES                                                  |
| Iowa                  | YES                                                       | *                                                    |
| Jicarilla Apache      | YES                                                       | YES                                                  |
| Kickapoo              | NO                                                        | *                                                    |
| Mescalero Apache      | YES                                                       | NO                                                   |
| Prairie Potawatomi    | NO                                                        | *                                                    |
| Pueblo of Laguna      | YES                                                       | YES                                                  |
| Standing Rock Sioux   | NO                                                        | Yes                                                  |
| Ute Mountain Ute      | NO                                                        | NO                                                   |
| White Mountain Apache | NO                                                        | *                                                    |
| Zuni                  | YES                                                       | NO                                                   |

\*Data are not available at this time on the Navajo, Pueblo of Acoma, & Wind River Tribes.

Source: Tribal Constitutions.

American Indian Lawyer Training Program, Indian Self-Determination and the Role of Tribal Court,  
February 18, 1977.

Some examples of the internal checks are as follows:

- "Balance of powers" among tribal officials:
  - The executive officer (e.g., chairman) may have veto power over ordinances passed by the tribal council;
  - The council may override vetos by the chairman;
  - The implementation of ordinances may be subject to review and appeals by the tribal courts;
  - The tribal members may reserve certain powers to themselves (e.g., requiring a referendum on certain matters), or
  - officials of the tribe may be removed from office by directive of the governing body.
- Accountability to members of the the tribe:
  - The constitution or code may expressly require that meetings be open, that members be allowed to participate and that records be kept of the proceedings;
  - Certain decisions may require popular referenda;
  - Members may initiate actions through referenda; on issues, or
  - Members may recall or remove tribal officials.

Table 4-10 highlights some of the internal controls instituted by the participating tribes. The checks imposed on the agencies within the tribal government are described in the next section on the administration of tribal programs.

External checks derive largely from the Tribal-Federal relationship discussed earlier. Examples of the role of these limitations on tribal actions are as follows:

- Review by the trustee, the Secretary of the Interior:
  - The Secretary approves or disapproves Constitutions or Codes of both IRA and non-IRA tribes;

TABLE 4-10

## EXAMPLES OF INTERNAL CHECKS AND BALANCES

| Tribe */              | CHECKS WITHIN GOVERNING BODY       |                             |                        | POWERS RESERVED TO MEMBERS |                           |                       |
|-----------------------|------------------------------------|-----------------------------|------------------------|----------------------------|---------------------------|-----------------------|
|                       | Executive Veto<br>Over Legislation | Council Override<br>Of Veto | Removal From<br>Office | Legislative<br>Initiative  | Legislative<br>Referendum | Recall of<br>Officers |
| Crow                  |                                    |                             |                        | X                          | X                         | X                     |
| Fort Berthold         |                                    | X                           | X                      | X                          |                           |                       |
| Northern Cheyenne     | X                                  | X                           | X                      | X                          | X                         | X                     |
| Southern Ute          | X                                  | X                           | X                      | X                          | X                         | X                     |
| Uintah & Ouray        |                                    |                             | X                      | X                          | X                         |                       |
| -----                 |                                    |                             |                        |                            |                           |                       |
| Blackfeet             |                                    |                             | X                      | X                          | X                         |                       |
| Cheyenne River Sioux  |                                    |                             | X                      | X                          | X                         | X                     |
| Chippewa-Cree         |                                    |                             | X                      | X                          | X                         | X                     |
| Ft. Belknap           |                                    |                             | X                      | X                          | X                         |                       |
| Ft. Peck              |                                    |                             | X                      | X                          | X                         |                       |
| Isabella              |                                    |                             | X                      | X                          | X                         |                       |
| Iowa                  |                                    |                             | X                      | X                          | X                         | X                     |
| Jicarilla             | X                                  | X                           | X                      | X                          | X                         | X                     |
| Kickapoo              |                                    |                             | X                      | X                          | X                         |                       |
| Mescalero Apache      | X                                  | X                           | X                      | X                          | X                         | X                     |
| Prairie Potawatomi    |                                    |                             | X                      | X                          | X                         |                       |
| Pueblo of Laguna      |                                    |                             | X                      |                            |                           |                       |
| Standing Rock Sioux   |                                    |                             |                        |                            |                           |                       |
| Ute Mountain Ute      |                                    |                             | X                      | X                          | X                         |                       |
| White Mountain Apache |                                    |                             | X                      | X                          | X                         |                       |
| Zuni                  | X                                  | X                           | X                      | X                          | X                         | X                     |

\*/ Data not available at this time for the Hopi, Navajo, Pueblo of Acoma, & Wind River Tribe

Source: Tribal Constitutions



- Tribal constitutions may specify that certain tribal decisions or actions (e.g., ordinances) are subject to Secretarial review. In some areas, DOI approval may be required;
  - In areas where the Constitution or Code does not specify the oversight role of the trustee, the Secretary of the Interior exercises considerable discretion in determining his authority to act on the tribal decision, or
  - In areas where the Secretary approves the decision, the tribal action may be appealed in federal courts.
- ° Finally, tribal government actions must be consistent with the Federal Constitution and statutes. Examples of laws that are relevant are:
- The early Trade Acts and Mineral Leasing Acts, requiring Secretarial approval of all tribal mineral development agreements, and
  - The Indian Civil Rights Act of 1968 (ICRA), setting minimum standards for the exercise of powers by the tribal governments.

The following section provides some examples of how regulatory programs authorized by the Constitution and Codes are being implemented.

#### TRENDS IN TRIBAL GOVERNMENT ADMINISTRATION

The functions performed by tribal governments have increased dramatically in recent years. For decades, many of the authorities granted in Constitutions and Codes were not exercised. The growing needs and demands of Indian people and the drive for self-determination have expanded the extent of tribal government involvement on reservations. Many of the tribal governments now undertake all of the major responsibilities seen in state and local governments: the provision of public services (e.g., fire, police, health) and public facilities (e.g., water, sewers, schools); social services (e.g., employment, education

and training); comprehensive planning (e.g., economic development, environment); and regulation activities on the reservation (e.g., land use, environment, and taxation). These new roles have greatly enlarged the budgets and staffs of tribal governments. Programs under the Self-Determination Act provide much needed support by enabling tribes to contract for certain services provided by either the BIA or the Indian Health Service (IHS), and by providing funds for management and training programs for tribal government staff. Gradually, tribes are beginning to fully exercise their rights of self-government.

One area that is of critical importance to tribes is the management of their resources. There is a commitment to retain control over the disposition of all tribally owned resources - fish, wildlife, timber, air, land, water, and minerals. Many tribes, especially those subject to heavy pressures to develop, have taken steps to build the institutional and technical capability to manage development.

This section provides background information on the extent to which the participating tribes, particularly the major coal-owning tribes, already are involved in controlling energy development. The materials here briefly identify trends in:

- ° the ways in which tribes presently manage resource development:
- ° how regulatory programs are set up within the government structure, and
- ° the types of implementation needs or problems that have been encountered.

Both the institutional and technical aspects of these programs will be analyzed in detail under in later Chapters of this study.

## Current Resource Management Activities

Indian tribes have the ultimate say in whether and how to develop their resources. As can be seen in Table 4-11, several of the participating tribes presently are producing energy resources. Decisions concerning mineral development involve complex and technical issues. Many tribal governments are building the institutional and analytical capability to make and implement these decisions. This involves the following four types of activities:

- ° Planning: Before any decisions are made, tribes must inventory their minerals, water, land, air, and other natural resources. The impacts of alternative types of development on their physical and human resources and on the economic base must be considered. Such studies may lead to tribal policies on resource management.
- ° Resolutions or Ordinances: The planning studies may suggest a need for rules and regulations that set minimum standards for any development that is to take place on the reservation. Examples include ordinances regarding land use; preparation of environmental assessments; air and water quality; employment and training; or other related concerns.
- ° Development agreements: On the initiative of either the tribe or a company, a development proposal may be prepared. Technical evaluations of the form (e.g., joint venture, lease) and the terms of the agreement must be conducted. Upon completion of the project assessment, the parties will negotiate an acceptable agreement for developing the resources.
- ° Enforcement: Once the tribe decides to develop a given resource, the appropriate officials enforce all applicable ordinances, contract terms, and federal laws.

Examples of tribal programs in each of these areas include the following.

Planning. All of the major coal-owning tribes are conducting studies to support their efforts to manage their energy resources. Some have undertaken these efforts to prepare "plans" or similar documents.

TABLE 4-11

## EXISTING ENERGY PRODUCTION BY THE PARTICIPATING TRIBES

| <u>Major Coal-Ownng Tribes</u> | <u>Coal</u> | <u>Oil &amp; Gas</u> | <u>Uranium</u> | <u>Forms Of Agreements</u>                          |
|--------------------------------|-------------|----------------------|----------------|-----------------------------------------------------|
| Crow                           | X           | X                    |                | Leases (Joint venture for coal under consideration) |
| Fort Berthold                  |             | X                    |                | Leases                                              |
| Navajo                         | X           | X                    | X              | Leases, Joint Venture for uranium exploration       |
| Southern Ute                   |             | X                    |                | Leases                                              |
| Uintah & Ouray                 |             | X                    |                | Leases                                              |
| -----                          |             |                      |                |                                                     |
| <u>Other Affected Tribes</u>   |             |                      |                |                                                     |
| Blackfeet                      |             | X                    |                | Leases and Joint Ventures                           |
| Cheyenne River Sioux           |             | X                    |                | Leases                                              |
| Fort Peck                      |             | X                    |                | Leases                                              |
| Hopi                           | X           |                      |                | Leases                                              |
| Jicarilla Apache               |             | X                    |                | Leases and Joint Ventures                           |
| Isabella                       |             | X                    |                | Leases                                              |
| Pueblo of Laguna               |             |                      | X              | Leases                                              |
| Ute Mountain Ute               |             | X                    |                | Leases                                              |
| Wind River                     |             | X                    |                | Leases                                              |

Source: Council of Energy Resource Tribes, Office of Policy Analysis, 1979.

Others have conducted studies to support the formulation or enforcement of codes, or litigation. Activities being undertaken by the tribes include:

- ° Minerals inventories: Data on the geology, hydrology and chemical properties of tribally-owned minerals are essential to all management activities. The BIA is conducting mineral inventories of reservations. Several tribes are participating actively in this program. Some tribes, such as the Navajo and the Northern Cheyenne, have undertaken independent geologic assessments of their resource development potential.
- ° Air quality: The implementation of the Clean Air Act has given tribes an opportunity to conduct baseline monitoring and modeling of the ambient air quality on the reservation. The Northern Cheyenne Tribe did extensive work in this area in order to prepare their petition to EPA for a designation as a Class I Area. Similarly, monitoring of the electric generating plants on the Navajo Reservation has created baseline data for that region.
- ° Water quality: The implementation of the Federal Water Pollution Control Act also has provided tribes with an opportunity to establish a data base on water quality. Most of the tribes have received funds under the Environmental Protection Agency's (EPA) "208" program for area-wide planning. In some cases EPA was able to work directly with the tribes, and in others the tribes subcontracted with State or regional governments.
- ° Economic Impacts: All of the tribes prepare "Overall Economic Development Plans" (OEDP) under the sponsorship of the Economic Development Administration (EDA). These monies have been used to assess the role of energy development on the reservation economy. Other funds have been used to develop socio-economic profiles of the tribes and to conduct surveys of tribal attitudes toward development.
- ° Land-Use: Comprehensive land-use and zoning plans have been prepared by many tribes. These plans, often under funding from the Department of Housing and Urban Development (HUD), focus on the location of buildings and the management of non-mineral resources on the reservation. The planning Office of the Three Affiliated Tribes of the Fort Berthold Reservation is preparing a comprehensive plan that will be used as a basis for mining reclamation performance standards.

Resolutions/Ordinances: Since the early 1970's, the tribes have established policies and rules which govern the manner of development on the reservation. Actions have been taken in the following areas:

° Resolutions stating general policies on development agreements:

- The Three Affiliated Tribes of the Fort Berthold Reservation adopted a policy resolution favoring energy projects developed and/or owned by the Tribe, in lieu of the standard lease arrangements.
- The Jicarilla Apache Tribe has resolved to discontinue the use of leases in favor of alternative forms of agreements.

° Taxation:

- In 1978, the Navajo Tribal Council adopted two taxation resolutions that affect the energy development on the reservation. The first is a "possessory interest" tax, which is levied on the value of the lease site and underlying resources. The second was a "business activities" tax, which is assessed on the net dollar value that certain businesses contribute to the output of economic goods and services in the Navajo Nation.
- In 1979, the Crow Tribe passed a resolution establishing a severance tax on coal, at a rate of 25% on the gross price, F.O.B. at the mine site.
- In 1977, the Jicarilla Apache Tribe levied a severance tax on oil and gas produced from leases.
- In 1979, the Three Affiliated Tribes of the Fort Berthold Reservation adopted a resolution expressing their powers to levy a tax on oil and gas.

° Environmental Assessments:

- In 1972, the Navajo Tribal Council established a Navajo Environmental Protection Commission (NEPC) and delegated to it the authority to analyze the environmental impacts of development on the Navajo Nation and to advise the Tribe on environmental stipulations in all leases.

- In 1976, the Jicarilla Apache Tribe adopted an ordinance which requires prospective developers to file an environmental assessment of their proposed project to the tribe.

- ° Air Quality:

- The Northern Cheyenne Tribe successfully petitioned for and received a Class I air quality designation under the Clean Air Act. In 1979, the Northern Cheyenne Tribal Council established the Northern Cheyenne Tribal Environmental Protection Commission (EPC) and charged it with the responsibility for issuing regulations and administering programs to protect air quality. At the same time, the U.S. Environmental Protection Agency awarded the Tribe with a grant under Section 302 of the Act. This is the first time that EPA classified an Indian tribe as an "air pollution control agency."
- In 1977, the Navajo Tribal Council passed a resolution that requires a permit for the discharge of sulfur (or its compounds) into the atmosphere from sources within the Navajo Nation. It sets minimum performance standards, and imposes a fee on any emissions exceeding this standard.

- ° Water Quality:

- The Navajo EPC is authorized by Council resolution to issue rules and regulations to protect the quality of Navajo waters;
- The Northern Cheyenne Tribe's EPC is authorized to issue rules and regulations to protect the quality of their waters.

- ° Oil and gas development

- In 1979, the Three Affiliated Tribes of the Fort Berthold Reservation adopted an ordinance requiring tribal permits for seismographic exploration for oil and gas.

- ° Land Use Control

- In 1978, the Crow Tribe adopted a Land Use and Zoning ordinance that requires permits and for all buildings (residential, commercial, industrial) and other special classifications of land use.

-- The Southern Ute Tribe has a Land Code which requires tribal members to obtain permits for the use of tribally-owned lands.

• Other

-- Both the Southern Ute Tribe and the Three Affiliated Tribes of Fort Berthold have enacted codes for the regulation of fish and wildlife. The Southern Ute Tribe also implements a Range Code.

Development Agreements. The contracts negotiated by tribes and operators form the basis for the economic and environmental terms under which development will take place. Prior to the enactment of P.L. 95-87, the only performance standards for existing mines were those contained in the leases. As a result of dissatisfaction with leases, tribes have sought to strengthen the terms of development agreements by renegotiating existing leases, litigating legally questionable permits and leases, and by negotiating more stringent stipulations in all new agreements. As one example, the Navajo Nation was able to incorporate detailed reclamation standards in renegotiated leases for existing and proposed coal mining projects.

Enforcement. The methods used to enforce the various ordinances and contract terms include a variety of civil and criminal measures. For example, the Navajo sulfur emissions permit system is enforced through a system of noncompliance fees which vary depending on the quantity of the excess emissions. The Navajo EPC has the authority to enforce environmental stipulations in existing leases through a combination of cease-and-desist orders and fines. The Northern Cheyenne Tribal EPC is empowered to issue compliance orders, cease-and-desist orders, and fines not exceeding \$1,000 per day for each of the violations. The penalties for noncompliance with the Crow Land Use Zoning Code include criminal penalties of up to \$500 for each violation in addition to civil actions.



### Institutional Setting of Tribal Regulatory Programs

There is no single "tribal" model for establishing regulatory programs in the tribal governments. The existing programs differ in scope and complexity. All of the initiatives are in embryonic stages and may be changed after gaining experience. Nonetheless, several existing programs demonstrate the attempt by tribes, notably the Navajo and the Northern Cheyenne, to establish quasi-independent commissions within tribal government. The characteristics of tribal regulatory bodies are described for each of the major programs cited above.

Navajo taxes. Both the possessory interest tax and the business activities tax are to be administered by the Navajo Tax Commission. On a day-to-day basis, the Commission is accountable to the Tribal Council and the Tribal Chairman. This Commission was created by a Tribal Council resolution. It is composed of three members who are appointed by the Tribal Chairman to serve three-year terms. Members of the Commission may be removed for cause by the Tribal Chairman. However, the administration of the taxes and the decisions rendered by the Commission are reviewable only by the Court of Appeals for the Navajo Nation.

Navajo Sulfur Emissions Permit and Fee. The responsibility for implementing this permit fee system is shared by the Navajo Environmental Protection Commission (NEPC) and the Navajo Tax Commission. Like the Tax Commission, the NEPC is accountable to the Tribal Council and Chairman on a day-to-day basis. The Commission was also established by Tribal Council resolution. It consists of five members, two of whom must be members of the Navajo Tribal Council. They are appointed by the Tribal Chairman for three-year terms, but may be removed for cause by the Chairman. The NEPC is authorized to hire staff to support its work;

they too ultimately answer to the governing body of the Tribe. Here again, however, the actions and decisions of the Commission on the emissions program are reviewable only by the Navajo Nation's courts.

Northern Cheyenne Environmental Protection Commission. The Northern Cheyenne recently established the EPC to implement the Tribe's pending regulatory activities (e.g., air and water quality). Like the Navajo commissions, the Northern Cheyenne EPC is accountable to the Tribe's governing body. Its powers derive from a Tribal Council resolution. Two of its three members must be members of the Tribal Council. The authorized staff answer first to the EPC, but indirectly to the governing body of the Northern Cheyenne. Yet, as in the Navajo case, the independence of EPC decisions is protected by the fact that its decisions are reviewable only by the Court of Appeals of the Northern Cheyenne Tribe.

Crow Land Use Zoning Code. The regulatory body established by the Crow Tribe for this program differs structurally from the examples presented above. This may be attributed to the more flexible standards and procedures that are involved in these land use decisions. The Land Use Zoning Code designates the Tribal Building Official and/or Planning Director as the Administrator for the program. Appeals to the decisions rendered by the Administrator are to be heard by a special "Board of Adjustments." This Board's membership is elected by members of the Crow Tribe.

Other Programs. The regulatory programs being implemented by the Southern Ute Tribe (Land Code, Range Code and Wildlife Code) and the Three Affiliated Tribes of the Fort Berthold Reservation (oil and gas seismic permits and fish and game regulations) share a common approach.

Only the tribal councils have the authority to approve permits. The regulations do not specify avenues of appeal. Finally, the program staff are integrated into the broad administrative structure of the tribal governments, and thus are accountable to the tribal councils and chairmen on a day-to-day basis.

#### Implementation Issues

The initial years of tribal regulation have been propelled by optimism and by exciting precedents being set for tribes and, in some cases, for the nation. These gains have been made despite a series of difficult obstacles. For example, litigation regarding ordinances and codes may delay the development of the staff that will be needed to administer the programs. The tribal political environment also affects the implementation scheme. However, several tribes have identified other important constraints.

Funding. Because the internal funds available to most tribes are very limited, appropriations for regulatory programs often are cut to meet essential services and other urgent needs. As a result, many tribes have had to rely on federal grants and contracts for their programs. Generally, these grants represent short-term, single-focused sources of funding for planning studies. Budget limitations have taken a heavy toll on many tribal enforcement activities. Most state, local and regional regulatory agencies receive funding assistance from the federal government (e.g., EPA). Because the Clean Air Act and other federal pollution laws were silent on the question of implementation on Indian lands, tribes have been held in an awkward state of limbo until agencies could sufficiently analyse their eligibility for similar financial support. The EPA decision to fund the Northern Cheyenne Tribe as an Air Pollution Control Agency may signal the easing of this barrier.

Training. Although the tribes have been able to hire skilled staff for positions, it often has been necessary to recruit beyond the tribal membership. The tribal leaders place a high priority on training their members in the technical skills that will be needed in the years ahead.

Overlapping Jurisdiction. One tribe, the Southern Ute, indicated that they had entered into a cooperative agreement with the State of Colorado (Division of Wildlife, Department of Natural Resources) to enforce the Tribe's Wildlife Code over non-Indians hunting and fishing within the reservation boundaries. Apart from this case, there are few cooperative agreements between tribes and other governments in the area of environmental or resource regulation. Most of the cooperative agreements between these parties pertain to police or court functions. A special State-Tribal Commission to examine these questions has recently been established by the National Congress of American Indians, the National Tribal Chairmen's Association, and the National Conference of State Legislatures. They are sponsoring a two-year study on the potential role and structure of cooperative agreements. Their findings may be useful to the development of recommendations regarding the implementation of the Surface Mining Act on Indian lands.

## CHAPTER 5

### TRIBAL COURT SYSTEMS

## CHAPTER 5

### TRIBAL COURT SYSTEMS

#### Introduction

Many of the decisions rendered by a mining regulatory agency are subject to judicial review. Applicants and other parties have the right to appeal agency actions involving permits, enforcement, bonds, and other decisions. P.L. 95-87 designates which courts have jurisdiction over the decisions of federal and state agencies. Legislation regarding an Indian lands regulatory program will need to account for the special role of tribal court systems in this process.

This Chapter sets forth a brief history of the development of tribal systems of justice, an analysis of the present formulation of reservation courts, and an exploration of some of the more significant issues presently confronting those courts. Information regarding the courts of the coal mining tribes are presented in summary form. A more detailed discussion of the tribal courts of the coal mining tribes may be found in Tribal Court Systems (report submitted by CERT to OSM, April 30, 1979).

#### HISTORY OF TRIBAL JUDICIAL SYSTEMS

Generally, reservation judicial systems in their present form are a composite of traditional tribal institutions and Anglo-American models. This melding of Indian and non-Indian concepts is a product of a series of federal administrative and legislative actions reflecting the ebb and flow of federal Indian policy. Since the mid-1960's, the federal policy of self-determination has fostered impressive development of the reservation judiciary. Indeed, today Indian courts are exercising primary jurisdiction in all spheres of activity arising on Indian reservations.

The notion that disputes relating to Indian lands should be resolved by organs of the tribe under principles of tribal law is fundamental to all American Indian tribes. Such tribal systems pre-dated the arrival of European institutions. Typically, tribal judicial authority rested in communal councils which "adjudicated" on the basis of consensus and religious principle:

Rather than the representative style typical of Western governments, tribal societies were often governed by communal systems of chiefs and elders. Leadership was often earned by performance or acknowledgement, and rested upon consensus and theological grounds for exercise. Many different systems existed for resolving disputes and maintaining order. Some tribes had warrior societies which functioned as enforcement mechanisms, other tribes utilized community pressure to enforce norms: scorn is said to have been an extremely effective method of enforcement. Imprisonment was unknown, and restitution, management, and death were the major retributive sanctions utilized. (Report of the American Indian Policy Review Commission Task Force Four on Federal, State and Tribal Jurisdiction, 121-22. July 1976).

From the outset, the autonomy of each Indian tribe over its affairs and territory was recognized. The United States Supreme Court considered tribes "distinct, independent, political communities". [Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559 (1832)]. Congress viewed the treaty process as the appropriate mechanism for concluding territorial arrangements between the United States and tribes.

However, in 1871 Congress determined to discontinue the negotiation of Indian treaties (16 Stat. 556). By then, some tribes, such as the Cherokee, Chickasaw, Choctaw, Creek and Seminole (the Five Civilized Tribes), and the Seneca had already adopted European-style institutions, including courts. At the same time, however, traditional systems of tribal justice remained essentially intact for most tribes.

During the first three quarters of the 19th century, federal Indian policy subjected tribes to persistent warfare, westward removal and confinement to reservations. Tribal societies suffered greatly and the institutions of tribal government foundered.

In the final quarter of the 19th century, "civilization" pressed for the opening of reservations to non-Indians and for the imposition of an external system of law and order. This resulted in a struggle between military and civilian authorities for control over reservation affairs. With powerful support from church and lay "friends of the Indian" -- who believed that the imposition of a system of law and order was essential to "civilizing" the Indian -- the civilian officials prevailed.

As a first step, federal Indian agents began delegating law and order authority to selected tribal members through the establishment of Indian police forces. The first Indian police force was constituted in 1874 on the San Carlos Apache Reservation. The effectiveness of this group encouraged the establishment of similar organizations on other reservations. This practice received congressional approval in 1878 when Congress appropriated \$30,000 for the employment of 480 Indian policemen. By the end of that year, Indian police were operating on one-third of the Indian agencies; and by 1890 virtually every agency had an Indian police force, comprising a total Indian police force of 770 men.

The authority for creation of the Indian police did not provide for the prosecution of offenders. Nevertheless, it was common practice for the Indian agent to act as judge or to delegate this duty to a subordinate or a trusted Indian. This practice gave impetus to the



creation, in 1883, of the Courts of Indian Offenses. In that year, the Commissioner of Indian Affairs promulgated regulations providing for the establishment of such courts and setting forth substantive and procedural rules under which the courts were to operate. The Indian agents were authorized to appoint judges and a code of offenses was set forth. In 1888, Congress commenced funding the operation of these courts. By 1890, Courts of Indian Offenses existed at two-thirds of the Indian agencies. In 1921, Congress enacted the Snyder Act (42 Stat. 208) which permitted the Bureau of Indian Affairs to fund these courts. By 1926, some 70 Indian judges were receiving such funding.

Through the early 1930's, tribal governments continued to founder under federal policies aimed at promoting assimilation, resulting in massive erosion of the tribal land base. However, in 1934, Congress abruptly ended this policy and passed the Indian Reorganization Act (IRA), (48 Stat. 984). The purpose of the IRA was to provide a framework for tribes to establish a revitalized tribal government. The IRA authorized and encouraged tribes to adopt new constitutions incorporating all powers already vested in tribes, as well as other powers specifically enumerated in the Act.

The IRA provided a distinctly Western model for tribal government. To implement the Act, the Department of the Interior prepared a model constitution which, with few revisions, was adopted by virtually all tribes organizing under the IRA. Generally, the adopted constitutions vested primary governmental authority in a popularly-elected tribal council and authorized the tribal law and order code.

In 1935, the regulations governing the Courts of Indian Offenses were revised. These regulations remain substantially intact today and

are found at 25 CFR Part 11 (1978). A tribe remains fully subject to these regulations until it enacts a law and order code under its constitution. Thereafter, the regulations apply only to the extent that the tribe retains Indian judges and Indian police who are paid from federal funds.

Many tribal courts and law and order codes were enacted under the authority of IRA constitutions. Although these tribal courts are legally distinct from Courts of Indian Offenses, nevertheless the two court systems are, on inspection, quite similar. This has resulted from the pervasive influence of the regulations contained in 25 CFR Part 11.

For the next thirty years, tribal courts progressed slowly, due primarily to the more pressing demands of land and economic issues in the post-depression era and the onset in the 1950's of federal policies favoring termination and assimilation. In 1953, Congress passed Public Law 83-280, (67 Stat. 588). This Act conferred upon five specified states all criminal and civil jurisdiction over reservation Indians. Other states were granted the option of assuming such jurisdiction and several states exercised that option.

However, the destructive effects of termination were soon appreciated, and by the mid-1960's federal policy once again changed, moving from assimilation towards self-determination. This policy remains in force today.

The year 1968 brought renewed congressional interest in tribal systems of justice. After several years of study and hearings, Congress passed the Indian Civil Rights Act of 1968 (ICRA), 82 Stat. 77. ICRA is premised on the conclusion that Indian tribal governments should be required to respect civil rights and liberties of persons coming under

their authority. Tribes are not bound by the civil rights provisions contained in the United States Constitution. Acting under its plenary authority, Congress through ICRA created a statutory set of new civil rights to be honored by tribal government. Strictly speaking, these rights are not constitutional rights, since they derive from statute. However, the statute repeats the language of the Constitution and covers most of the civil rights and liberties found therein, with certain exceptions. Those exceptions were intended to avoid infringement on the cultural identity and autonomy of tribes.

In May, 1978, the United States Supreme Court decided Santa Clara Pueblo v. Martinez, (436 U.S. 49). The Court held that, except for habeas corpus petitions from tribal court criminal proceedings, federal courts lack jurisdiction to hear suits claiming violations of ICRA by tribes or tribal officials.

The Court concluded that tribal governments themselves, and in particular tribal courts, are the proper forums for testing compliance with the standards of ICRA. Thus, save for federal habeas corpus review, tribal courts now carry full responsibility for judicial enforcement of ICRA.

## PRESENT STRUCTURE OF TRIBAL COURTS

### Legal Structure

Indian judicial systems may be classified today into three categories based upon their mode of organization and methods of operation. These categories are: tribal courts, Courts of Indian Offenses (CFR courts), and traditional (or custom) courts. However, the three categories share many common characteristics.

The most common of the tribal judicial systems are "tribal courts" (see Table 5-1). Many are established under the inherent power of tribes to provide for the administration of justice as confirmed by the Indian Reorganization Act of 1934 (IRA), and specifically enumerated in tribal constitutions. However, a written constitution is not necessary for the creation of a court system and some tribes that function without constitutions have organized tribal courts. At the same time, some tribal constitutions do specify procedures for creation of courts, the jurisdiction they may exercise, and methods for selection and removal of judges.

Ordinarily, tribal court systems are subordinate in authority to the tribal governing bodies. The relationship between these two branches of the Fort Berthold Tribe, seen in Figure 5-1, illustrates this pattern. The judges are either elected by the tribal membership or appointed by the tribal council. Table 5-2 indicates the selection process followed by the coal-owning tribes. Appellate systems often exist, and may consist of judges of the tribal court or judges borrowed from other tribes' court systems. The manner of tribal judicial review of their court decisions is reviewed in Table 5-3.

These tribal courts typically handle both civil and criminal matters. Examples of the types of cases are presented in Table 5-4. Most of these cases involve Indian activities on Indian lands, but increasingly the courts are assuming jurisdiction over non-Indian offenses as well.

The second category of tribal judicial system is comprised of those courts established pursuant to provision contained in 25 CFR Part 11. Those regulations set out the procedure for the establishment of a CFR

TABLE 5-1

## Types of Courts Established by The Coal-Ownng Tribes

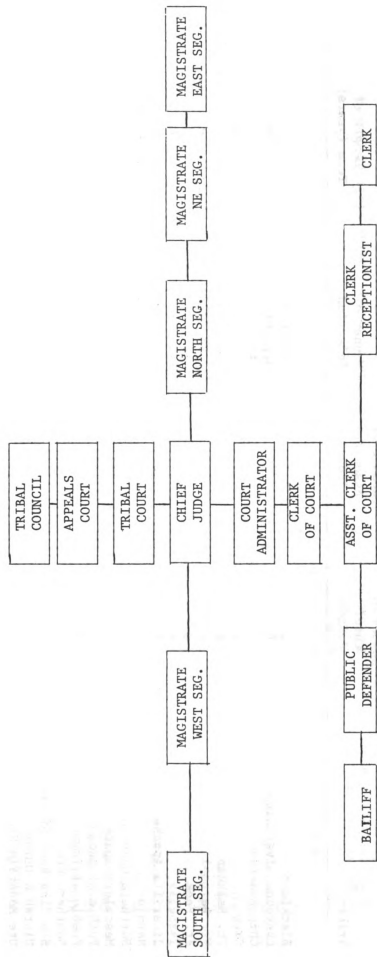
| Tribes<br>*/          | Tribal Court      |                                 | CFR<br>Court | Auxiliary<br>Courts**/ |
|-----------------------|-------------------|---------------------------------|--------------|------------------------|
|                       | IRA/Other<br>Code | Number of<br>Circuits/Districts |              |                        |
| Blackfeet             | X                 | One                             |              | X                      |
| Cheyenne River Sioux  | X                 | One                             |              | X                      |
| Chippewa-Cree         | X                 | One                             |              |                        |
| Crow                  | X                 | One                             |              | X                      |
| Ft. Belknap           | X                 | One                             |              | X                      |
| Ft. Berthold          | X                 | One/Five                        |              |                        |
| Ft. Peck              | X                 | One                             |              |                        |
| Isabella              | X                 | One                             | X            |                        |
| Jicarilla Apache      | X                 | One                             |              |                        |
| Navajo                | X                 | Three                           |              | X                      |
| Northern Cheyenne     | X                 | One/Five                        |              | X                      |
| Mescalero Apache      | X                 | One                             |              |                        |
| Pueblo of Acoma       | X                 | One                             |              |                        |
| Pueblo of Laguna      | X                 | One                             |              |                        |
| Southern Ute          | X                 | One                             |              |                        |
| Standing Rock Sioux   | X                 | One                             |              | X                      |
| Uintah & Ouray        | X                 | One                             |              | X                      |
| Ute Mountain Ute      | X                 | One                             |              |                        |
| White Mountain Apache | X                 | One                             |              |                        |
| Wind River            | X                 | One                             | X            | X                      |
| Zuni                  | X                 | One                             |              |                        |

\*/ The Iowa, Kickapoo & Potawatomi Tribes presently do not have tribal court systems. No data are available on the Courts of the Hopi Tribe.

\*\*/ Includes special courts, such as juvenile and/or traffic courts.

FIGURE 5-1

EXAMPLE OF TRIBAL COURT  
ORGANIZATIONAL CHART\*



\*Source: Three Affiliated Tribes of the Fort Berthold Reservation, Product Item 3, Tribal Courts, April, 1979.

TABLE 5-2

## Selection Process for Tribal Judges

| Tribes                | */ | Number of<br>Chief<br>Judges | Number of<br>Associate<br>Judges | Manner of<br>Selection | Length of<br>Term (years) |
|-----------------------|----|------------------------------|----------------------------------|------------------------|---------------------------|
| Blackfeet             |    | 1                            | 2                                | Appointed              | 2                         |
| Cheyenne River Sioux  |    | 1                            | 2                                | Appointed              | 4                         |
| Chippewa-Cree         |    | 1                            | 1                                | Elected                | 4                         |
| Crow                  |    | 1                            | 2                                | Elected                | 4                         |
| Ft. Belknap           |    | 1                            | 2                                | Appointed              | 4                         |
| Ft. Berthold          |    | 2                            | 3                                | Elected/Appointed      | 4                         |
| Ft. Peck              |    | 1                            | 2                                | Appointed              | 4&3                       |
| Isabella              |    | 1                            | -                                | Appointed              | 4                         |
| Jicarilla Apache      |    | 1                            | 2                                | Appointed              | lifetime                  |
| Navajo                |    | 1                            | na                               | Appointed              | lifetime                  |
| Northern Cheyenne     |    | 1                            | 2                                | Appointed              | 2                         |
| Mescalero Apache      |    | 1                            | 2                                | Appointed              | 2                         |
| Pueblo of Acoma       |    | 1                            | 1                                | Appointed              | na                        |
| Pueblo of Laguna      |    | 1                            | 3                                | Appointed              | 4                         |
| Southern Ute          |    | 1                            | 1                                | Appointed              | 3                         |
| Standing Rock Sioux   |    | 1                            | 2                                | Appointed              | 4                         |
| Uintah & Ouray        |    | 1                            | 2                                | Appointed              | na                        |
| Ute Mountain Ute      |    | 1                            | -                                | Contract               | na                        |
| White Mountain Apache |    | 1                            | 1                                | Elected                | 4                         |
| Wind River            |    | 1                            | 2                                | Elected/Appointed      | 4                         |
| Zuni                  |    | 1                            | -                                | Appointed              | 6                         |

\*/ The Iowa, Kickapoo & Potawatomi Tribes presently do not have tribal court systems. No data are available on the Courts of the Hopi Tribe.

TABLE 5-3

## Judicial Review of Tribal Court Decisions

| Tribes */             | Appellate Body    | Composition                                 |
|-----------------------|-------------------|---------------------------------------------|
| Blackfeet             | Appeals Court     | Appointed lay members of tribe              |
| Cheyenne River Sioux  | Appeals Court     | Three judge panel                           |
| Chippewa-Cree         | Informal          | Review by another judge                     |
| Crow                  | Appeals Court     | Three judges                                |
| Ft. Belknap           | Appeals Court     | Two non-tribal judges                       |
| Ft. Berthold          | Appeals Court     | Three judges                                |
| Ft. Peck              | Appeals Court     | Two judges who have not heard the case      |
| Isabella              | None at this time | -                                           |
| Jicarilla Apache      | Informal          | Review by panel of three council members    |
| Navajo                | Appeals Court     | Three judges                                |
| Northern Cheyenne     | Appeals Court     | Tribal attorney (plans to add three judges) |
| Mescalero Apache      | Tribal Council    | Council members                             |
| Pueblo of Acoma       | Tribal Council    | Council members                             |
| Pueblo of Laguna      | Informal          | Governor plus eight elected officers        |
| Southern Ute          | None at this time | -                                           |
| Standing Rock Sioux   | Appeals Court     | Three judges                                |
| Uintah & Ouray        | Appeals Court     | Three judges                                |
| Ute Mountain Ute      | None at this time | -                                           |
| White Mountain Apache | Informal          | Three judges, using visiting judges         |
| Wind River            | Appeals Court     | -                                           |
| Zuni                  | Tribal Council    | Council members                             |

\*/ The Iowa, Kickapoo & Potawatomi Tribes presently do not have tribal court systems. No data are available on the Courts of the Hopi Tribe.



TABLE 5-4

## Examples of Tribal Court Cases

| Tribes <sup>*/</sup>  | Civil            |                              |                    |          |       | Criminal     |        |
|-----------------------|------------------|------------------------------|--------------------|----------|-------|--------------|--------|
|                       | Land Regulations | Natural Resource Regulations | Property/contracts | Domestic | Other | Misdemeanors | Others |
| Blackfeet             |                  |                              |                    | X        | X     | na           | na     |
| Cheyenne River Sioux  | X                |                              |                    | X        | X     | X            |        |
| Crow                  |                  |                              |                    | X        | X     | X            | X      |
| Ft. Belknap           |                  |                              |                    | X        |       | X            |        |
| Ft. Berthold          |                  |                              | X                  | X        | X     | X            | X      |
| Ft. Peck              |                  |                              | X                  | X        | X     | X            |        |
| Isabella              |                  |                              |                    | X        | X     | X            |        |
| Jicarilla Apache      |                  |                              | X                  | X        | X     | X            |        |
| Navajo                | X                | X                            | X                  | X        | X     | X            | X      |
| Nothern Cheyenne      | X                | X                            | X                  | X        | X     | X            | X      |
| Mescalero Apache      |                  |                              | X                  | X        | X     | X            | X      |
| Pueblo of Acoma       |                  |                              | X                  | X        | X     | X            | X      |
| Pueblo of Laguna      |                  |                              | X                  |          | X     | X            |        |
| Southern Ute          |                  |                              |                    | X        |       | X            |        |
| Standing Rock Sioux   |                  |                              | X                  | X        |       | X            | X      |
| Uintah & Curay        | X                | X                            |                    | X        |       | X            |        |
| Ute Mountain Ute      |                  |                              | X                  | X        | X     | X            | X      |
| White Mountain Apache |                  |                              | X                  | X        |       | X            |        |
| Wind River            | X                |                              |                    | X        | X     | X            |        |
| Zuni                  |                  |                              | X                  |          | X     | X            |        |

<sup>\*/</sup> The Iowa, Kickapoo & Potawatomi Tribes presently do not have tribal court systems. No data are available on the Courts of the Hopi Tribe; also data are not available on the caseload of the Chippewa-Cree Tribes.

court and contain a partial listing of actions and offenses to be dealt with by those courts. There is a method provided for the "transition" from CFR court to tribal court. However, because of ambiguities in the regulations, it is often not clear whether a particular court has reached the stage of being an independent tribal court or is still, for some purposes, to be considered a CFR court. For example, 25 CFR Section 11.1(d) indicates that the federal regulations apply until a tribe has adopted a law and order code in accordance with its own constitution. Certain sections of the regulations apply even after tribal adoption of a code for as long as the Indian judges are paid from federal funds, "or until otherwise directed." Thus, depending on the source of funding for tribal judicial systems, it is not clear whether courts which have adopted codes but which have a complex of sources for paying their judges are to be considered still CFR courts.

For most tribes, the CFR courts represented the only familiar judicial model for the establishment of "tribal courts". Accordingly, when tribes created "tribal courts" they adhered closely to the model set forth in 25 CFR Part 11.

The third type of reservation court, "traditional courts," are, for the most part, confined to those Pueblo tribes in New Mexico that still maintain custom-based judicial systems. These courts, like tribal courts, derive their authority from the inherent tribal power to administer justice and not from any written constitution, code or ordinance. Rather, these courts rest on long-standing oral custom.

Although characterized as courts, these Pueblo institutions bear little resemblance to the tribal court and Court of Indian Offenses models. Judicial functions are usually entrusted to the chief executive

officer of the Pueblo and appeals are usually heard only by the Pueblo Councils.

#### Judges and Court Personnel

The pattern of court personnel varies greatly from tribe to tribe. Some court systems are sophisticated institutions with a full complement of judges and administrators while others consist of a single judge utilizing a makeshift courtroom. Almost all tribal court judges are members of the tribe over which they preside. A very few tribal judges are graduates of law schools and even fewer are attorneys admitted to the bar of the state in which they sit.

The qualifications for appointment are similar for most tribes. Table 5-5 summarizes commonly used criteria for selecting tribal judges. In general, a judge must be a member of the tribe, must have achieved some basic educational level, must not have been convicted of any felonies whatsoever or of any misdemeanors in the year preceding appointment, and must meet some age limits. Once appointed, most judges are subject to removal by a vote of the tribal council, though often only after being given a hearing on specific charges. As tribal courts begin to play a larger role on reservations and as caseloads and litigation increase, judges become more insulated from the political winds and a more independent judiciary develops. This trend has been stimulated further by increased training, as shown below.

In addition to the chief judge and associate judges, most courts have some additional court personnel, including, for example, clerks, bailiffs, prosecuting attorneys, criminal defenders, probation and juvenile officers. As would be expected, larger courts are likely to have more support staff. For most courts, the court clerk performs

TABLE 5-5

## Basic Qualifications for Tribal Judgeships

| */<br>Tribe              | Tribal<br>Member | Age | Character | General<br>Education | Legal Training |
|--------------------------|------------------|-----|-----------|----------------------|----------------|
| Blackfeet                | X                | X   | X         |                      | <u>1/</u>      |
| Cheyenne River Sioux     | X                | X   | X         |                      |                |
| Chippewa                 | X                |     | X         |                      |                |
| Crow                     | X                | X   | X         |                      |                |
| Ft. Belknap              | X                | X   | X         | X                    |                |
| Ft. Berthold             | X                | X   |           | X                    | X              |
| Ft. Peck                 | X                | X   | X         | X                    |                |
| Isabella                 | X                |     | X         |                      |                |
| Jicarilla Apache         | X                | X   | X         | X                    |                |
| Navajo                   | X                | X   | X         | X                    |                |
| Northern Cheyenne        | X                | X   | X         |                      |                |
| Mescalero                | X                | X   | X         |                      |                |
| Pueblo of Acoma          |                  |     |           | <u>2/</u>            | <u>1/</u>      |
| Pueblo Laguna            |                  | X   | X         |                      |                |
| Southern Ute             | X                |     | X         | X                    |                |
| Standing Rock Sioux      |                  | X   | X         | X                    | X              |
| Uintah & Ouray <u>3/</u> |                  |     |           |                      |                |
| Ute Mountain Ute         |                  |     |           |                      | X              |
| Wind River               | X                |     | X         | X                    |                |
| Zuni                     |                  | X   | X         |                      |                |

\*/ The Iowa, Kickapoo & Potawatomi Tribes presently do not have tribal court systems. No data are available on the Courts of the Hopi Tribe.

1/ Require competence regarding tribal code.

2/ General qualifications imply need for education but no level is specified.

3/ No qualifications are specified in the code. They are determined by the Business Committee.

secretarial tasks and may act as court stenographer. The types of support personnel available to the tribal courts of the coal-owning tribes are illustrated in Table 5-6.

Because most tribal court cases are criminal in nature, the need for prosecutors increases as the caseload increases. Persons serving as tribal court prosecutors include professional attorneys, tribal policemen, trained lay prosecutors, and untrained personnel. Some tribes use a professional attorney as a prosecutor only in those instances where a professional attorney will be serving as defense counsel.

Few tribes provide professional attorneys as defenders for indigent criminal defendants. However, many tribes do provide lay advocates to represent the interests of such persons.

Until recently, most lay prosecutors and advocates had no training available prior to assuming their positions. The American Indian Lawyer Training Program has instituted a training program for paralegal personnel working in Indian tribal courts.

In addition to the full-time and part-time court personnel described above, many tribal courts utilize the services of tribal attorneys who act as advisors to the tribal court and the judge. Some tribal attorneys act as prosecutors and others act in more traditional roles as law clerks to the judge, doing research, reviewing cases, and helping the judge prepare decisions and opinions.

The lack of adequate court personnel often stimulates the participation by judges directly in court proceedings. Judges often call witnesses, question them, and do other tasks that are necessary to make court proceedings run smoothly. Outside the courtroom, judges attempt to settle disputes informally, resulting in a reduction of caseloads.

TABLE 5-6

## Types of Support Personnel

| Tribes*/              | Clerks | Bailiff | Secretary/<br>Reporter | Prosecutor/<br>Defender | Attorney | Admini-<br>strator | Probation/<br>Juvenile Officer |
|-----------------------|--------|---------|------------------------|-------------------------|----------|--------------------|--------------------------------|
| Blackfeet             | X      |         | X                      | X                       | X        | X                  | X                              |
| Cheyenne River Sioux  | X      |         | X                      |                         | X        |                    | X                              |
| Chippewa-Cree         | -      | -       | -                      | -                       | -        | -                  | -                              |
| Crow                  | X      |         |                        | X                       | X        | X                  | X                              |
| Ft. Belknap           | X      |         |                        | X                       | X        |                    |                                |
| Ft. Berthold          | X      | X       | X                      | X                       |          | X                  | X                              |
| Ft. Peck              | X      |         | X                      | X                       |          |                    |                                |
| Jicarilla Apache      | X      |         | X                      | X                       |          |                    |                                |
| Navajo                | X      |         |                        |                         |          |                    |                                |
| Nouthern Cheyenne     | X      | X       | X                      |                         | X        |                    | X                              |
| Mescalero Apache      | X      |         |                        |                         |          |                    | X                              |
| Pueblo of Acoma       | X      |         |                        |                         |          |                    | X                              |
| Pueblo of Laguna      | X      |         |                        |                         |          |                    |                                |
| Southern Ute          | X      |         |                        | X                       |          |                    | X                              |
| Standing Rock Sioux   | X      |         |                        |                         |          |                    |                                |
| Uintah & Ouray        | X      | X       |                        |                         |          | X                  | X                              |
| Ute Mountain Ute      | X      |         |                        |                         |          |                    |                                |
| White Mountain Apache | X      |         |                        |                         | X        |                    |                                |
| Wind River            | X      |         |                        |                         |          |                    |                                |
| Zuni                  | X      |         |                        |                         | X        |                    |                                |

\*/ The Iowa, Kickapoo & Potawatomi Tribes presently do not have tribal court systems. No data are available on the Courts of the Hopi Tribe. Also, no data are available on the support personnel available to the Isabella Court System.

Tradition also dictates direct participation of judges in court cases. The judge's role is perceived as that of a "counselor" tempering justice with compassion.

#### Funding of Courts

Funding for tribal court systems comes from several different sources -- the tribes themselves, the Bureau of Indian Affairs, and the Law Enforcement Assistance Administration (LEAA). Table 5-7 summarizes the level and pattern of funding of the tribal courts involved in this study.

Tribes vary greatly in their capacities to fund their own court systems. Funds are needed for many other essential purposes. Thus, economic constraints often determine the degree to which tribes are able to develop functional and respected court systems. Most tribes have found it difficult to pay the higher costs of courts caused by increasing caseloads and the requirements of the Indian Civil Rights Act. It has been noted that there is a striking similarity between the problems of tribal courts and those of neighboring non-Indian courts in rural areas with insufficient tax bases.

The federal government has responded to the needs of tribal courts in recent years with financial assistance. This has been consistent with the congressional policy of enhancing tribal self-government.

Prior to 1976, the BIA support program for tribal courts was located in its Law Enforcement Division. In 1976 this responsibility was given higher priority and the BIA established a separate Judicial Services Division. This new administrative unit assists Indian courts in attaining greater professionalization and independence.

TABLE 5-7  
Funding of Tribal Courts

| Tribes-*/             | Number of<br>Cases-*/ | Level of<br>Funding-*/ | Source of<br>Funds |
|-----------------------|-----------------------|------------------------|--------------------|
| Blackfeet             | 4,295                 | \$ 600,000             | Tribe/BIA          |
| Cheyenne River Sioux  | 2,940                 | 47,000                 | Tribe              |
| Chippewa              | 300                   | na                     | BIA/Tribe          |
| Crow                  | 294                   | 461,460                | Tribe/BIA          |
| Ft. Belknap           | 600                   | na                     | Tribe/BIA          |
| Ft. Berthold          | 1,277                 | 76,310                 | Tribe/BIA          |
| Ft. Peck              | 5- 6,000              | na                     | Tribe/BIA          |
| Isabella              | 50- 60                | na                     | Tribe/BIA          |
| Jicarilla Apache      | na                    | na                     | BIA/CETA           |
| Navajo                | 2,900                 | 55,000                 | Tribe/BIA          |
| Northern Cheyenne     | 2,500                 | 800,000                | Tribe/BIA          |
| Mescalero Apache      | 240                   | 140,000                | Tribe/BIA          |
| Pueblo of Acoma       | 290                   | na                     | na                 |
| Pueblo of Laguna      | 117                   | na                     | na                 |
| Southern Ute          | 250                   | 34,000                 | Tribe/BIA          |
| Standing Rock Sioux   | 843                   | 33,900                 | BIA                |
| Uintah & Ouray        | 1,468                 | 100,000                | Tribe/BIA          |
| Ute Mountain Ute      | 600                   | 163,326                | Tribe/BIA          |
| White Mountain Apache | 3,652                 | 10,000                 | Tribe/BIA          |
| Wind River            | 2,000                 | 45,000                 | Tribe/BIA          |
| Zuni                  | 520                   | na                     | BIA                |
|                       |                       | 33,000                 | BIA                |

\*/ The Iowa, Kickapoo & Potawatomi Tribes presently do not have tribal court systems. No data are available on the Courts of the Hopi Tribe.

\*\*/ Data on caseload and funding vary among tribes. Some include police activity, others do not.



Since 1973, the Law Enforcement Assistance Administration has also made substantial contributions to the support of Indian courts. Several million dollars have been given over this period by LEAA usually for the development and funding of specific projects such as court construction, judicial training, courtroom equipment, and the general upgrading of criminal justice systems.

In January 1975, Congress enacted the Indian Self-Determination and Education Assistance Act, (88 Stat. 2203). Funds under this Act, are available for strengthening and improving tribal court systems and the administration of criminal justice systems on Indian reservations.

This infusion of substantial federal funds for tribal court systems is indicative of a strong federal policy which seeks to encourage Indian tribes to fulfill their responsibilities as the local governments of their reservations, and in particular to deal adequately with the problems of the administration of local justice.

#### NAICJA and Judicial Training

In 1968, partly in recognition of the additional responsibilities which had been placed upon them by the Indian Civil Rights Act, Indian court judges formed the National American Indian Court Judges Association (NAICJA). Its purpose is to enhance the competence of Indian court judges and to establish a national program of continuing judicial education.

In 1975-76, 199 persons participated in tribal court training sessions. LEAA has funded the program of continuing judicial education since its inception and the Bureau of Indian Affairs has funded judicial training in the areas of family law and child welfare over the last several years. All Indian court judges are eligible to participate in training sessions.

Training takes place at four regional sites and sessions are held for two and one-half days each month for six or seven months of the year. In addition there are usually two national training sessions of three days each. Non-formalized on-site training is also provided, particularly for new judges. Statistics indicate that the training available and utilized by Indian court judges is far more extensive than that available to or utilized by non-lawyer state court judges.

The instructional program for the NAICJA is designed each year under the supervision of lawyers and law professors and is evaluated at the end of the year. Curricula are developed and training is coordinated by experts in the field. A special casebook for the training of Indian court judges was published by NAICJA covering jurisdictional questions, substantive and procedural criminal law, and Indian Civil Rights Act issues. In addition, materials have been specially prepared on family law and child welfare.

The formation of the NAICJA and the institutionalization of its programs have been responsible for creation of a more effective judicial system for Indian reservations. Along with the development of the judicial training program, NAICJA has undertaken to assist Indian courts in a variety of other practical ways through the preparation of material invaluable to Indian court proceedings. A Criminal Court Procedures Benchbook is now widely used by Indian court judges. Model Indian Court Rules of Criminal Procedure have been adopted by many reservation courts and are patterned after the Federal Rules of Criminal Procedure as modified for Indian court use. A Model Appellate Procedures Code provides a method by which several Indian tribes can combine their appellate court systems. In addition, NAICJA established its Court

Advisory Program through which regional attorney-instructors have been made available to Indian courts on an individual basis, have visited tribal courts, observed trials in progress, and advised courts on improving their effectiveness and procedures.

A particularly important result of this training has been the increased respect earned by tribal court judges from tribal council members, law enforcement personnel, parties to tribal court actions, and judicial personnel of other jurisdictions.

In addition, the American Indian Lawyer Training Program has established a program for training lay advocates and the NAICJA has begun to train court clerks as their roles in tribal courts have expanded.

#### Positive Attributes of the Tribal Court System

The revitalization of the Indian court system has been made possible by a variety of factors which have influenced this development. First, the authority and importance of Indian courts have increased as a result of the recognition by federal courts of tribal court authority over most matters arising in Indian country. This trend began in 1959 with the Supreme Court's insistence, in Williams v. Lee, (358 U.S. 217), that actions by state governments may not interfere with the authority of tribal courts. Federal courts have deferred to the judgment of Indian courts, requiring an exhaustion of tribal remedies before redress may be sought in the federal system. Federal courts have determined that they are bound by tribal court interpretations of tribal constitutions and ordinances much the same as such courts are bound by state court determinations of the meaning of state laws.

Second, Indian courts have provided quick access to the most appropriate forum for reservation disputes. Most Indian reservations are

located in rural areas, far from federal and state courts. When local courts are nearby, they often are located in reservation border towns where hostility towards Indians may run high and sympathy for Indian values may be lacking. Thus, Indian courts located on reservations are convenient to the persons who will use them and are the most appropriate forums to do justice in specific situations. Disputes can be resolved and anti-social acts can be redressed quickly and efficiently. Most important, Indian values are best understood and translated into legal principles and remedies by Indian courts and judges.

Third, Indian courts have drawn strength from the growing support of federal agencies, tribal leaders and organizations. Indian organizations are making a new and strengthened commitment to the growth and improvement of Indian courts. Tribal leaders are realizing that Indian courts can help maintain the delicate balance between the need to assimilate contemporary judicial models and the desire of Indian people to maintain traditional Indian values. Congressional and administrative policies to foster tribal self-government have resulted in increased funding and technical assistance being made available to Indian court systems.

Fourth, the dedication of Indian judges is one of the most notable strengths of Indian courts. Judges in the non-Indian system are rewarded by prestige and adequate compensation. The Indian judge usually does not enjoy such luxuries; nevertheless, Indian judges have shown a willingness to do difficult jobs fairly and diligently. Surveys indicate that virtually all Indian court judges are zealous in their desire to improve their competency and abilities. Such enthusiasm compensates for the lack of formal education and legal background of most judges.

## CURRENT JUDICIAL ISSUES

Like most dynamic institutions, tribal courts act in areas in which their power is firmly established and areas in which their power has not yet been fully resolved. The following brief survey indicates some of these areas.

### General Criminal Jurisdiction

Most cases coming before tribal courts involve the commission by Indians of misdemeanor-type offenses. Since the Indian Civil Rights Act limits tribal court penalties to six months imprisonment and a \$500 fine, trial of serious offenses is not practical. While the federal government has explicit jurisdiction over certain categories of major reservation crimes, federal enforcement with regard to those crimes has been inadequate. The rate of declinations to prosecute by United States Attorneys is very high and FBI investigation is quite slow. Consequently, many tribal courts assert authority over these major crimes. Nonetheless, the bulk of Indian tribal court matters will continue in the foreseeable future to consist of minor offenses committed by Indians on Indian reservations.

The United States Supreme Court in Oliphant v. Suquamish Indian Tribe, [435 U.S. 191 (1978)], held that tribal courts do not possess the jurisdiction to try and punish non-Indians committing crimes on Indian reservations. However, under specific treaty provisions and pursuant to inter-governmental cooperative agreements, non-Indians may be detained by tribal police and tribal courts may through extradition deliver non-Indian offenders to the appropriate state or federal jurisdiction.

## General Civil Jurisdiction

As previously indicated, the Supreme Court has held in Williams v. Lee that tribal courts are the proper forum for the resolution of civil disputes involving Indian persons or property. In fact, unless state courts have been granted jurisdiction by federal statute, tribal court is the only court available for bringing a civil action against an Indian arising from a reservation transaction.

Most civil actions brought before tribal courts involve family matters - domestic relations, child welfare, and probate. These are clearly areas in which the unique position of the tribal judge as "counselor" can be utilized to advantage. However, as tribal courts have become more sophisticated, other general civil matters, including contract disputes, personal injury actions and land use matters have been litigated.

The Supreme Court's prohibition on the exercise of direct criminal jurisdiction by tribal courts over non-Indians did not extend to civil jurisdiction. Indeed, while subjecting non-Indians to tribal criminal jurisdiction may be "inconsistent with the status" of Indian tribes, the same analysis would not apply to civil matters. For example, the Supreme Court long ago held that non-Indians are subject to taxation by Indian tribes, and tribal courts are being utilized to enforce such taxation schemes.

In addition, many tribes are attempting to control the activities of non-Indians on Indian reservations through the use of civil penalties and property forfeiture proceedings. In some areas of regulated activity, such as hunting and fishing, the imposition of civil penalties and the forfeiture of contraband are logical manifestations of the tribes'

civil jurisdiction. Zoning and the regulation of land use are also areas in which tribal courts are becoming more involved.

Indeed the fundamental jurisprudential doctrine that the proper forum for the resolution of a dispute is that forum having the most significant contacts with and interest in the matters at hand suggests that tribal courts are the appropriate forum for the resolution of on-reservation civil disputes.

#### Comity and Full Faith and Credit

The extension of full faith and credit to the decisions of Indian courts is important in light of increased interaction between Indian and non-Indian communities, giving rise to a need to enforce tribal judgments outside reservation boundaries.

Some state courts have enforced tribal judgments as a matter of comity, or where essential tribal relations are involved. Several of these courts have declared that tribal court decrees are entitled to full faith and credit to the same extent as decrees of sister states. However, it is probable that not all state courts will abide by this view.

Perhaps the most promising way for tribes to attain foreign enforcement of orders and judgments as well as extradition is through mutual agreements and legislation. Tribal courts are establishing themselves as courts of record so that their judgments and decrees can be filed in state courts. A basis for reciprocity does exist in that if states want their court orders enforced and persons extradited from the reservation, it must be through the tribal court system. Examples of the types of formal agreements between tribal and other courts are presented in Table 5-8.

TABLE 5-8

## Agreements between Tribal and Other Courts

| Tribes*               | Cross-deputization | Extradition | Recognize Decrees                  |
|-----------------------|--------------------|-------------|------------------------------------|
| Blackfeet             | no                 | yes         | no                                 |
| Cheyenne River Sioux  | no                 | yes         | no                                 |
| Crow                  | no                 | no          | no                                 |
| Ft. Belknap           | no                 | yes         | no                                 |
| Ft. Berthold          | yes                | no          | no                                 |
| Ft. Peck              | yes                | no          | no                                 |
| Isabella              | yes                | no          | no                                 |
| Jicarilla Apache      | yes                | no          | no                                 |
| Navajo                | yes                | yes         | yes (with other tribes/state)      |
| Northern Cheyenne     | yes                | yes         | yes (with other tribes)            |
| Mescalero             | no                 | yes         | no                                 |
| Pueblo of Acoma       | yes                | no          | yes (with other tribes)            |
| Pueblo of Laguna      | no                 | no          | no                                 |
| Southern Ute          | no                 | no          | no                                 |
| Standing Rock Sioux   | no                 | no          | yes (with other tribes)            |
| Uintah & Ouray        | no                 | no          | no                                 |
| Ute Mountain Ute      | no                 | no          | no                                 |
| White Mountain Apache | no                 | no          | yes (with other tribes)            |
| Wind River            | yes                | no          | yes (informally)                   |
| Zuni                  | no                 | yes         | yes (with other tribes/<br>county) |

\*/ The Iowa, Kickapoo & Potawatomi Tribes presently do not have tribal court systems. No data are available on the Courts of the Hopi Tribe. Also, no data are available on the agreements the Chippewa-Cree Tribe.



### Treatment, Personnel and Facilities

Among the most pressing needs of tribal courts is the requirement that adequate treatment facilities and personnel be available to the court, especially for juvenile matters. Tribes are establishing, within the confines of budgetary limitations, mental health facilities, family counseling facilities, and alcoholism treatment programs. Attempts to maintain law and order on reservations and to rehabilitate criminals and families are frustrated when the treatment alternatives are not available to the tribal court judge.

The increase in the caseload of tribal courts also demands an increase in tribal social services personnel. Perhaps the greatest success of current tribal court programs is in the area of alcohol treatment. Surveys indicate that the utilization of such programs by tribal judges has had positive results in the reduction of crime on Indian reservations.

Tribal detention capabilities vary considerably. Larger tribes usually have tribal jails and smaller tribes either have detention facilities or contract with local non-Indian governments to utilize their facilities.

Increased training for probation officers and counselors has enabled tribal court judges to use effectively the complex of on-reservation programs in dealing with adult and juvenile crime and family matters. The major problem, however, lies in budgetary constraints which prevent even the most dedicated judge from accomplishing his tasks. It is hoped that with increased federal support and with the renewed interest of tribal leaders, additional funding will be made available for these important purposes.

## Public Law 83-280 Issues

In 1953, Congress passed Public Law 83-280 (67 Stat. 588) which provided a means for states to assume jurisdiction over Indian lands and people. Several states were specifically granted such jurisdiction and other states were authorized to assume jurisdiction. Congress specifically prohibited any transfer of jurisdiction to states with respect to the regulation of hunting, fishing, and trapping, and the alienation or taxation of trust property. In addition, only state laws of general applicability could be extended to reservations. In 1968, Congress provided for tribal consent before any further jurisdictional transfers could occur.

As declared in the Final Report of the American Indian Policy Review Commission, [199 (May, 1977)], "Public Law 280 is a failure of Federal policy on many levels." The record shows that where the state has asserted its jurisdiction, Indian personal and property rights have not been protected. In addition, the Indian experience in state courts has been decidedly negative as a result both of anti-Indian prejudice as well as a lack of appreciation and understanding of Indian cultural values.

A positive result of the failure of Public Law 83-280 has been the revitalization of Indian tribal courts described above. While the federal government surrendered its jurisdiction to the states under Public Law 83-280, nothing in the legislation deprived tribal courts of their continuing concurrent jurisdiction. Thus, many tribal courts continue to operate in all spheres of reservation activity despite the Public Law 83-280 status of the particular reservation.

Moreover, the courts have made it clear that in light of contemporary federal policy encouraging Indian self-determination, Public Law 83-280 should be viewed in the narrowest context possible. Thus, the Supreme Court has held that the imposition of state jurisdiction on Indian reservations did not include the right of states to tax Indian property interests, and other courts have held that the statute did not authorize the imposition of local zoning and building codes on property on an Indian reservation. Rather, it is the view of the courts that, with respect to civil matters, the only effect of Public Law 83-280 is to open the state courts to civil causes of action by and against Indians previously not subject to state jurisdiction.

Finally, it has been held that the exercise of tribal jurisdiction over a subject area may preempt the exercise of state jurisdiction. As tribes become more involved in such preemptive activities, responsibility for resolving jurisdictional disputes will fall more heavily on the existing tribal courts.

#### CONCLUSION

Since the last part of the 19th century, Indian courts have developed from disciplinary instrumentalities of the federal government to sophisticated judicial tribunals exercising inherent powers of Indian self-government. Persons coming before the courts -- whether Indian or non-Indian -- are assured by federal law of receiving a fair trial consistent with due process and other protections. Further assurance that justice will be done is found in the dedication of tribes, Indian court judges, and the federal government to strengthening Indian courts through better funding, staffing, facilities and training.

The unique role that tribal courts have played and will continue to play in tribal life mandates the continued attention of both tribal and federal leaders. Only tribal courts can administer justice in such a way as to maintain the delicate balance between contemporary legal requirements and traditional Indian cultural values.

## **CHAPTER 6**

### **EXISTING TRIBAL LAWS AND REGULATIONS RELATED TO NATURAL RESOURCES**

CHAPTER 6  
EXISTING TRIBAL LAWS AND REGULATIONS  
RELATED TO NATURAL RESOURCES

Introduction

Indian tribes have long exhibited a strong interest in regulating natural resource activities on their reservations, and have established codes, regulations and agencies to administer them in a number of areas. Among these resource areas are: fish and wildlife protection; land use planning; air and water quality assessment and protection; and mining and other forms of energy supply development. The Surface Mining Act of 1977 affects coal-owning tribes in two major respects: it sets new performance standards for mining and reclamation, and, when amended as proposed in Section 710, it will afford the tribes opportunities to assume additional functions through the administration and enforcement of this law.

From the perspective of assuming larger regulatory functions under the Act, the past experiences of the tribes in regulating mining, their existing laws, regulations, and administrative apparatus, and their current activities in analogous natural resource areas are all relevant. This chapter is divided into two parts. The first presents a brief discussion of the historical background of coal mining regulation on Indian lands. The second reviews the existing laws and regulatory practices of the sub-contracting tribes which are relevant to the Surface Mining Act, and tribal regulation of other natural resource activities which are similar to what would be required to fulfill the purpose of the Act.

## THE REGULATORY BACKGROUND OF COAL MINING ON INDIAN LANDS

Participation in the regulation of surface mining on Indian reservations by the tribes themselves is a relatively new activity. The Indians' opportunities to plan for and to regulate mining have been limited in the past as a result of a number of factors. Prior to the passage of the Indian Reorganization Act (IRA) in 1934, the extent of tribal control over mineral development was minimal. Although the tribes had the right to decide whether or not to develop their resources, once tribes or allottee owners had agreed to development, the negotiation of leases and the regulation of mining operations rested largely in the hands of the Secretary of the Interior, within the ambit of existing federal laws and regulations. After passage of the IRA, those tribes that elected to organize under the Act were able to negotiate leases in accordance with their IRA constitutions or charters, subject to the approval of the Secretary of Interior. However, the coverage afforded by the mineral leasing laws which were applicable to Indian lands was not uniform and in many cases was not adequate. Congress attempted to remedy the situation by passage of the Omnibus Indian Mineral Leasing Act in 1938.

The Omnibus Act was intended to provide comprehensive authority for the leasing and development of minerals on tribal lands, including Executive Order reservations. Regulations adopted pursuant to the Act, however, did not adequately protect either the Indian lands from environmental damage or the people living on them from health and safety hazards. Moreover, general awareness of both environmental and public health considerations has grown in breadth and depth over the course of

the last several decades, and would, in any event, have encouraged promulgation of new standards.

In 1969, the Department of the Interior augmented the existing regulations so that consideration and protection of a broad array of ecological, social, and cultural values was made a prerequisite of the approval of agreements concerning exploitation and surface mining of tribal and allotted lands. These concerns were reflected in the following policy statement:

It is the policy of this department to encourage the development of the mineral resources underlying Indian lands where mining is authorized. However, interest of the Indian owners and the public at large requires that, with respect to the exploration for, and the surface mining of, such minerals, adequate measures be taken to avoid, minimize or correct hazards to the public health and safety. (25 C.F.R. 171.1. See also 25 C.F.R. 177.)

These federal regulations, which are administered by the BIA, have provided the basis for most existing regulation of Indian mineral development. Since passage of the federal Surface Mining Act in 1977, most major coal-owning tribes have expressed strong interest in creating similar tribal laws and regulations.

In addition to increased opportunities to participate in the regulation of mining on Indian lands, the tribes now have greater knowledge about the resources they possess and their development. In the past, the paucity of accurate and detailed data on natural resources and their development was a factor which contributed to the lack of opportunity for tribal planning and regulation of mining. Technological advances and the increasing need to locate and develop new sources of energy supplies have spurred more systematic and detailed surveys of resources



in many areas of the United States in recent years. Among the beneficiaries of this larger trend have been Indian tribes who own energy resources. In conjunction with the greater degree of political authority they have exercised in recent years, the tribes have been able to make use of new data concerning their resources, and in some instances to undertake their own studies of the available resources. Increased knowledge of what they own and how it could be developed has done much to facilitate planning for development and awareness of the sorts of regulation which development might entail.

The current strong interest by tribes in regulating the environmental effects of mining on Indian lands coincides with the recent, more general trend in the country toward the recognition and furtherance of environmental and social values in public policy. Until recently, development of mineral resources was primarily an economic and technical matter, and there was only limited awareness of and concern for its external effects. Indian tribes, as well as some other groups, had few appropriate outlets to express concern for or disapproval of, the threat some mining operations posed to other values or to attempt to avoid or minimize these hazards. The Surface Mining Act of 1977 requires that explicit consideration be given to values which might be adversely affected by mining operations. The Act also requires evaluation of the conflicts among competing objectives, and regulation of mining in such a manner as to protect and promote the general interest of the tribal (or any other affected) community.

## INDIAN REGULATORY APPARATUS AND EXPERIENCE

In the last several years, some of the major coal-owning tribes have been increasingly involved in planning, regulatory, and enforcement tasks relevant to those required under the Surface Mining Act. Although none of the tribes currently have laws, regulations, offices, and procedures which would satisfy all of the requirements of the Act, several of them have established ordinances, regulations, offices, and procedures which are intended to serve similar objectives, and they have had considerable experience with the regulatory process in related natural resources areas.

### Existing Laws and Regulations On Mining

Of the subcontracting tribes, one, the Crow Tribe, is currently in the process of considering a broad-gauge law -- the Crow Coal Mining and Reclamation Ordinance -- which addresses the range of concerns expressed in the Surface Mining Act. The basic authority to enact new laws is present, however, in other tribal constitutions, and can be utilized should tribes decide to undertake mining regulatory functions.

The types and extent of existing laws regulating mining vary considerably among tribes. The Northern Cheyenne Tribe and the Three Affiliated Tribes of the Fort Berthold Reservation have already passed a number of resolutions pertaining to some aspects of mining and to mineral resource development in general. Two tribes, the Uintah-Ouray and the Southern Ute, do not have specific laws, codes or regulations applicable to mineral exploration and development. At present, the Code of Federal Regulations governs most aspects of these activities on their reservations. However, these tribes have begun to establish the apparatus for long-range planning with respect to mining as well as other natural resource areas, and a major function of the planning agencies is

to make decisions regarding future laws the tribes will need in these areas and draft proposed laws and resolutions.

All of the tribes have enacted some resolutions aimed at preventing environmental degradation of lands, air, and water on the reservations. Many of these resolutions pre-date the Surface Mining Act, and are not specifically addressed to its concerns or to mining activities. Nonetheless, some of these resolutions are or can be made consistent with the objectives of the Act. The tribal Environmental Protection Commissions of the Northern Cheyenne and Navajo Tribes are, for instance, charged with protecting the quality of the reservations' waters, quite apart from the requirements of the Surface Mining Act. In the event that the standards set by the Act differ from those embodied in the resolutions establishing the commissions, it is likely that amendments reconciling these differences can be enacted.

In a similar vein, most tribes have passed land use and conservation ordinances. These are not directly concerned with mining activities, and they were passed with the primary intention of regulating agricultural practices, hunting and fishing, and general industrial activities. In some instances, it is likely that they can be amended so as to incorporate the standards set by the Surface Mining Act; in others, they may serve as models for new laws intended to regulate mining. Existing laws of the Three Affiliated Tribes of Fort Berthold establish and delegate authority to protect and preserve the tribe's property, wildlife, and natural resources. Although they do not specifically address the question of protecting these assets from adverse effects associated with coal mining, it is likely that they can be broadened in such a way as to do so where necessary. Because a number

of existing tribal laws proceed from a recognition of the need for conservation and careful use of natural resources, it is probable that they can be readily amended to incorporate the objectives of the Surface Mining Act.

#### Regulatory and Administrative Offices

There is considerable variance among the tribes with respect to the size, scope, and degrees of authority of their regulatory bodies and administrative offices, as well as major differences in the way the several tribes have chosen to divide areas of function. In addition, the exercise of these functions is sufficiently new that few patterns have been established and further changes may occur as the tribes undertake enlarged programs and additional tasks. There are, as one might expect to find, indications of a progression from undertaking small-scale, relatively non-technical regulatory functions to the establishment of larger offices, staffed by technically-trained personnel, dealing with several interrelated and complex subject areas. Thus, most tribes have been involved in the process of granting (or deciding not to grant) permits for a variety of activities: hunting; fishing; land use; building; and mineral exploration for some time. In most cases, wildlife conservation and the maintenance of unspoiled areas has come earlier than preservation of air and water quality, and only recently have there been efforts, such as the pending Crow mining ordinance, which unite several regulatory objectives affected by one activity.

The experience of the Three Affiliated Tribes of Fort Berthold is illustrative of several aspects of increasing tribal involvement in formal regulatory activity. In 1955, the tribal council established the office of game warden to protect wild game on the reservation from

poachers. Over the years following, tribal regulation of fishing and hunting expanded, but most decisions and official actions remained the responsibility of the tribal council. The council set license fees, granted licenses for hunting and fishing, and adopted the regulations which governed those activities.

In 1975, the tribes established the Indian Action Team which later became the Tribal Government Task Force. It was the responsibility of this body to administer tribal development programs, and work toward self-determination and self-sufficiency. On the recommendation of the Task Force, the tribal council created the Department of Game, Fish and Recreation in November, 1975. The Department was granted authority to administer all ordinances relating to fish, wildlife and recreation, and to set its own operating and permitting procedures; the Tribal Business Council, however, retained the authority to approve ordinances, licensing and fees in these areas.

In 1978, the Tribal Government Task Force recommended that the tribes establish an Office of Natural Resources and Energy Development (ONRED), and funding for this entity was obtained from the BIA. ONRED was given a broad subject area from the beginning; its responsibility for this area was initially advisory but has since been expanded to encompass regulation and enforcement in a largely autonomous manner. ONRED has been delegated authority to manage all natural resource development on the Fort Berthold Reservation, and currently regulates activities of oil and gas companies on the reservation. It has established cooperative relationships with the relevant federal agencies, and in some areas depends on them for technical information, surveys, and inspections. It also is responsible for tribal planning with respect to coal mining and would be the principal agency involved when the tribes undertake regulatory activities under the Surface Mining Act of 1977.

In addition to these two regulatory offices, the Fort Berthold Tribes have recently created an Office of Planning, which has been directed to develop a comprehensive land use plan -- a matter bearing significantly on future mine siting questions. Although the experience of the Three Affiliated Tribes and the particular planning and regulatory offices they have established differ considerably from those of other tribes, they are to some degree indicative of the general capabilities of the coal-owning tribes in the regulatory area, the increasingly larger and more complex activities being undertaken by the tribes, and of the determination of many tribes to take on more responsibility for resource regulation.

#### Regulatory Procedures and Review

As a result of the separate development of Indian regulatory activities, the procedures followed vary considerably from one tribe to another and among agencies within tribes. The establishment of standard regulatory procedures shares with the creation of regulatory entities the relative newness of the undertaking and an element of experimentation. The creation of new agencies tends to build on and add to the forms used in earlier ones, and the development of processes and procedures tends to evolve similarly.

All of the subcontracting tribes have had some experience with granting permits for activities having to do with natural resources and have developed procedures for doing so. When some of the less complex activities such as hunting or agricultural projects are involved, the tribes have generally determined their own standards for granting or denying permits. In more technical areas, the tribes often rely on information and advice from the relevant federal agencies in deciding

what standards to set. And, in some areas, such as coal mining, the required standards of performance will presumably be determined by generally applicable federal regulations. In certain areas, however, the tribes have developed more stringent standards than are required by federal regulation and have also acquired the expertise needed to maintain them. The Northern Cheyenne Tribe's petition to EPA for designation as a Class I area under the Clean Air Act is one such case.

In the areas of technical evaluation and inspection, some tribes have developed sophisticated procedures in those fields where: 1) they have considered the matter one where they could perform an important role which was not then being fulfilled, and 2) they have been able to obtain financial and technical assistance from federal agencies. Most tribes have received funds under EPA's "208" program to establish data bases on water quality. Some have worked directly with EPA and have acquired a degree of competence in performing these evaluations. In other cases, tribes have subcontracted the projects to state or local government agencies which already had the necessary expertise. The Navajo Tribal Council considered a variety of environmental considerations important enough to the tribe to establish its own Environmental Protection Commission in 1972. The tribe authorized the commission to analyze the environmental impacts of diverse developmental activities on the reservation and to advise the tribal council on the environmental standards to be set in leases. Inspection and enforcement functions are generally exercised by the tribes in those areas where: they have or can develop the expertise to do so; where there seems to be a need for the tribe to become knowledgeable and involved; and where the tribe can obtain the funds to mount an effective program. In these respects, the

expansion of tribal inspection activities is generally analogous to the enlargement of other aspects of tribal regulatory activities.

The degree of cooperation of Indian regulatory authorities with other governmental entities is generally quite high. There are some issues in dispute and some instances in which the parties in question have not yet found a suitable working relationship, but these are neither a large proportion of the whole nor a common occurrence. The tribes are very much aware of the benefits accruing from cooperative relationships with most other governmental entities. Cooperative arrangements range from surveys conducted jointly with USGS, BIA, EPA and other federal agencies to agreements with local law enforcement officials to try Indians accused of crimes committed off the reservation in Indian courts and non-Indians charged with crimes committed on Indian lands in courts in their own communities. In a similar way, cooperation among Indian regulatory agencies is high; the gains from cooperative behavior are too great to be lightly foregone.

#### Public Participation In and Judicial Review of Decisions

With respect to public participation in and review of decisions by administrative or judicial authorities, the tribes are moving toward increasingly formalized procedures. Some tribes have recently enacted legislation which addresses these purposes. The Crow Tribal Court has been authorized by tribal resolution to review all decisions of administrative agencies and organizations. The Three Affiliated Tribes of Fort Berthold have specifically devised and instituted a variety of procedures to encourage public participation: notices of pending issues; public meetings to consider such issues; requirements for the publication and availability of information, and requirements that



hearings and referenda be scheduled if petitions bearing a sufficient number of signatures are submitted requesting them. Other tribes have similar procedures which are applicable to some aspects of regulatory activities.

However, because in the past tribal council and local district meetings have been the customary place for raising issues of public concern or of interested parties to a decision, and because the tribal communities are usually smaller, more closely knit, and more consensus-oriented in their decision-making, not all of the formal aspects of public participation and of administrative or judicial review which federal regulations ordinarily require have been established or made the subject of explicit legislation. The instances in which such procedures have been instituted imply that sometimes the tribes themselves have become aware of a need for such procedures, and that they can devise and use suitable procedures when necessary. Moreover, a tribe which wished to and was capable of undertaking other major aspects of the regulatory process would probably be capable of fulfilling requirements in these areas, not least because such procedures are comparatively inexpensive. As the prospect of mining is realized on more reservations and on a larger scale, and as the tribes are encouraged to expand their capabilities, the affected tribes will undoubtedly develop the appropriate regulatory apparatus to govern this activity.

**CHAPTER 7**

**TRIBAL PHYSICAL RESOURCE DATA BASES**

## CHAPTER 7

### TRIBAL PHYSICAL RESOURCE DATA BASES

#### Introduction

The effective regulation of surface mining on Indian lands, as on other lands, requires that the regulatory authority possess a physical resource data base and information system. This is necessary to evaluate properly permit applications and mining and reclamation plans, to designate lands unsuitable for mining, and to reclaim abandoned mined lands. Public Law 95-87, the Surface Mining Control and Reclamation Act of 1977, recognizes the need for the development of data and analyses so that regulatory "decisions [are] based upon competent, scientifically sound data and information".

The purpose of this chapter is to document the information that is available to tribes that would help them establish capabilities needed to meet the objectives of the Surface Mining Act. The chapter is divided into five parts. The first discusses the information requirements of P.L. 95-87 from the point of view of a tribal regulatory authority. The second part provides an overview of the tribes' data bases and of the tribal organizations that maintain and use them. The third part discusses the wide variety of existing resource data bases available to tribes which complement their own data. The fourth part summarizes the resource data bases of each of the subcontracting tribes and those of the other 18 affected tribes. A concluding part discusses the potential for expansion of the tribes' physical data bases and information systems as they establish surface coal mining regulatory authorities.

## INFORMATION REQUIREMENTS

The Surface Mining Control and Reclamation Act establishes certain regulatory activities and programs to ensure that surface mining activities attain particular environmental objectives. Examples of major activities and programs are the permitting process, the program for designating lands unsuitable for mining, and the abandoned mined lands program. The permitting process involves the review of permit applications, and of mining and reclamation plans to ensure that a potential operator meets the environmental objectives and standards of the Act. The process for designating lands unsuitable for mining involves locating and removing from consideration as mine sites those lands for which the regulatory agency determines that reclamation is not technically or economically feasible. The abandoned mined lands program involves a mapping of these previously mined lands and their reclamation.

The successful implementation of these programs requires that a regulatory authority have certain types of physical resources data organized for easy access. The types of resources about which information is required include: the geology of the area; the water resources; the existing and potential land use, and the soils of the area. In addition, there is an omnibus category for other types of data which may be pertinent. The types of data subsumed under these headings are summarized as follows:

### Geology

The Act requires that an operator supply geologic profiles based upon exploration drilling records showing the geology of the area, the

composition of the overburden strata and the underlying strata to demonstrate technical capability to mine the coal. Rider seams, crop line, and strike and dip of the coal must be checked for accuracy and consistency. If the regulatory authority determines that certain lands are unsuitable for mining, then it must prepare a detailed statement on the area's potential coal reserves.

#### Water Resources

The operator is required by the Act to minimize disturbance to the hydrologic balance. Proper review of the operator's application requires that the regulatory agency know the past water quantity and quality for both surface and ground water sources, characteristics of affected aquifers and recharge zones, the location of alluvial valley floors in the vicinity, etc.

#### Land Use

The operator is required to submit land use maps showing current land ownership and expected mining sequence and timing. The regulatory authority must determine with its own land use data if there are any potential areas of conflict, such as prime farm lands. To assure adequate reclamation, topographic maps showing pre-mine contour are required for the area to be mined. Land use and condition data are also required of the regulatory authority to designate lands unsuitable for mining or to identify abandoned mined lands.

### Soils

The Act also requires that an operator stabilize surface areas, segregate and replace top soil, and protect prime farm lands. To provide for adequate action to achieve this standard, the regulatory authority must know the soils and their characteristics throughout the area.

### Other Baseline Data

Further, the Act requires that the mine and reclamation plans be consistent with the physical environment and climatological conditions of the permit area. This requires of a regulatory authority data on air quality, climate, historical/archaeological resources, fish and wildlife resources, and data on native vegetation.

In summary, the regulatory authority should have access to a sound physical resource data base in order to evaluate and verify the exploration applications and the mining and reclamation plans submitted by operators. Further, it requires data to determine lands that are unsuitable for mining, or which are abandoned and unreclaimed. To perform these functions, the regulatory authority needs data and analyses on the geology, water resources, land use, soils, physical environment and climatological conditions of each area that could be affected by surface mining.

## AN OVERVIEW OF THE TRIBAL PHYSICAL RESOURCE DATA BASES

### Types of Available Information

The physical resource data bases of the coal-owning tribes vary in terms of: 1) the extent of information available; 2) how the information

is organized and maintained (including the extent of systemization); and 3) how the information is currently used for land use, water or minerals planning. The quality of the data bases most directly related to surface coal mining is highest in those areas where a significant amount of mineral resource development has been undertaken. Where mineral exploration and production have already taken place, company drilling programs have generated considerable information with respect to the reservation's mineral potential, its geology, its hydrology, and several other characteristics. In addition, in those cases where mineral development has taken place after the passage of the National Environmental Policy Act (NEPA), the Bureau of Indian Affairs and/or the U.S. Geological Survey have prepared environmental impact statements for each new lease proposal. In those instances where tribes have not yet begun development of mineral resources, many have benefited from extensive natural resource inventory programs conducted by federal or state agencies concerned with planning for the region's resources. Finally, all of the tribes concerned with surface coal mining have on file tribal reports, federal government agency reports, and, in some cases, company reports which provide data on the reservation's resources. The individual subcontract reports indicate which types of data are available for the reservations; they are discussed below.

Geology. The Bureau of Indian Affairs has sponsored a series of studies on the geology of most of the reservations, including those which possess substantial mineral and water resources. In the 1960's and early 1970's, the Bureau of Mines examined the "mineral resources and their potential on Indian lands" as part of its planning effort for

the Missouri River Basin. These reports compiled the existing literature on the geography, geology, mineral deposits and production on the reservations in that region. In 1974-75, the BIA initiated comprehensive "minerals inventories" of the reservations to support the Bureau's trust activities in this area. This continuing effort is being conducted in conjunction with the Bureau of Mines and USGS. It consists of three major phases:

- ° Phase I involves the collection and summary of all published and unpublished data on the geology of tribal mineral resources.
- ° Phase II involves limited exploration to confirm the findings developed in Phase I.
- ° Phase III involves an assessment of the quantity, quality and marketing characteristics of specific deposits.

Phase I studies have been prepared for all the coal-owning tribes participating in this study, with the exception of the Isabella Reservation. Phase II has been proposed or initiated for the Blackfeet, Cheyenne River Sioux, Fort Apache, Crow, Fort Belknap, Fort Berthold, Pueblo of Acoma, and Wind River Tribes. Phase III studies have been proposed or are in progress for the Pueblo of Laguna, Uintah and Ouray, and Wind River Tribes.

On those reservations where exploration and development of mineral resources is taking place, geologic data also are available from reports submitted by companies involved in exploration or development of tribal resources. Leaseholders and other contractors must submit records of all mine plans, core drillings, production, and related matters to USGS and/or the tribe involved. The federal trustee compiles available statistics on the quantities and quality of the minerals produced. In addition, for most areas undergoing exploration or development, the



tribe and the BIA maintain maps which indicate the extent of the mineral deposits, and ownership of surface and subsurface rights.

Water Resources. Maps and analyses of the reservation's hydrology and water resources have been prepared by various federal and tribal agencies. Many of these reports have been developed for specific purposes such as water rights assignments or litigation, irrigation projects, pollution control and water supply systems. The reports include: USGS "open file" investigations on ground water, water quality, and hydrology; water quality monitoring and planning in support of Environmental Protection Agency regulatory programs and the EPA 208 management programs, and Bureau of Reclamation plans and evaluations of irrigation, reservoir and power generation facilities. Furthermore, the Indian Health Service of the Department of Health, Education and Welfare maintains records on water wells within the reservation.

Land Use. Most tribal governments retain records on reservation land uses through permit, public facility and planning programs. These data are supplemented by the files and reports maintained by the BIA agency and area offices that administer realty, crop, forestry, roads, archaeological, and other programs. Many tribes have also undertaken the production of detailed economic development plans which identify and analyze the location of natural resources and potential sites for residential, commercial and industrial activities. A number of tribes are also preparing comprehensive land use plans under the Department of Housing and Urban Development's "701" planning program.

Tribes and/or the BIA maintain maps and aerial photos showing roads, utility rights-of-way, commercial and industrial sites, agricultural areas, forested areas and archaeological sites. Moreover, the

1980 Census of Housing will provide detailed data on the location of dwellings on the individual reservations.

Soils. Both tribal and trustee efforts have provided tribes with soil inventories on reservations. The BIA has prepared reports on the "Soil and Range Resources" of most western reservations. The U.S. Department of Agriculture also conducts soils surveys for the tribes. These studies are refined on sites selected for a particular development.

Other Data. The environmental base line data available to tribal officials also include reports on vegetation, forestry, fish and wildlife resources and on air quality and climate. Much of the vegetation research has been a product of BIA's soil and range surveys and BIA agricultural reports. The Bureau also provides forest inventories and management planning for the reservations. A number of tribes have worked with the U. S. Fish and Wildlife Service to identify and protect their fish and wildlife resources. Collection of air quality and climatological information generally has been done in conjunction with federal regulatory programs and includes data on the levels of particulates monitored under the Clean Air Act, meteorological characteristics for the airshed, average seasonal precipitation, and the average duration and velocity of prevailing winds.

In addition, many tribes have conducted studies or have been the subjects of regional socio-economic research to identify area economic and demographic characteristics and the potential impacts on reservation communities of new or expanded energy development activity.

## Organization of Tribal Data Bases

Portions of the physical resource data bases maintained by tribes are usually dispersed among the agencies of the tribal governments charged with different resource planning and management activities. Each of these agencies maintains its data base in a library and/or a computerized data file, and shares it on an as-needed basis with other tribal organizations. Examples of the most common administrative structures used by tribal governments to maintain these data for their resource management activities are described below.

Department of Natural Resources. A number of tribes have established Departments of Natural Resources to administer plans and regulations concerning natural resources. These departments are the repositories of the tribes' information concerning such natural resources as grazing, land, timber and water resources as well as data pertaining to coal, oil, gas and other mineral resources. The departments are generally organized into resource-specific divisions.

Environmental Protection Offices. Some tribes have established environmental protection offices to monitor the air and water quality on their reservations. This type of office is a source of environmental base line information concerning regional air and water quality, and is the repository for regional environmental impact statements. The Navajo and Northern Cheyenne Tribes' Environmental Protection Commissions are notable examples of tribal environmental protection offices.

Tribal Planning Offices. Most tribes have created planning offices which prepare both long and short range plans on how best to develop tribal resources. A tribal planning office usually is responsible for

compiling and producing land use maps, property ownership maps, population and income information, and specific data on individual development projects.

Research Projects. Some tribes have established "research projects" or independent research organizations. In a number of cases, it is this office which carries on the tribes' environmental monitoring activities, natural resource planning, and land use planning. In others, the research organization serves as an adjunct to the tribe's internal planning and resource management organizations. These organizations also conduct basic research to develop the physical resource data base. Examples of such projects are those established by the Northern Cheyenne, Northern Ute and Crow Tribes.

Other. The Bureau of Indian Affairs, at the agency level, is often an integrated part of each tribe's management effort, and provides technical assistance and other services. In many cases, BIA range-land experts, geologists and other officials work directly with tribal personnel in developing needed reports. The BIA also is the repository of the tribe's land ownership records.

For the most part, information concerning tribal physical resources is distributed among the relevant agencies rather than being stored in a single system. The format of most tribal data bases is that of a catalogued library of the various studies and analyses that have been compiled regarding tribal resources. As resource development expands, it will undoubtedly become necessary to computerize many types of data which are currently stored in other formats. The Northern Cheyenne Research Project has recently acquired a sophisticated time-sharing

computer system capable of supporting numerous scientific and administrative applications. All frequently-used data bases are kept on-line, allowing rapid access to, and analysis of, hydrologic, geologic and socioeconomic data. Other tribes also possess some computer facilities, and are working toward expansion and rationalization of their data bases and capabilities. The Jicarilla Apache, Uintah and Ouray, and Pueblo of Laguna tribes working in conjunction with CERT, have undertaken systematization of their physical resource data. On most reservations, the Department of Natural Resources or the planning office maintains the information system, and serves as the liaison with the external agencies which maintain regional resource data.

#### Use of Tribal Resource Data Bases

Tribal resource data are currently being used for various land use, water, minerals and environmental protection activities of the tribal governments. For example:

- ° Data on the geology, hydrology and chemical properties of tribally-owned minerals are currently being used by tribes to identify deposits which are economically feasible to develop. These data also are being used to evaluate exploration and development contracts;
- ° Water resource data are currently being used to determine water availability and suitable uses, to estimate average flow and flood patterns, and to locate potential groundwater reserves; Most tribes conduct water quality planning programs under the aegis of the Environmental Protection Agency;
- ° Land use data are being used to prepare comprehensive land use and zoning plans in order to designate and implement future mineral, recreational and agricultural development programs. Range land information is currently being used to establish proper range management programs, and to determine range improvement potential.

## OTHER RESOURCE DATA AVAILABLE TO TRIBES

The in-house tribal physical resource data systems are augmented and complemented through coordination of efforts with the agencies that collect environmental base-line data as part of their own programs and in support of tribal initiatives. Tribes have access to much physical resource and other data from federal, state and local governments, regional planning authorities, environmental groups, universities, information companies and mining companies. Among these are the following.

### Federal Agencies

Department of Agriculture. The USDA provides information upon request concerning a variety of subjects from agricultural statistics and prices to soils and vegetation mapping. Among the divisions within the USDA, the following are the most important sources of physical resource data for the tribes.

- ° Division of Agricultural Economics. This agency collects and analyzes information on farm land productivity, agricultural commodity demand and prices. The agency also makes forecasts of demand and prices.
- ° United States Forest Service. The USFS collects information on forest productivity, forest management, forest product evaluation and forest environments. USFS maintains Regional Forest Environmental Protection Units to monitor the forest environments and measure pollution damage.
- ° Soil Conservation Service. The SCS conducts soils mapping and other investigations. The agency classifies soils and rates their capabilities, in such areas as engineering suitability and irrigability.

Department of Commerce. The Department contains the Bureau of the Census and the National Weather Service. Both these agencies provide important data and information.

- ° Census Bureau. This agency provides population statistics and maps, and has just completed a mapping project in conjunction with the BIA on the reservations involved in this study. This effort will enable the Bureau to aggregate population, housing, and other statistics for each reservation in the 1980 census.
- ° National Weather Service. The agency provides current and historical base-line meteorological information. The National Oceanic and Atmospheric Administration also maintains an Environmental Research Lab and Environmental Data Service to supplement air quality base-line data.

Department of Energy. DOE is a source of information on national and regional energy demand, supply, prices and federal policy. Research conducted within DOE supplies information on extractive technology and on socioeconomic impacts of energy development.

Environmental Protection Agency. The EPA provides information on air and water quality, pollution monitoring and pollution abatement, and enforcement techniques. EPA's "Storet" program provides a computer print-out detailing correct environmental data for specific regions. The following divisions within EPA maintain important data relevant to mine regulation:

- ° Air and Hazardous Material Division. This division provides air quality and air monitoring information as well as information on toxic materials.
- ° Water Division. The division conducts water quality assessments and hydrologic studies.
- ° Surveillance and Analysis Division and Enforcement Division. This division conducts field investigations and enforces water and air quality regulations.

Department of the Interior. DOI is the largest single federal source of information related to tribal mineral resource programs. The department contains the United States Geological Survey, Bureau of Indian Affairs, Bureau of Land Management, Bureau of Mines, Office of Surface Mining, Bureau of Reclamation, and Fish and Wildlife Service.

- United States Geological Survey. USGS is a valuable source of maps, geologic reports and water resource reports to tribes. USGS also offers topographic and geologic mapping over most areas of the United States, and conducts geologic and hydrologic investigations throughout the country. The agency currently is contracting out a program to map the coal resources of all federal lands. In addition, USGS maintains a network of stream gaging stations to determine stream flow, flood frequency and water quality, and conducts water resource evaluations of both surface and ground water.
- Bureau of Indian Affairs. The BIA is the lead agency in programs concerning Indian lands. In the area of mineral development, programs sponsored by BIA are conducted in conjunction with the USGS. The BIA also maintains Indian mineral and surface land ownership records at both agency and area level offices.
- Bureau of Land Management. The BLM is in charge of managing all federal lands. In many cases, BLM lands are adjacent to reservation lands, and reports covering BLM lands are useful in evaluating adjacent reservation lands. The agency also produces surface management maps and minerals management maps.
- United States Bureau of Mines. The Bureau provides technical assistance in mining and reclamation technology, and can provide access to computer systems for reserve estimates, mine models and economic models of mining.
- Office of Surface Mining. OSM is the lead agency for administering the provisions of the Surface Mining Act. The Office promulgates the regulations that govern surface coal mining, approves and oversees state programs to administer the Act and regulates surface mining on Federal lands and in states which have not established an approved program. The Office conducts research and development in the area of reclamation techniques, collects reclamation information and maintains a data center for regulatory agencies to use. In addition, OSM sponsors State Mining Institutes which conduct research in mining and reclamation technology. The Office is divided into four divisions: Technical Services, Inspections and Enforcement, Abandoned Mined Lands, and State and Federal Programs. The Office is also divided into regions; most tribes are in the Western Region.



- Bureau of Reclamation. The Bureau is a source of water resource and soil irrigation information for lands on or near existing or possible Bureau land reclamation projects.
- Fish and Wildlife Service. The agency administers the Endangered Species Act and monitors the nation's fish and wildlife resources. This agency is a major source of wildlife population, migration and management information.

### State Agencies

State agencies which are functionally similar to federal agencies provide detailed information pertaining to natural resources on a state level. The state agencies most likely to provide valuable information to a regulatory authority are the departments of agriculture, state forest services, state resource offices, state geological surveys, state environmental protection offices, and reclamation authorities.

### Regional Planning Authorities

There are a number of regional planning authorities which cross state boundaries. These agencies typically supply planning support to state and local governments and, to a lesser extent, tribal governments. For the most part, they focus on regional economic development or environmental protection problems. Since tribes have often not been represented on these commissions, their needs have not always been adequately addressed. Nonetheless, the commissions have supported tribes on some occasions and continue to be a source for regional data. The Four Corners Regional Commission, the Old West Regional Commission, and the Missouri River Basin Commission encompass the land areas where most of the reservations with which this study is concerned are located.

### Other Sources

Local Governments. Local governments often have base-line data on air and water quality, and stream flow and flood frequency for streams within their boundaries.

Universities. Public and private universities conduct research on myriad subjects relevant to mining regulations. These include agricultural studies, geologic studies and water quality studies. Universities also serve as repositories for a wide range of information and as a source of computer facilities and laboratories.

Information Subscription Services. A number of private companies offer information subscription services with respect to environmental regulations and new developments. Some services provide geologic reports, drilling records and industry production and pricing statistics. Among the most helpful are: Environmental Reporter; Energy Users Report; Environmental Regulation Handbook; and reports from the Petroleum Information Company and the American Stratigraphic Company.

All of the coal-owning tribes have worked with a number of these agencies and information sources in their resource planning and management, and they can be expected to continue do so when regulating surface coal mining activities.

### SUMMARY OF TRIBAL REPORTS

The subcontracting tribes have all described their physical resource data bases and their mineral resource activities in their reports. The following passages provide a summary of that information and a brief consideration of comparable information for the other 18 affected tribes.

All of the tribes have established resource departments to administer their agricultural, fish and wildlife, forest, range and mineral resources. All tribes also have a planning authority to assist in land use plans and policy. The subcontracting tribes currently have the most extensive involvement in surface coal mining. The Crow and Navajo tribes are currently engaged in surface mining. The Three Affiliated Tribes of Fort Berthold, the Southern Ute Tribe, and the Uintah and Ouray tribes are all contemplating coal production in the near future. The Northern Cheyenne tribe is currently evaluating its existing coal permits and leases.

#### Crow

The Crow Indian Tribe reports that coal production and oil and gas activities are currently being conducted on their reservation. The coal leases date back to 1972, and tracts have been leased to five major coal companies. Of these, Westmoreland is currently the only producing lessee.

The Crow tribal government has established several agencies which maintain data relevant to surface mine regulation. The major agencies are: the Land Deferral Program; the Crow Land Records Program; the Crow Lands Study Project; the Crow Fish and Game Program; the Crow Reclamation Office, and the Crow Division of Natural Resources. In addition, the Crow Research Office does basic research on Crow coal resources. Within the Crow Tribal Council, three committees which have relevant areas of responsibility have been set up: the Crow Coal Authority; the Water Rights Commission, and the Air Quality Commission.

The tribe possesses several extensive bibliographies which indicate the geologic, hydrologic, land use and socio-economic information for the reservation and the surrounding area. A Geological Survey bibliography contains 38 citations which indicate data on area geology and hydrology. Another bibliography, supplied by the BIA Planning Support Group, indicates the availability of land use, environmental base-line and socioeconomic data. An additional bibliography was prepared for the Crow tribe in 1977 by the Rocky Mountain Research Corporation. This forms part of an analysis of physical resource data to be used in making recommendations for resource development and land use planning.

Data on Crow Reservation geology and mineral resources are to be found in reports by the U.S. Geological Survey (most recent surveys: 1973, 1974 and 1977). Included in this body of information are drill log data, structure contour maps and physical and chemical analyses of reservation mineral deposits. Analyses of area coals also have been undertaken by the U.S. Bureau of Mines (1932, 1946, 1951) and the Montana Bureau of Mines and Geology (1946). An airborne radiometric survey of the area was completed by the Atomic Energy Commission in 1952. Data on other minerals -- bentonite, gypsum, lime and limestone -- are available in various reports by the Montana Bureau of Mines and Geology (1949 and 1956) and the U. S. Bureau of Mines (1951). The BIA has completed the Phase I report in its comprehensive mineral inventory of the reservation.

Data on reservation surface and ground-water are available in reports by the Mountain Geologic Survey (1960), the Montana Bureau of Mines and Geology (1963), the U. S. Geologic Survey (1973) and several environmental assessments.

Land use and related data have been compiled for various environmental base-line and impact studies, which are cited in the Planning Support Group bibliography. In addition, the impact studies contain data on wildlife populations, vegetation, and socioeconomic groupings. Specific data on soils and range resources are available in studies completed by the Bureau of Indian Affairs (1971).

The Crow Tribe's Physical Resource Data Base Report outlines the major sources of information which are used by the tribe, and describes the working relationship established with each source. It also denotes each of the relevant tribal organizations which are responsible for parts of the tribe's physical resource data base. The addendum to the report identifies in greater detail the contents of the tribe's data base.

#### Fort Berthold

The Three Affiliated Tribes of the Fort Berthold Reservation report that oil and gas production is currently taking place. The tribes possess coal reserves which have not yet been developed. A tribal government task force has created an Office of Natural Resources and Energy Development (ONRED) to manage the tribe's natural resources.

The Fort Berthold Tribes possess an extensive resource data base. Their report lists available information concerning the reservation's water resources, land use, soils, mineral inventories and demographic statistics. The report also identifies gaps in the tribe's data base which are important for regulation of surface mining, and it includes an extensive bibliography.

The tribes possess extensive strippable lignite reserves, and have known desposits of other valuable minerals: construction aggregate: clay; salt; potash; and leonardite. The aggregates and clay can be surface mined; the salt and potash deposits are deep and necessitate solution mining processes.

The tribe's resource data base for water quantity is extensive and derives from USGS reports and monitoring. The available information concerning water quality is limited, however, and has only been collected from three points on the reservation. A general ground-water outlook is available for the reservation, but site specific data are needed. The soils of the reservation have been typed and mapped. However, analysis of soil characteristics, such as engineering qualities and irrigability, remains to be done. The major mineral resource inventory data for the reservation has been assembled by the BIA in its Phase I Mineral Inventory Program report, BIA Report 40. This report does not cover the Homestead Area of the reservation.

### Navajo

The Navajo Tribe is the largest Indian tribe in both enrollment and land area. The tribe owns large reserves of coal, oil and gas, and uranium, all of which are in production at this time.

The Tribal Council makes all resource development decisions. In its deliberations, it is supported by a number of agencies, commissions and committees. The Division of Internal Affairs for the tribe contains the Land Administration Department, which administers the use of tribal lands, and the Department of Natural Resources, which administers the tribe's fish and wildlife, range, forest and water resources. These offices maintain the relevant data for their areas of responsibility.

The Division of Community Services is responsible for community planning and water and sanitation planning and for maintaining data in these areas. The Mineral Department of the tribal Economic Development Division identifies the quantity and quality of energy reserves for potential development, and monitors development operations.

The Navajo Environmental Protection Commission conducts air and water quality monitoring and is in the process of developing a tribal pollution code. The Navajo Water Commission reviews the quantity and quality of Navajo water resources; this Commission is also responsible for developing water resource policy. The Navajo Tax Commission keeps production and royalty information from mineral leases. All of these agencies can draw on the tribe's in-house cartographic and computer facilities in compiling and maintaining data bases.

#### Northern Cheyenne

The Northern Cheyenne Tribe reports that it has estimated coal reserves in excess of 20 billion tons. However, the tribe has disputed the validity of coal leases and permits issued by the BIA during the late 1960's and early 1970's, and the lease situation is still unresolved. The Secretary of the Interior suspended the leases on June 4, 1974, but no definitive action, such as cancellation of the leases, has been taken. The tribe is involved in a legislative effort aimed at resolving the disputed coal permits and leases.

The tribe reports that it possesses numerous reports dealing with various aspects and evaluations of the geology of the reservation and surrounding areas. A number of USGS bulletins (1929, 1930, 1932, 1935, 1959 and 1976) have reported on the Sheridan, Ashland, Forsyth and Birney-Broadus coal fields and on the quality and reserves of strippable

coal deposits. A report by the U.S. Bureau of Mines (1967) provides additional data on the reservation's mineral resource potential. The Montana Bureau of Mines and Geology has issued reports on the quality and reserves of selected deposits which are on the reservation (1973) and on oil and gas deposits (1960). A 1971 report by the American Association of Petroleum Geologists provides data on the geology and potential of area petroleum reserves. The Bureau of Indian Affairs Phase I report of the comprehensive mineral inventory, BIA-3 (1975), provides extensive information on the status of mineral resources on the reservation. The BIA also completed, in 1973, a technical assessment of coal permits on the reservation.

Water resource data for the reservation are available in a USGS Atlas published in 1973, which covers the Northern Cheyenne reservation and adjacent area. Water quality data have been compiled by the Northern Cheyenne Research Project for an EPA "208" water quality program. In addition, two detailed reports have been prepared by the staff of the Northern Cheyenne Research Project staff on the hydrologic and hydrogeologic impacts of potential coal strip mining (1978, 1979).

Land resource data are also available from a number of reports. In 1977, the Research Project compiled overlays for the reservation with USGS 1:24,000 quadrangles. Land area and use data were prepared for the BIA in 1974. Soils data are available from a 1976 soil survey of the reservation. Range and agricultural resource data are currently being inventoried. Data on timber resources have been prepared for the BIA (1977). Vegetation mapping and ethnobotanical studies have been prepared under contract to the Bureau of Indian Affairs by local universities and the Montana State Historical Society. The U. S.



Environmental Protection Agency, the U. S. Fish and Wildlife Service and the Montana Fish and Game Department have all compiled data on reservation fish and wildlife population. The Northern Cheyenne Reservation has been included in a number of regional environmental impact statements and socioeconomic analyses, which have generated considerable information on the area's atmospheric, economic and demographic characteristics.

#### Southern Ute

The Southern Ute Tribe reports varying production levels of reservation coal, oil, and natural gas over the last 100 years. This has provided the impetus for a number of resource reports.

The tribe possesses six reports on its mineral resources that have been completed by the U. S. Geological Survey (1971), the Bureau of Indian Affairs (1976), the New Mexico Bureau of Mines and Mineral Resources (1973, 1975 and 1978) and the U. S. Bureau of Mines (1975). These reports provide data and evaluations of the geologic formations which underlie reservation lands, calculations of strippable coal reserves and the water requirements for coal utilization on the Southern Ute reservation. The tribe also possesses mineral resources maps prepared by USGS and BIA, as well as drill hole maps produced by Sunedco. The oil and gas data were first compiled by USGS and BIA in 1950 and revised in 1978. USGS maps prepared in 1972 and 1974 on the geology in general and on uranium deposits specifically are available at a scale of 1:250,000. A USGS fuel resources map prepared in 1954 is drawn to a scale of 1:62,500.

Water-related information include data on the quantity and quality of principal rivers entering the Southern Ute Reservation (USGS Water Resources Division, 1975), availability and quantity of groundwater for the reservation (USGS, 1977) and water quality (USGS, 1976). Municipal and industrial water use estimates and projections for 1974 to 2020 have been prepared by Kirchner Associates (1976).

Available land resources data include information on reservation forest stand conditions (prepared for BIA, 1978 as part of a determination of timber development potential). A soil and range inventory accompanied by an interpretive report and map atlas was prepared by the BIA (1966). Data are available for soil range groups, range conditions classes, tree canopy density classes, soil permeability, slope erosion classes and climate zones. A Colorado state funded "208" water quality management report (1978) contains data on reservation watercourses and annual sediment yields. In addition, some limited data on tribal arable lands are included in the Southern Ute comprehensive plans (1974).

The tribe also has an arable lands map drawn at a scale of 1 inch to 3000 feet. The reservation's archaeological resources have been surveyed generally by the University of Colorado (1970, 1971), and the construction of the Animas-LaPlata project has prompted additional studies by the Bureau of Reclamation (1976, 1978) pertaining to archaeology.

Other resource data which are relevant to the administration of the Surface Mining Act are production data for mining activities in the general area (1977), and air quality and climatological data (Colorado State Department of Health, 1976). Data on area temperatures and precipitation are available in Park Service reports for Mesa Verde.

Tribal officials currently use the available data in natural resource planning and management and in economic development efforts. The principal agencies with responsibilities in these areas are the tribe's Natural Resources Division, the Planning Office, the Economic Development Office and the BIA's Forestry, Land Operations, and Realty Divisions.

#### Unitah and Ouray

Oil and gas production on the Uintah and Ouray Reservation has been carried on since the 1950s. The tribe reports that it has an estimated 50 million tons of coal reserves and is interested in developing these reserves. The tribe also owns limited oil shale reserves which could be developed in conjunction with reserves on lands adjacent to the reservation. In addition, the tribe has measurable phosphate reserves. The Ute Tribe's Division of Resources administers the tribe's grazing, timber, agricultural and water resources as well as energy and mineral resources through its appropriate subordinated departments, in coordination with the BIA agency office.

The Ute Tribe has a research facility, the Ute Research Laboratory, that is funded by grants and contracts from federal agencies and private companies. Currently, the lab is conducting an air quality monitoring program in the Four Corners Region for the Environmental Protection Agency. The lab also provides geochemical analysis, agricultural testing, and water quality testing. Its capabilities include emission and infrared spectroscopy, gas chromatography and sample preparation and analysis. The state of Utah has assisted these endeavors through its sponsorship of a manpower development program, which helped train and staff the project.

The tribe also has a land use planning authority, the Master Planning Commission, which includes as members the Director of Resources, the EDA planner and other BIA and tribal personnel.

The tribe's available data has recently been supplemented by a set of maps (prepared by Meiji Resource Consultants) which update information on ownership of surface and mineral rights, and depict the location of oil, gas, coal, oil shale and phosphate deposits on tribal lands. General land records are maintained by the BIA Agency Realty Office, and supplemented by county land records. The Bureau of Mines and BIA are currently working with Meiji Consultants on the development of a detailed minerals inventory for the reservation. The BIA has completed Phases I and II of the Minerals Inventory; Phase III has been proposed for the next fiscal year.

#### SUMMARY REPORT OF THE EIGHTEEN AFFECTED TRIBES

The 18 non-subcontracting tribes included in this study, who are considered potential coal-developing tribes, were surveyed by telephone interviews with respect to their existing resource data base.

The survey sought four basic items of information: (1) the specialized departments, offices or agencies have been established to handle natural and mineral resources; (2) the resources these departments manage; (3) the extent of past, present and future mineral development, and (4) the type of studies, surveys or reports which have been done on their respective reservations.

The majority of the tribes have established agencies to study the tribe's natural resources and potential development. However, most of

these agencies have areas of responsibility which extend beyond development of natural resources and are concerned with overall economic planning and development. Two tribes maintain resource data for planning within general natural resource agencies; one tribe gave responsibility for resource planning and data maintenance to its environmental water quality office; and four tribes organized resource data within land use agencies. Most tribes have general planning offices, which are responsible for resource data compilation and maintenance as well.

Only eight tribes indicated that mineral or oil and gas development had taken place on their reservations in the past. Four tribes have some type of on-going development, and six tribes have definite plans for future mineral development. Many of the tribes interviewed expressed concern over the absence of complete and up-to-date mineral surveys of their lands, which, of course, is a prerequisite to any development decisions. All of the tribes indicated a need for additional, more detailed studies of their resources to more adequately assess their economic development potential. Over half the tribes were interested in beginning their own resource surveys. The most commonly available type of report seems to be the BIA Mineral Inventory Studies (Phase I, II and III studies).

#### CONCLUSION

All tribes have, to some extent, developed a physical resource data base and information system to support their resource planning and management efforts. The extent of the data coverage and the sophistication of the in-house information systems varies among tribes. The availability of information pertaining to surface coal mining and its

effects is related to the extent of mineral resource development activity experienced by each tribe. The extent of systemization varies with the needs of the tribal staffs utilizing the information.

The appended reports of the subcontract tribes show that extensive information is available on the physical resources of each reservation. Data and analysis exist on each reservation's geology, hydrology, soils, land use, ecology and other physical environmental attributes. In many cases, these data are dispersed among the agencies which have responsibility for the planning and management of specific resources, and are not synthesized in a single system. However, the operation of a centralized and computerized research data system on one reservation clearly demonstrates a tribal capability to manage such information with the same level of sophistication as other governmental entities.

P.L. 95-87 calls for the federal government to assist surface coal mine regulatory authorities in assembling the physical resource data and analyses necessary to carry out the provisions of the Act. It would therefore seem incumbent upon the federal government to extend similar assistance to the coal-owning tribes which establish regulatory authorities under the Act, when it is amended.

## **CHAPTER 8**

### **SPECIAL LAND STATUS**

## CHAPTER 8

### SPECIAL LAND STATUS

#### Introduction

The purpose of this Chapter is to identify those lands, to the extent possible, which may have special or uncertain land status under the provisions of P.L. 95-87. "Indian lands," for the purposes of mining regulation under SMCRA, are defined 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" (Section 701, Part 9).

CERT has consulted with the 25 affected coal-owning Indian tribes and has requested that they identify examples of areas which may be of special or uncertain land status in relationship to these provisions of the Surface Mining Act. Separate reports, describing or identifying lands of possible special status, have been developed by each of the subcontracting tribes. These reports and additional related materials, are presented in CERT's full report, Special Land Status (CERT, April 1979). A brief summary-overview of these reports, is presented below.

Other examples of possible special status lands, in addition to those identified in the tribal reports, might include the following: non-treaty aboriginal lands, checkerboard areas outside the exterior boundaries of the reservation, restricted lands, and dependent Indian communities.



It should be emphasized that nothing in this report should be construed as a legal interpretation of tribal land status. Such interpretations and analyses can only be done on a tribe by tribe basis by qualified attorneys.

#### CROW INDIAN RESERVATION SPECIAL LAND STATUS REPORT

The Crow Special Status Lands Report focuses on the Crow ceded area in which there is a producing coal mine operated by Westmoreland Coal Company. The Crow Tribe has been actively involved in litigation over the ceded area's status. In the tribe's report, the nature of the Crow ceded area is described and various legal and administrative actions pursued by the tribe are outlined.

The Crow Tribe ceded 1,137,500 acres of land to the federal government in the "Agreement of April 27, 1904." The undisposed portion of the ceded land was restored to the tribe in the Act of May 19, 1958. In restoring these lands to the tribe, the lands were to be placed in trust and to be considered as "added to and make part of the existing reservations for such Tribe or Tribes."

The tribe has been in dispute with the State of Montana over which has jurisdiction in the ceded area. The state and tribe have been in dispute over the taxation of the coal produced and over the beneficiary of the abandoned mined lands fund collected under P.L. 95-87 from the ceded area. The tribe's actions in this dispute are described in the tribe's report.

## FORT BERTHOLD RESERVATION SPECIAL LAND STATUS REPORT

The Fort Berthold Reservation submitted a narrative report and supporting maps defining ownership classifications of tribal and allotted lands. This report should assist the Solicitor's Office in identifying lands of special or uncertain status. The report also gives a comprehensive assessment of the tribes' coal reserves and mineral ownership status.

The report identifies and describes in considerable detail several specific types of land status, including the Homestead Area, the Taking Area, and acquired lands.

The Homestead Area was opened to homesteading by the Act of June 1, 1910, 36 Stat. 455. The tribe sought a definitive ruling as to the status of the area and won a court decision in 1972 in the Federal Appeals Court which affirmed the tribe's contention that the Homestead Act had no bearing on the status of the area and that the "Homestead Area" is and always has been a part of the reservation.

The Taking Area comprises an area in which the federal government took land for the Lake Sakakawea Reservoir. This included the area adjacent to the lakeshore, which is now administered by the Bureau of Land Management. The taking also included the mineral interests.

The tribe has also received a contract from the Farmers Home Administration of the U. S. Department of Agriculture to allow it to purchase lands for individuals. The tribe has concentrated its purchases on non-Indian or allottee-held lands within the reservation's boundaries. In the future, however, the tribe may purchase lands outside the reservation's boundaries.

## NORTHERN CHEYENNE RESERVATION SPECIAL LAND STATUS REPORT

The Northern Cheyenne Tribe has indicated that they currently have no lands which could be recognized as having special or questionable status under the definitions for Indian lands provided in P.L. 95-87.

However, the tribe has listed several categories of potential special status lands. These include possible future land acquisitions by the tribe by purchase, exchange, or claim settlement. Specific examples of current tribal activities in each of these areas are discussed in the report.

## SOUTHERN UTE SPECIAL LAND STATUS REPORT

The Southern Ute Tribe identified one area of tribal lands that might be of special or uncertain status. However, this area, the Archuleta Mesa, does not contain known coal reserves.

The tribe acquired the Archuleta Mesa in 1962 in exchange for lands lost due to the Navajo Dam Project. The tribe received 2,837 acres on the eastern side of Archuleta Mesa from the Bureau of Land Management. An additional 160 acres was purchased from a private land owner. Both the BLM and the private land owner retained the mineral rights.

The area could be considered as having special or uncertain status because it lies outside the exterior boundaries of the reservation. The importance of these lands to coal development is not currently significant, however, because no known mineral deposits are located on the property.

## UINTAH AND OURAY RESERVATION SPECIAL LAND STATUS REPORT

The Uintah and Ouray Reservation has submitted a two-part report. The first part of the report consists of a series of land status maps to aid the Solicitor's Office in identifying special status lands. The second part deals with the Red Creek Coal Mine lease which is located on a tract of land called the Forest Service Tract.

The Uintah and Ouray Tribes have identified the "Forest Service Tract" as one area of possible special or uncertain status. It is in the northwest portion of the reservation and contains approximately 13,511 acres. The area is within the original reservation boundaries created by Executive Order of October 3, 1861. The land was transferred from the tribe to the public domain through various allotments and land cessions. In 1956, the area was added to the Uintah National Forest, and was administered by the United States Forest Service of the Department of Agriculture. The mineral interests were restored to the tribe at the same time, and placed in trust. In 1966, the Forest Service exchanged that land for land owned by the State of Utah, and surface ownership is now held by the state.

In 1941, while these lands were still in the public domain, a 200 acre mining lease was granted by the Bureau of Land Management to the Red Creek Coal Company. The lease has subsequently changed hands several times; only an estimated 1000 tons of coal have been removed to date. This deposit is a 27 foot bituminous coal seam that is steeply dipping in some places, making it difficult to mine. Several coal mining companies have continued to express interest in developing the area; however, mining activities have not yet been resumed. The tribe

is currently attempting to persuade the present leaseholder to relinquish the lease. The tribe feels this should be done because the present leaseholder's failure to develop the mine is depriving the tribe of royalty income.

The "Forest Service Tract" is considered to be of special status because the State of Utah, which owns the surface, has assumed jurisdiction over mining in the area. The tribe, however, may have legitimate rights to jurisdiction, according to the definition of Indian lands given in P.L. 95-87 which includes as Indian Lands ". . . all lands including mineral interests held in trust . . ." (Section 701, Part 9). For further information, see the tribe's report entitled "Red Creek Coal Lease History," in CERT, Special Land Status (April 1979).

The tribe currently is trying to negotiate a compact with the State of Utah concerning tribal rights to water, hunting, fishing, and other jurisdictional matters. The tribe's contention is that Acts of Congress that subsequently reduced the tribe's land holdings, creating a checkerboard pattern of land ownership, did not vacate the original reservation boundary. The tribe is seeking a compact to enumerate its rights within the original reservation boundaries.

The state legislature has proposed bills supporting the compact but none have been enacted. The tribe may therefore initiate court action; hearings are scheduled to begin late in 1979.

If the compact is upheld in court, the tribe could claim that the original reservation boundaries have been accepted as the "exterior reservation boundaries." This could allow the tribe to seek control over mining in all areas within the original reservation boundaries under the portion of the P. L. 95-87 definition of Indian lands as

" . . . all lands, including mineral interests, within the exterior boundaries of any Federal Indian Reservation, notwithstanding the issuance of any patents and including rights of way . . ." (Section 701, Part 9).

SECTION III

ALTERNATIVE MODELS AND TRIBAL RECOMMENDATIONS  
FOR SURFACE MINING CONTROL AND RECLAMATION  
ON INDIAN LANDS

### SECTION III

#### ALTERNATIVE MODELS AND TRIBAL RECOMMENDATIONS FOR SURFACE MINING CONTROL AND RECLAMATION ON INDIAN LANDS

The Surface Mining Control and Reclamation Act gives states the authority to regulate surface coal mining on state lands in accordance with regulatory programs which meet the requirements of the Act. The Act also requires the Department of the Interior, after conducting a study in which Indian tribes may participate, to submit legislation to Congress which would enable the tribes to elect to assume full regulatory authority over surface mining on Indian lands in a manner consistent with the purposes of the Act.

The current study represents a significant effort by Indian tribes affected by the regulation of surface coal mining to analyze existing requirements for approved regulatory programs, to evaluate these requirements in relationship to the reservation regulatory setting, to develop and examine alternative models for the regulation of mining on Indian lands, and to make specific recommendations for legislative action. It is the culmination of many hours of work, including discussion, data gathering, analysis, and workshops carried out by the 25 affected tribes and the Council of Energy Resource Tribes.

In Sections I and II of this study, the regulatory program requirements of the 1977 Act and the regulatory setting on Indian lands were discussed. In Section III, which follows, we consider alternative methods for surface mining control and reclamation on Indian lands and present tribal recommendations for a regulatory scheme under new legislation.



The first chapter of this section, Chapter Nine, sets out a range of alternative models and provides a framework for tribal analysis of surface mining control and reclamation issues in relationship to the Indian Lands Study. Chapter Ten focuses on various practical factors, such as staffing needs and costs, which are relevant to an evaluation of the program models and to the formulation of legislative recommendations. Chapter Eleven analyzes a number of special policy issues relating to Indian lands. Chapter Twelve presents an overview of the tribes' application of this analysis in relationship to their specific regulatory setting, and concludes with a set of tribal recommendations for future legislation on surface mining control and reclamation on Indian lands.

## CHAPTER 9

### ALTERNATIVE MODELS: AN ANALYTICAL FRAMEWORK FOR TRIBAL EVALUATION OF REGULATORY OPTIONS ON INDIAN LANDS

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### ALTERNATIVE MODELS: AN ANALYTICAL FRAMEWORK FOR TRIBAL EVALUATION OF REGULATORY OPTIONS ON INDIAN LANDS

In this Chapter, various alternative models for the regulation of surface mining and reclamation on Indian lands are discussed. These alternative models were designed to provide an analytical framework for the tribal evaluation of regulatory options on Indian lands, conforming in part with proposals previously generated by the tribes. They were developed to present a broad range of viable regulatory programs for tribal consideration and to provide a common framework for discussion and analysis.

While there are many possible models for regulatory programs on Indian lands, this analysis will focus on the following:

1. The State Model - This model involves the requirements, discussed in Part I, which a state must meet to have an approved regulatory program; and

2. Alternative Models for Indian Lands under New Legislation -  
The alternative models for regulatory programs on Indian lands represent a continuum from full tribal control to full federal control, with two intermediate models for the division of functions or the joint performance of some functions. These models represent the major options in this range. It is possible to use a combination of them.

In addition to the various tribal and/or federal programs, other options, such as an inter-tribal regulatory authority or a tribal/state program, are discussed briefly. These present the same possible continuum as between the tribe and the federal government, but with a

different governmental entity. A brief description of the models is given below:

a. Full Tribal Model - This model discusses full tribal control of a surface mining regulatory program and explores possible variations from the state model based on special Indian considerations;

b. Full Federal Model - This model involves full federal regulation of coal strip mining on Indian lands;

c. Divided Tribal/Federal Model - Under this model, the tribe would perform some regulatory functions while the federal government would perform others;

d. Joint Tribal/Federal Model - Certain regulatory functions under this model would be shared or performed jointly by the tribe and the federal government; and

e. Other Models, including --

1. Inter-tribal Model - This model explores the possible roles of an inter-tribal regulatory authority, and

2. Tribal/State Model - This model discusses the possibility of a divided or joint program between the tribes and the states.

These models were chosen because they represent a manageable and viable means of discussing program types, they conform in part with proposals already generated by tribes, and they offer a broad arena for comparing and analyzing basic directions which may be open to tribes in regulating surface mining.

In evaluating these models, one could conclude that the best program for Indian lands might be a combination of one or more of these models. For example, a tribe may wish full tribal control of some

regulatory functions while performing other functions jointly with the federal government. Similarly, it is possible to phase in models over a period of time. The tribe may wish, for example, to start with a joint tribal-federal program and over several years to phase in a fully tribal program.

Each of these models assumes a substantive program with all or some of the regulatory program elements discussed previously in relation to state program requirements. We have delineated eight basic program elements in order to provide tribal members a convenient and common analytical framework for evaluating proposed models. Briefly, these substantive program elements are as follows:

1. Performance Standards - These are requirements that govern the actual mining and reclamation processes to ensure that they are conducted in a manner which is not harmful to the environment or to public health and safety. For example, the Act protects the hydrologic balance, the air quality and the productive capacity of the soil disturbed by requiring a wide range of specifications by the operator in each of these areas.

2. Permit System - Under the Act, a permit is a license to conduct mining, on lands owned or leased by the permittee, which is issued by the government with jurisdiction over the lands. To obtain a permit, very detailed information must be submitted on characteristics of the land and ecology, the operator's legal and financial situation and past history of complying with the law, and the proposed mining and reclamation operations. If a permit is issued, it must be conditioned on compliance with all applicable laws. Further conditions also may be imposed.

3. Bonding and Insurance Requirements - To operate a strip mine under the Act, the operator must have not only a permit but also adequate bonding and insurance. Bonding is a financial guarantee by the permittee that, if the permittee fails to live up to the terms of the permit, sufficient money will be available to the regulatory authority to reclaim the land. The permittee also is required to carry insurance adequate to cover any personal injuries and property damage which may result from the operation.

4. Inspection and Enforcement - These concepts cover a wide range of the regulatory authority's activities to ensure that the mine is operated in a lawful and environmentally sound manner. The regulatory authority conducts a certain minimum number of inspections. If a mine is not complying with the law or otherwise poses a hazard to the environment or the public, under the Act, a regulatory authority must have many powers available to require the mine operator to correct the problems.

5. Administrative and Judicial Review - Various legal proceedings may arise from a strip mine's operation and regulation. The regulatory authority may seek to force an operator to comply with the law. The operator may challenge the actions of the regulatory authority. Adversely affected individuals may seek relief from both the regulatory authority and the operator. Under the Act, the regulatory authority must have a legal system to deal with these cases.

6. Designation of Lands Unsuitable for Mining - This is a proceeding by which the regulatory authority, on its own or upon petition from an interested individual, may declare land off-limits for mining because it cannot be reclaimed successfully or for certain other reasons.

7. Public Participation in the Regulatory Process - Many rights are granted to citizens to allow them to participate in various stages of the regulatory process, such as intervention rights, access to information and the award of attorney's fees and costs.

8. Miscellaneous Program Elements - This category includes lesser elements of an approved regulatory program, such as the training and certification of blasters, as well as any additional aspects of the program which may not be covered in the seven major program elements defined above.

The substantive program areas described above are drawn from the State Model. Variations on all of them are possible for an Indian lands program. While we discuss possible variations only in one of the tribal models, these and other possible variations in the substance of the regulatory program apply equally to all the alternative models.

Both the substantive program and the model for allocation of regulatory responsibilities should reflect the special circumstances of mining and regulation on tribal lands. Thus, in designing a tribal program, one must focus not only on surface mining and reclamation requirements, but also on tribal needs and tribal capabilities.

We turn now to the models themselves.

#### MODEL I: FULL TRIBAL REGULATORY PROGRAM

Under this model, the tribe assumes full control of its own regulatory program. The primary advantage of adopting a full tribal regulatory program is that the tribe would enjoy complete control over the mining and reclamation activities on its lands.

In addition to the tribe's current powers, the tribe could designate lands unsuitable for mining and administer a permit system for those lands where mining takes place. Designation would provide a land use planning tool for lands over which the tribe has jurisdiction but which are not tribally owned, and permits may be suspended or revoked for non-compliance. The decisions associated with the designation and permitting processes, moreover, would be based on ample technical information.

The tribe also would maintain day-to-day control over operations through its inspection and enforcement powers. A tribal administrative and judicial review system would provide the forum to resolve disputes arising from mining activities.

The primary disadvantage of adopting a full tribal regulatory program is the need to commit significant tribal resources to the tasks. The problems associated with full capability, however, probably could be resolved by a combination of a regulatory program designed to the proper scale of the operations to be regulated and the availability of federal funding and technical assistance. It is assumed, for this model and all others involving some degree of tribal control, that federal funding and technical assistance will be available.

#### A. Adopting the State Model

One such full tribal regulatory program is the State Model program, described in Chapter Two, which could be adopted in its entirety under a new federal statute, with the exclusion of certain aspects which are not applicable to Indian lands.



The capability required to implement, administer and enforce such a program, naturally, would be much the same as that required of a state in a comparable situation in terms of size, numbers and types of mines to regulate. These factors are discussed in greater detail in Chapter Ten.

**B. Variations on the State Model to Suit Indian Needs and Circumstances**

Under the Full Tribal Regulatory Program model, as well as all models which follow, it is possible and perhaps desirable to vary certain program elements of the state model based on circumstances unique to mining and regulation on Indian lands. Tribal recommendations regarding variations from the state model are discussed in later chapters.

Of the eight program areas:

Performance Standards;

Permit System;

Bonding and Insurance;

Inspection and Enforcement;

Administrative and Judicial Review;

Designation of Lands Unsuitable for Mining;

Public Participation; and

Miscellaneous,

some are more likely to suggest variations from the state model than others. Administrative and Judicial Review and Public Participation are two areas where the unique circumstances of Indian tribes may call for deviations. The Performance Standards and Bonding and Insurance, on the other hand, may be less likely to call for variation. All elements of this and other tribal regulatory program models conceivably could be

different than those in the state model program, as long as the program provides for regulatory control and protection of the public and the environment that is no less stringent than the standards of the Act.

Tribes involved in the study were encouraged to propose and evaluate variations in the program elements delineated above, in conjunction with their analysis of the program models. Two examples of how a tribe might approach the question of program element variations are presented below. It was emphasized that any proposed variation viewed as "less stringent" than the requirements of the Act would require special justification and probably special legislative authorization. [NOTE: CERT does not necessarily recommend the following sample variations. They are presented as samples, for demonstration purposes only. It is hoped that they will provide to tribes concrete examples of ways in which the structural models and the substantive program elements may interact during the consideration of various tribal programs.]

#### 1. Sample Variation #1: Enforcement

First, let us consider a sample variation from the state model's enforcement provisions. They are premised on a need to regulate a large number of mines operated by persons with a record of non-compliance with the law and disregard for the environmental and public health and safety consequences of their activities. Thus, the enforcement scheme is premised on the need to regulate a large number of mines, and to impose mandatory and tough sanctions and penalties for violations. This model is perfectly justifiable for state programs in the East, where there are many mines run by many operators, and where there has been a serious problem of lax enforcement. It also makes some sense in the West, although there are fewer mines.

The state model may make less sense, however, as a regulatory model for enforcement on some tribal lands. For example, the state model provides for mandatory permit suspension when the regulatory authority finds that the permittee has committed three or more violations of the same or related requirements during three or more inspections of the permit area within a 12-month period. On tribal lands, where the tribal inspection presence is apt to be much greater at a mine than would a state regulatory authority's, permit suspension could occur repeatedly on a small volume of violations without any real enforcement or environmental benefits.

As a conceptual matter, possible enforcement approaches might include:

- ° A state-scale enforcement scheme, with mandatory sanctions, where the tribal situation resembles that of a state, regulating extensive mining by non-tribal entities.
- ° A small-scale mandatory enforcement scheme, where fewer mines are regulated. This might entail, for example, a new approach to civil penalties. While civil penalties would remain mandatory, the penalties might not be assessed according to the present statutory criteria (history of previous violations, seriousness of the violation, negligence, and good faith abatement of the violation). Rather, civil penalties could be geared to deprive the operator of any economic gain accruing from a series of violations, or some other measure which makes sense and is manageable in a small-scale regulatory context.
- ° A small-scale discretionary enforcement scheme, again where few mines must be regulated. Here, the exercise of sanctions and penalties would be lodged in the discretion of the tribal regulatory authority.

## 2. Sample Variation #2: Public Participation

Another major area which could be affected by unique tribal considerations is the matter of public participation in the tribal regulatory process.

Under the state model, expansive rights are granted to citizens with respect to participation in the development, revision, and enforcement of state regulations, programs, and permits. The rationale for this is as follows:

"The success or failure of a national coal mining regulation program will depend, to a significant extent, on the role played by citizens in the regulatory process. The state regulatory authority or Department of the Interior can employ only so many inspectors, only a limited number of inspections can be made on a regular basis and only a limited amount of information can be required in a permit or bond release application or elected at a hearing. . . . While citizen participation is not and cannot be a substitute for governmental authority, citizen involvement in all phases of the regulatory scheme will help ensure that the decisions and actions of the regulatory authority are grounded upon complete and full information. In addition, providing citizen access to administrative appellate procedures and the courts is a practical and legitimate method of assuring the regulatory authority's compliance with the requirement of the Act." (S. Rep. 95-128, at 59.)

In other words, Congress saw participation as a necessary supplement to the efforts of the regulatory authority. Citizens also could monitor the actions of the regulatory authority itself. This makes sense under the state model because (1) state regulatory resources often are stretched thinly to cover many mines and also because (2) many states had demonstrated a lack of will in regulating surface mining.

The first of these considerations probably is not applicable to most Indian reservations, given the few mines to be regulated. The second consideration also may not be applicable with respect to the tribes. The relationship of the tribe to its members and resources may be different from that of the state government to its citizens and resources within its borders.

On the other hand, public participation provisions may be a positive feature for the tribes. The tribes may wish to give their members these various opportunities for direct participation in the regulatory decisions and actions affecting tribal lands.

Participation of persons off the reservation also must be considered. There may be adjoining or nearby property owners, for example, with legitimate concerns as to mining control and reclamation on tribal lands. Potential abuse of any public participation rights afforded non-members off reservation probably could be avoided by limiting participation to those persons with "an interest which is or may be adversely affected" by the mining activity. This is often the standard for participation under the existing Act. Moreover, any abuse could be limited where the tribe is the regulatory authority and review functions are performed by tribal courts.

Considerations such as these, among others, might be applied to a tribe's analysis of the role of public participation, in each of the following areas:

- ° Development, approval, and revision of tribal programs;
- ° Permitting and bonding process;
- ° Citizen reports, violations and hazards and inspection requests;
- ° Right to accompany the tribal inspector onto the minesite;
- ° Right to review of tribal action or inaction;
- ° Right to initiate and to participate in administrative and judicial proceedings;
- ° Right to petition for and to participate in the process of designation of lands unsuitable for mining; and

- ° Rights of access to tribal regulatory authority information.

The areas discussed above -- Enforcement and Public Participation -- are merely two examples of areas where Indian needs could suggest variations from the state model. As noted above, the many possible variations will be further developed in consultation with the tribes.

When variations are identified, their impact on the showing of capability required for that program function must be considered. In many instances, program variations will be designed to suit a smaller scale regulatory authority for tribal lands; thus the capability required will not be as great as under the state model.

#### C. Ancillary Programs

These programs, i.e., research and education programs and an abandoned mine reclamation program, are not an integral part of an approved regulatory program. It is assumed, for purposes of this and subsequent models, that even those tribes without an approved regulatory program will wish to participate in existing and new research and education programs. Options in this area also were developed in consultation with the tribes, and are discussed in Chapter Twelve.

It is also assumed that each tribe with an approved regulatory program, under any of these models, and with abandoned unreclaimed mines on tribal lands, will wish to participate in the abandoned mine reclamation program. As currently legislated, the program makes explicit provision for Indian Lands.

## MODEL II: FULL FEDERAL REGULATORY PROGRAM

Another alternative is full federal regulatory control over mining and reclamation on Indian lands. The model for such a program is the federal program implemented for a state where no state program is submitted, a state program is disapproved, or approval of a state program is withdrawn. (30 CFR 736).

The Federal Model is identical to the State Model, except for the following changes:

- ° Changes which are necessary or desirable as a result of the state's unique physical conditions;
- ° Changes necessary to implement other federal laws imposing duties on the Department of Interior, such as the Endangered Species Act, and
- ° Changes to coordinate the review and issuance of strip mine permits under the federal program with any federal, state or local planning or permit process for such operations under other laws, such as the Clean Air Act and the Clean Water Act.

With a full federal regulatory program on Indian lands, the tribes would not have to commit any resources to the regulation of surface coal mining and reclamation. On the other hand, the tribes would lose all control over the nature and quality of such regulation, except in exercising existing leasing and contracting powers and public participation rights granted under a federal program.

The models considered so far, the Full Tribal Regulatory Program and the Full Federal Regulatory Program, represent the opposite ends of the tribal-federal regulatory spectrum. Two intermediate models on the spectrum will now be discussed: the "Divided Tribal-Federal Program Model" and the "Joint Tribal- Federal Model".

### MODEL III. DIVIDED TRIBAL/FEDERAL PROGRAM

This model contemplates a substantive program like that set forth in the Full Tribal Regulatory Program model above, but with a division of responsibility for the listed functions between the tribe and the Federal government.

A discussion of the division of functions, and the pros and cons of tribal or federal responsibility, ensues under each function. Performance standards remain constant as they are not a function. Under all models, there is flexibility to alter performance standards to suit unique physical conditions. Public participation issues are discussed in the context of the function to which they relate. This leaves: (1) Permitting and Bonding, which as part of the same process logically are performed by the same regulatory entity; (2) Inspection and Enforcement; (3) Administrative and Judicial Review, and (4) Designation of Lands Unsuitable for Mining. The need to demonstrate capability, via program submission, remains the same as described previously for each of the functions over which the tribe would assume control.

#### 1. Permitting and Bonding

Under this model, permitting and bonding may be wholly the function of the tribe or wholly the function of the federal government. If the tribe assumes this function, it will enjoy control over the implementation of mining and reclamation performance standards on its lands and over the ultimate assurance that the standards will be met and its members' persons and property insured. On the other hand, this part of the regulatory process is most demanding in terms of the need for specialized staff.



It is possible, however, under this model to subdivide the function of permitting and bonding. For example, the federal government could perform the technical functions and make recommendations to the tribe, which would review and make final decisions on the permit application.

## 2. Inspection and Enforcement

Tribal performance of this function would assure day-to-day control over mine operations, including responses, if required, to citizen complaints. While not requiring as great a commitment of resources as the permitting and bonding process, inspection and enforcement by the federal government would reduce the tribe's regulatory costs. Administration of the permitting and bonding system, as well as the administrative and judicial review functions, might provide the tribe with sufficient control over its resources and program. On the other hand, the tribe would be dependent on the diligence of federal inspectors to monitor compliance and to refer matters to the tribal court.

Again, it is possible to subdivide the inspection and enforcement functions to balance these interests. For example, the tribal program could require a minimum number of partial and complete federal inspections with referral of matters that do not involve imminent hazards to the tribe for enforcement action.

## 3. Administrative and Judicial Review

As the administrative and judicial review bodies will be the ultimate arbiters of many disputes, the tribe may wish to assume this function. On the other hand, it may prove difficult or administratively burdensome in certain circumstances to establish an administrative court or judicial system which would meet federal program requirements.

If the federal government assumes judicial review responsibilities, the likely authority would be the U. S. District Court for the region in which the tribal headquarters or the mine is located. The drawback with this approach is that the U. S. Attorney would have discretion as to whether to prosecute cases, and the tribal viewpoint would not necessarily be represented.

There are a number of possibilities for subdividing this review function. For example, the tribal court could assume administrative review responsibilities and the federal government could conduct the judicial review proceedings.

Note: If federal legislation under which tribal court jurisdiction has been usurped by the states is not amended, then certain tribes may find it necessary to divide this function with the state government.

#### 4. Designation of Lands Unsuitable for Mining

Tribes effectively have control already over the designation of tribal lands unsuitable for mining through their ownership powers. Where there are non-tribally owned mineral interests (e.g., non-Indians' or allottees), however, the designation process may be a useful land-use planning tool for the tribe. Tribal members also may wish to have the right to petition the tribal regulatory authority to set aside certain tribal lands as unsuitable for mining.

Such a system requires the development of a large data base and inventory system on which to base evaluation of reclamation feasibility, and it requires significant involvement of specialized staff. Much of the data and many of the personnel, however, also would be useful for other functions which a tribe may wish to undertake as resource owners.

To the extent a tribe believes a designation system would be necessary or useful, it could divide the function with the federal government, relying on federal agencies to perform the technical work while retaining the ultimate authority to decide on designation.

## 5. Conclusion

There are advantages and disadvantages to each of the various program divisions. For example, a tribe which does not wish to commit substantial resources may retain considerable control over its land through its authority as the resource owner and assumption only of administrative and judicial review functions.

The division of responsibilities may be accomplished through approval of a partial tribal program and the execution of a tribal/federal cooperative agreement. The Act, for example, provides for state/federal cooperative agreements whereby a state may agree to regulate mining activities on federal lands within the state according to terms of the agreement. (Sec. 523(c)).

## MODEL IV: JOINT TRIBAL/FEDERAL PROGRAM

We already have looked at models for full tribal or full federal control, and a model where control would be divided between the tribe and the federal government. We turn now to a model of a Joint Tribal/Federal Program. This model, too, assumes a substantive program such as that set forth in the Full Tribal Model, and its difference is merely in terms of allocation of responsibility. All or some of the functions may be shared, or performed jointly, by the tribe and the federal government, rather than one or the other having full control over that function. Aspects which tribes may consider in the pros and cons of these joint regulatory programs are discussed under each function.

### 1. Permitting and Bonding

The tribe could share fully or partially its responsibilities for permitting and bonding under this model. The reasons for doing so are the same as those cited above for dividing these responsibilities. The primary advantage of the joint approach is technical assistance from the federal government's permitting and bonding staff with the opportunity for tribal learning and/or input throughout the process. This would be particularly helpful where regulatory programs of different types are phased in, for example, a joint program for three years and then a full tribal program. It also is possible to subdivide this function under the joint model. For example, the tribe could share the technical review process and reserve full control over the decision process.

### 2. Inspection and Enforcement

The same rationale offered above for the sharing of permitting and bonding is applicable here. Inspection and enforcement, however, involves more subjective judgments than the permitting and bonding process. For example, if cessation orders for imminent hazards are part of the tribal regulatory program, there are a number of judgment calls, such as how "imminent" is the hazard, or how soon will the harm occur if the problem goes unresolved? Sharing in such judgments may be difficult.

On the other hand, inspections could be conducted jointly by the tribe and the federal government, with the tribe reserving full control over enforcement action to be taken.

### 3. Administrative and Judicial Review

It does not seem possible to share administrative and judicial review responsibilities, with the possible exception of establishing a

joint tribal/federal review commission. This would involve relinquishing some degree of tribal sovereignty.

#### 4. Designation of Lands Unsuitable for Mining

As noted above, under the Divided Tribal/Federal Model, tribes already exercise considerable power in land use planning on tribal lands, which probably should not be shared or relinquished.

With respect to non-tribally owned mineral interests under tribal jurisdiction, the designation process is a desirable but highly technical and costly feature of a regulatory program. Sharing responsibility for this function with the federal government would have the same advantages and disadvantages as those cited above for permitting and bonding. Here, too, the tribe might share the responsibilities for establishing a data base and inventory system, and even the technical review process, while retaining full control over the decision process.

#### 5. Conclusion

Some combinations are more likely than others, such as sharing only the technical aspects of the permitting, bonding and designation processes. The Joint Tribal/Federal Model would seem to offer several advantages to a tribe whose goal was to phase in greater regulatory control over time.

This model may be implemented in much the same manner as the Divided Tribal/Federal Model, i.e., through a complete, approved tribal regulatory program, supplemented by a cooperative agreement with the federal government in certain areas.

#### OTHER ALTERNATIVE MODEL REGULATORY PROGRAMS

Again, the initial substantive program is assumed to be that set forth in the Full Tribal Model.

#### MODEL V. INTER-TRIBAL REGULATORY PROGRAMS

Possible allocations of responsibility between tribes and/or an inter-tribal authority are discussed below.

##### Sole Inter-tribal Regulatory Authority

Under this model, one inter-tribal regulatory program might function for all Indian lands. The advantage would be a pooling of resources. The disadvantage would be each individual tribe's loss of control over the management of its own resources, once a leasing or contracting decision is made.

Theoretically, there could be divided or shared responsibility between such an inter-tribal entity and the federal or state government. There probably would be little need for such an arrangement, however, given the concentration of all tribes' resources.

There also could be a more limited inter-tribal regulatory program, involving, for example, only two tribes where a mine crosses tribal boundaries. Historically, there is an example of an inter-tribal regulatory program. The Hopi and Navajo created a Joint Commission to regulate the Black Mesa Mine, located in an area disputed by both tribes. While the dispute was litigated, the Joint Commission looked after the economic and reclamation interests of the tribes.

##### Divided or Joint Inter-tribal/tribal program

Under this form of the model, the tribe might retain its control while using the greater technical resources of the inter-tribal unit, among other options.

## MODEL VI: TRIBAL/STATE REGULATORY PROGRAM

Tribes, through cooperative agreements with states, could enter into the type of programs discussed above with respect to divided and shared tribal/federal programs. The benefits are the same and requirements are the same. Such a tribal/state program, however, would involve justifying the state's capability as well as the tribe's and might be hampered in its implementation by sometimes-strained relations between state and tribal governments, which often compete for jurisdiction.

Such a program -- particularly a shared program -- might be in order where a mine is located across a boundary on both state and tribal land. A cooperative agreement could be implemented for a shared regulatory authority over dual jurisdiction mines. Full jurisdiction, on the other hand, could be granted by cooperative agreement to one administrative authority or the other, based on mutually agreed upon conditions.

### Conclusion

We wish to stress again that there are many options in terms of the substantive nature of a tribal program (e.g., what kind of enforcement scheme will there be?) and the allocation of responsibility for carrying out the program (e.g., who will have enforcement responsibility?). We have presented only hypothetical programs to aid the tribes in considering what type of program would best suit their needs.

An idea of the options and capability requirements for the various possible substantive programs can be formed by looking at the components of the State Model and Full Tribal Program Model given above. The amount of authority for the program functions which may be delegated to or shared with other governmental entities is discussed in the other models.

It is important to keep in mind several concepts while considering these alternative models:

- There are many varieties of substantive programs that are possible within each of these models.
- There is the possibility of mixing these models, for example, of sharing some functions, dividing responsibility for some functions and retaining sole authority for others.
- There is the possibility of phasing in certain models; for example, going from shared to sole authority over a period of time.

Both the substantive program and the allocation of responsibilities should reflect the special circumstances of mining and regulation on tribal lands. Apart from the theoretical advantages and disadvantages of various program options, other factors are relevant to choosing and refining the appropriate regulatory program for Indian lands. These factors include costs and staffing requirements associated with various tribal program models as well as special policy issues relevant to the regulation of coal mining on Indian lands. These special factors are analyzed and discussed in the following two Chapters.



## **CHAPTER 10**

### **ANALYSIS OF STAFF NEEDS AND ASSOCIATED COSTS FOR TRIBAL REGULATORY PROGRAMS**

## CHAPTER 10

### ANALYSIS OF STAFF NEEDS AND ASSOCIATED COSTS FOR TRIBAL REGULATORY PROGRAMS

#### Introduction

The cost associated with mine regulation is one of several factors that tribes may want to consider when evaluating program model options and when making recommendations for legislation.

In this chapter staff needs and associated costs are estimated for a hypothetical tribal regulatory program. The costs are estimated from data provided by the Office of Surface Mining and from mining regulatory program operating costs of several western states.<sup>\*/</sup>

#### ASSUMPTIONS AND FORMAT

The following cost estimates assume existing state program requirements of the Surface Mining Act, and full tribal regulatory authority. In addition, the cost estimates are broken out by components of the regulatory process, so that tribes also may use costs and skill needs as factors in their evaluation of various partial regulatory programs.

The following costs are estimated on a unit basis, i.e., for one large mine (roughly 5 million tons per year) for one year. Thus, tribes may manipulate these cost estimates to correspond with a wide range of mining scenarios and specific reservation circumstances, by factoring into their calculations projected number of mines, duration of regulatory effort, intensity of the regulatory effort, etc. A qualitative estimate of how these costs would vary in relationship to these factors is given for each component of the regulatory process.

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<sup>\*/</sup> States surveyed include Wyoming, Montana, Utah, New Mexico and Colorado.

The components of the regulatory process for which costs have been estimated, and the substantive program elements to which they primarily relate are:

- (1) Administration (Administrative Review, Public Participation, Miscellaneous)
- (2) Mining Plan/Permit Review (Performance Standards, Permit System, Bonding and Insurance Requirements)
- (3) Inspections and Enforcement
- (4) Designation of Lands Unsuitable for Mining

It should be stressed that a great many uncertainties or variables exist which will affect cost estimates and their application to a specific tribal situation. These include such factors as the structure of the tribal regulatory agency and its interface with other ongoing planning and regulatory efforts (tribal or non-tribal), the degree and type of technical assistance available to the tribe, regional variations in pay scales, uncertainties regarding federal funding formulae for tribal programs, possible variations in tribal program requirements from those which currently exist for state programs, and many others. As many of these uncertainties will persist until federal legislation is passed defining more specifically the application of the Surface Mining Act to Indian lands, tribes are urged to exercise caution when evaluating program model options on the basis of cost factors. Analysis of the effect of some of these factors on actual tribal regulatory program costs will follow the cost estimates provided below.

#### STAFF, SKILL AND COST ESTIMATES

##### 1. Administration

Program administration would require basic management skills. The administrator of a tribal mining regulatory program should possess the skills and background which would enable him to:

- coordinate and oversee work in the other program components (permit review, mine inspection and enforcement, designation of lands unsuitable, etc.);
- manage an office with clerical personnel;
- prepare written reports, funding applications, public notices, etc.;
- administer public participation requirements; and
- maintain liaison with tribal officials, tribal members, energy company officials, federal regulatory personnel and the general public.

Additional skills which would be helpful in the administration of a tribal mining regulatory program would be those related to actual mining operations, legal processes and requirements, bonding and insurance procedures, or a scientific background related to mine reclamation.

OSM's Budget and Finance Office estimates that administrative costs for state programs would be about 15% of total program costs. This percentage would probably be higher for tribal programs, as the overall program operating costs for most reservations would be lower than for states, while many administrative functions would be required regardless of the program size, and thus they would tend to form a larger percentage of total costs.

A sample budget estimating costs for administration of a tribal regulatory program is provided in Table 10-1. In addition to the salary of an administrator, the budget also provides for a clerk/typist and secretary/bookkeeper. The normal administrative costs of running an office -- tribal and per diem costs, etc. -- are also figured into the costs estimates.

Also included in the budget are costs for a tribal regulatory commission, which might be established to oversee the performance of the

program and its employees, as well as to provide an administrative review function. A tribe might appoint a three to five member commission and, according to a specific tribe's practice, pay the commissioners for the time expended in their official duties. Such a commission probably would be part of a broader natural resources regulatory effort and, if this were the case, the costs could be shared by the various programs, thus reducing the cost of this function to the mining regulatory effort.

TABLE 10-1

## SAMPLE ANNUAL ADMINISTRATION OPERATING COSTS

| <u>A. Personnel (annual salaries)</u>                                                                                 | <u>Low Estimate</u> | <u>High Estimate</u> |
|-----------------------------------------------------------------------------------------------------------------------|---------------------|----------------------|
| Administrator                                                                                                         | \$20,000            | \$25,000             |
| Clerk/Typist                                                                                                          | 7,500               | 8,500                |
| Secretary/Bookkeeper                                                                                                  | 7,500               | 8,500                |
|                                                                                                                       | <u>35,000</u>       | <u>42,000</u>        |
| Fringe Benefits/Payroll Costs<br>(estimated at 20%)                                                                   | 7,000               | 8,400                |
| Total Personnel                                                                                                       | <u>42,000</u>       | <u>50,400</u>        |
| <u>B. Regulatory Commission</u>                                                                                       |                     |                      |
| 3 - 5 persons/biweekly meetings<br>10% of time on an annualized basis<br>@ \$300 - \$500 per meeting x 26<br>meetings |                     |                      |
| Total Regulatory Commission                                                                                           | <u>3,900</u>        | <u>6,500</u>         |
| <u>C. Office and Other</u>                                                                                            |                     |                      |
| Travel and Per Diem                                                                                                   | 5,000               | 5,000                |
| Office Equipment & Supplies<br>(including typewriter rental<br>2 @ \$150/month)                                       | 6,400               | 6,400                |
| Telephone @ \$150/month                                                                                               | 1,800               | 1,800                |
| Printing and Publication<br>(including copier @ \$200/month)                                                          | 4,800               | 4,800                |
| Space Costs<br>(500 square feet/person x 3 x \$8<br>square foot)                                                      | 12,000              | 12,000               |
| Miscellaneous                                                                                                         | 2,000               | 2,000                |
| Total Office and Other                                                                                                | <u>32,000</u>       | <u>32,000</u>        |
| TOTAL POSSIBLE BUDGET                                                                                                 | <u>\$77,900</u>     | <u>\$88,900</u>      |

The administrative costs for a tribal mining regulatory program would vary depending on the internal structure of the program as well as its interface with other tribal agencies. For instance, costs and administrative staff needs for mine regulation might be reduced if the program were administered in the context of a larger tribal environmental protection or natural resources regulatory agency. This would permit the pooling of technical and administrative personnel, office space, equipment, etc., with other related efforts, such as air and water quality regulatory programs.

Administrative costs also would increase or decrease in relation to the overall scope and size of the tribal regulatory effort, though not as a direct function of the number or size of mines regulated since many administrative activities would remain relatively constant in relation to changes in these factors.

## 2. Permit Review

The mining plan and permit review process is basically a one-time (or first year) occurrence, although some reviews (e.g., coal exploration operations, special mining category permits, permit revisions, and periodic permit renewals) might occur at intervals throughout the mining regulatory process.

The staffing needed within this full tribal regulatory program example may include:

- ° a mining engineer, who would review both the mining plan and the reclamation plan for conformity with the performance standards;
- ° at least one environmental specialist and possibly two, who would review and analyze the impacts of mining and reclamation

plans on the land and ecology, including soils, vegetation, hydrology, air quality, fish and wildlife, etc., and

- periodic access to specialized technical skills, via tribal staff, federal technical assistance or outside consultants.

Important variables in the staffing needs and associated costs for the permit review component of a tribal mining regulatory program include the degree of availability of federal technical assistance, the in-house technical capabilities of the tribe, the range of skills and expertise represented by individuals on the full-time regulatory program staff, and the extent to which outside consultants would be used.

To perform their tasks fully and successfully, the mining plan/permit review staff also must have access to and a thorough understanding of a large data base (e.g., ownership information, land maps, surrounding land uses, etc.) as well as sufficient environmental base-line data (e.g., soil and vegetative types and capabilities, fish and wildlife habitat patterns, geology, air and water quality information, etc.).

While some of this information will necessarily be supplied by the mining company requesting the permit, it is likely that considerable work could be involved in reviewing this information for accuracy, in gathering information not submitted by the company in organizing files, records, etc., and then in reviewing the accumulated materials. Clerical and research help could therefore be provided by the program's permanent administrative staff, and the program's administrators could oversee the legal and financial (e.g., bonding, insurance, etc.) aspects of the permit review and mining plan approval process.



The Office of Surface Mining has provided data for estimating permit review costs at three levels of complexity, depending on the amount of environmental analysis required for the review. These estimates are presented below and summarized in Table 10-2. The cost estimates are based on a team approach to completing the review. The staff cost estimates (\$38,000 - \$45,000 per person) include both salary and support costs.

a. Mining Plan Review and Environmental Study

This is the simplest and least time-consuming procedure applicable to the least complex actions such as most of the mine plan revisions (new permits) required for existing mines. It is expected that 14 mine plan reviews and environmental studies can be performed annually by a seven-person team (including the personnel equivalent of contractor/consultant input). Staff cost has been computed at \$38,000 per person per year.  $7 \times \$38,000 \div 14$  equals the estimated cost per mine for permit review and environmental study.

\$19,000 Per Mine

b. Mining Plan Review and Environmental Analysis

An environmental analysis (EA) is a formal National Environmental Policy Act (NEPA) process somewhat more complex than an environmental study. EA's will be sufficient for most new leases. It is anticipated that 10 mine plan reviews and environmental analyses can be performed annually by a 10-person team (including the personnel equivalent of con-

tractor/consultant input).  $10 \times \$38,000 \div 10$  equals the estimated cost per mine for permit review and EA's.

\$38,000 Per Mine

c. Mining Plan Review and Environmental Impact Statement (EIS)

Mining plans involving potentially more significant environmental impacts will require EIS's. It is expected that 2.5 mine plan reviews/EIS's can be performed annually by a 12-person team (including the personnel equivalent of contractor/consultant input). Increased personnel cost (\$45,000 reflects the cost to publish the EIS's.  $12 \times \$45,000 \div 2.5$  equals the estimated cost per mine for permit

\$216,000 Per Mine

Permit review costs for specific tribal mining regulatory programs would be a direct function of the number of mines being regulated, and the complexity of the environmental analysis required for each mine.

TABLE 10-2

## OSM COSTS ESTIMATES

The table below presents OSM's estimates of mine regulatory costs for one mine on a yearly basis for five years, at three levels of permit review complexity. CERT's estimates are adapted from these figures.

## YEARS

|                                | ONE       | TWO   | THREE | FOUR  | FIVE  | TOTAL    |
|--------------------------------|-----------|-------|-------|-------|-------|----------|
| Level 1 Permit Review & E.S.   | \$19,000  | --    | --    | --    | --    | \$19,000 |
| Inspection & Enforcement       | 4,800     | 4,800 | 4,800 | 4,800 | 4,800 | 24,000   |
| Administration 15%             | 3,570     | 720   | 720   | 720   | 720   | 6,450    |
| Total Cost                     | \$27,370  | 5,520 | 5,520 | 5,520 | 5,520 | 49,450   |
| Level 2 Permit Review & E.A.   | \$38,000  | --    | --    | --    | --    | \$38,000 |
| Inspection & Enforcement       | 4,800     | 4,800 | 4,800 | 4,800 | 4,800 | 24,000   |
| Administration 15%             | 4,280     | 720   | 720   | 720   | 720   | 7,160    |
| Total Cost                     | \$47,080  | 5,520 | 5,520 | 5,520 | 5,520 | 69,160   |
| Level 3 Permit Review & E.I.S. | \$216,000 | --    | --    | --    | --    | 216,000  |
| Inspection & Enforcement       | 4,800     | 4,800 | 4,800 | 4,800 | 4,800 | 24,000   |
| Administration 15%             | 33,120    | 720   | 720   | 720   | 720   | 36,000   |
| Total Cost                     | \$253,920 | 5,520 | 5,520 | 5,520 | 5,520 | 276,000  |

### 3. Inspection and Enforcement

Inspection and enforcement costing methods differ from those for permit review in that costs incurred will not be a large one time effort, but most likely will be a relatively low-cost item that remains constant over the life of the mine being regulated.

The costs for inspection and enforcement would vary as a direct function of the number of mines being regulated. The size of the mine being regulated is a relatively minor factor in estimating these costs, since inspection requirements and schedules for smaller mines would be the same as those for larger mines.

The Surface Mining Act requires four complete inspections of each mine per year and partial inspections on a monthly basis. In addition to these basic inspection and enforcement activities, other types of inspections are likely to occur on an irregular basis. These could include inspections in response to citizen complaints, special compliance inspections or repeat visits to mines to assure compliance where violations have occurred, inspections of coal exploration activities, or inspections for bond release.

Estimated tribal inspection and enforcement costs, for one mine for one year, using data supplied by OSM, are provided below. The cost figure of \$38,000 per person represents both salary and support costs for an inspection and enforcement officer.

The above method of calculating inspection and enforcement costs reveals that one person would need to spend approximately 20% of his time in inspection and enforcement activities. While these costs are estimated for a one mine per year example, tribes which are aware of the potential number of mines on their reservations may adjust their estimates accordingly.

TABLE 10-3

## INSPECTION AND ENFORCEMENT COSTS

Basic Inspections

|                                                                                                                                                                                                                        |                |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------|
| <ul style="list-style-type: none"> <li>4 complete inspections per mine per year:<br/>estimated 120 staff hours per year<br/>(120 total hours + working hours per year<br/>x \$38,000 per person per year) =</li> </ul> |                |
| estimated cost =                                                                                                                                                                                                       | \$2,400        |
| <ul style="list-style-type: none"> <li>8 partial inspections per mine per year:<br/>estimated 120 staff hours per year</li> </ul>                                                                                      |                |
| estimated cost =                                                                                                                                                                                                       | \$2,400        |
| 12 Basic inspections annually                                                                                                                                                                                          | <u>\$4,800</u> |

Irregular Inspections

|                                                                                                                                       |                |
|---------------------------------------------------------------------------------------------------------------------------------------|----------------|
| <ul style="list-style-type: none"> <li>1 inspection of coal exploration activities:<br/>estimated at 15 staff hours each =</li> </ul> | \$300          |
| <ul style="list-style-type: none"> <li>2 citizen complaint response inspections:<br/>estimated at 30 staff hours each =</li> </ul>    | \$1,200        |
| <ul style="list-style-type: none"> <li>2 compliance inspections:<br/>estimated at 15 staff hours each =</li> </ul>                    | \$600          |
| <ul style="list-style-type: none"> <li>1 bond release inspection:<br/>estimated at 30 staff hours each =</li> </ul>                   | \$600          |
| Irregular Inspections                                                                                                                 | <u>\$2,700</u> |

|                                         |                |                      |
|-----------------------------------------|----------------|----------------------|
| <u>Total Estimated Inspection Costs</u> | <u>\$7,500</u> | Per Mine<br>Per Year |
|-----------------------------------------|----------------|----------------------|

Several staffing options are available. The mine inspector could be a general tribal inspection officer, who might spend other portions of his time monitoring other natural resources activities, such as those affecting air or water quality, rangelands, etc. The person in question also could be either one of the staff environmental specialists or the mining engineer who reviewed the mining and reclamation plans, and who would therefore be familiar with the full operation.

The skill levels for doing inspection and enforcement activities would require that the inspector be thoroughly familiar with mining and reclamation operations and standards, and also be abreast of improvements in the reclamation field. Federal training programs already are being developed to train individuals in the necessary skills.

It should be noted that there also could be judicial costs associated with the enforcement of a mining regulatory program. Though these would not be direct costs to the tribal regulatory program, they could affect the tribe as a whole and its judicial system, depending on the size of the increased caseload which might result.

#### 4. Designation of Lands Unsuitable For Mining

The designation process is essentially a land-use planning process, rather than part of the process for regulating existing surface coal mining and reclamation operations. It is possible that the designation process may not be required for approved tribal programs, since tribes already have a number of mechanisms for prohibiting mining on lands deemed unsuitable for that purpose, including existing land-use planning activities and leasing or contractual powers. If a designation process is required for Indian lands, it may be no more than a variation on these existing mechanisms.

The designation of Indian lands unsuitable for mining could track the requirement for states, i.e., simply set up a data base and inventory system and provide a procedure to receive and handle any petitions to designate lands as unsuitable. It also could be more intensive, providing for an initial review of all tribal lands for designation purposes as well as the features of a state designation process. This more intensive approach is similar to that required for federal lands. (Section 522(b) of the Act).

In either event, designation of particular lands as unsuitable for mining probably would occur in two phases, one general in scope and the other more detailed. First, the regulatory authority could determine whether any existing and hard criteria required designation of the land as unsuitable for mining. For example, proposed mining might be located on an alluvial valley floor, be inconsistent with the tribe's existing land-use plans, or it might conflict clearly with cultural or religious values. If a determination not to allow mining is made at this stage then the expensive and time-consuming review of the land's reclamation feasibility need not be conducted. Second, if the regulatory authority had reached no decision on the basis of these general criteria, it could then conduct a detailed review of the feasibility of reclaiming the specific site proposed for mining. As a practical matter, of course, these "two phases" represent the extremes on a whole range of intensity.

The costs, staffing and skill levels associated with the designation process vary widely, based on a number of factors.

First, the extent and character of tribal mineral lands will determine the scale of wholesale review of the lands, the number of petitions for designation of various tracts as unsuitable, and the relative ease or difficulty of making a determination.

Second, the resources devoted to land designation may vary as a function of the level of intensity of the tribe's designation system. If the state model is followed, then there will be no initial review costs, but there may be many petitions to handle on a piecemeal basis. If the federal lands model is followed, then there will be the costs associated with an initial review of tribal lands, but there may be fewer, if any, petitions to process.

Third, financial and staffing requirements will vary depending upon the amount of scrutiny which is given to lands under review or under petition. Designation at the first level will require a small commitment of resources. Tribes, for example, may already know what lands are of utmost significance to their tribal identity and may take steps immediately to insure that no mining activity occurs in those areas. Designation at the second level will be more costly and require more staffing, since a reclamation feasibility study will require the work of various specialists.

Fourth, the costs associated with the designation process will depend to a large extent on the quality and comprehensiveness of the tribe's existing data base and inventory system for tribal lands. If the tribe's land-use planning process already is sufficiently operable and effective, relatively little resources would be needed to implement a designation system. For a tribe that is only now beginning to approach its land and resources in systematic fashion, staff time devoted to implementing a full designation system could be quite large.

Finally, it should be noted that these various cost factors have an impact on each other. For example, the size of the tribal territory will affect the cost of developing an adequate data base. The adequacy of the data base in turn will affect the ease of conducting an initial lands review and of processing petitions.

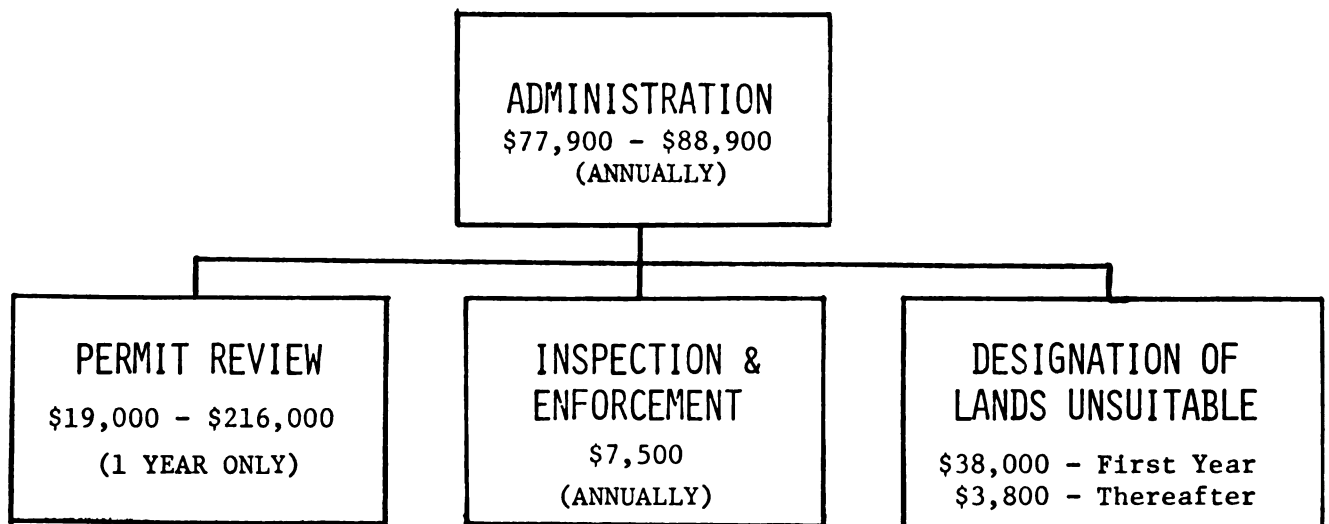
Subject to the factors outlined above, it is likely that a medium-intensity designation system could be developed and implemented by most tribes' existing planning, environmental protection, or natural resources staffs. It is estimated that the services required would average half-time for a land-use planner and half-time for an environmental



specialist for the first year, and one-tenth time for a land-use planner for subsequent years. In this instance the cost, including support, would be \$38,000 for the first year, and \$3,800 per year thereafter.

FIGURE 10-1

SAMPLE TRIBAL REGULATORY PROGRAM OPERATING COSTS



## FEDERAL FUNDING AND ASSISTANCE PROGRAMS CURRENTLY AVAILABLE TO STATES

Several federal funding, technical assistance, and educational and training programs have been developed to aid states in achieving the mining reclamation and control standards set forth in the Act. In order to place the cost and staff needs discussion of this chapter in the context the types of assistance programs which would likely be available to tribes, and to aid tribes in evaluating the actual impact of cost factors and staffing requirements of the alternative regulatory models, the federal assistance programs currently available to states are described below.

### Federal Funding for State Program Development and Implementation

States are eligible to receive federal funding for the development and implementation of approved state programs. If tribes are to be treated as states for regulatory purposes, then it is reasonable to assume that federal funding similarly will be available for tribal programs.

The Secretary of Interior is authorized to make annual grants to the states for both development of a state program and implementation of a state program. (Section 705 of the Act; 30 CFR Part 735).

"Development" grants may be used to cover the costs of developing:

- ° New or revised state laws, regulations and procedures;
- ° Revised or expanded inspection systems;
- ° Training programs for inspectors and other personnel;
- ° New or revised organizational structures;
- ° Information and communications systems, including data processing systems;

- ° A planning process including a data base and information system to receive and act upon petitions to designate lands unsuitable for mining;
- ° An application for the initial administration and enforcement grant to the extent not covered by indirect costs or other cost items;
- ° Other components necessary to obtain an approved state program, as mutually agreed upon by the Regional Director and the agency receiving a grant.

Implementation or "administration and enforcement" grants may be used to cover the costs of:

- ° Administering an approved state regulatory program;
- ° Providing supporting and administrative services required by the state regulatory programs, and
- ° Providing equipment required for the regulatory program and its support, either through use charges or direct purchases (30 CFR Section 735.14).

States may apply for two annual program development grants. The first development grant may cover up to 80% of the program development costs, and the second development grant may cover up to 60% of such costs. The amount of the subsequent annual implementation grants depends upon the number of development grants received by a state. If no development grant was awarded, a state's implementation grant may cover up to 80% of its program implementation costs for the first year, 60% for the second year, and 50% for each following year. If one development grant was awarded, a state's implementation grant may cover up to 60% of costs the first year and 50% for each following year. Finally, if a state was awarded two annual development grants, it is eligible only for a 50% implementation grant each year.

#### Technical Assistance and Other Staffing Support Available to States

In addition to these grants, the Act requires the Secretary "to cooperate with and provide assistance to any state" regarding program development and implementation, including:

- (1) technical assistance and training including provision of necessary curricular and instructional materials in the development, administration, and enforcement of the state program, and
- (2) assistance in preparing and maintaining a continuing inventory of information on surface coal mining and reclamation operations for each state for the purposes of evaluating the effectiveness of the state programs. Such assistance shall include all Federal departments and agencies making available data relevant to surface coal mining and reclamation operations and to the development, administration, and enforcement of state programs concerning such operations. (Section 705(b) of the Act).

The Act also provides federal funding and assistance for general research and education programs, which may be useful to regulatory program implementation:

- (1) State mining and mineral resource research institutes

The Act authorizes funds "to assist states in carrying on the work of a competent and qualified mining and mineral resources research institute". The institute is to be located at an existing qualified state institution or other institution as provided in the Act. The purpose of the institutions is to "conduct research, investigations, demonstrations and experiments . . . and to provide for the training of mining engineers and scientists through such research . . ." (Section 301) Separate funds may be provided for individual research projects.

- (2) University coal research laboratories (Section 801)

The Act provides funds for university coal research laboratories. There are to be ten universities selected for the program. They are to provide facilities for interdisciplinary research projects in "any discipline which is related to the development of adequate energy supplies in the United States." These labs are to also have a "test lab for coal characterization" and "provide research and development activities for students engaged in advanced study."

(3) Energy resource graduate fellowships (Section 901)

Energy resource graduate fellowships are designated for students in acceptable Masters programs. The fellowships provide up to \$10,000 per year for up to two years and also allow for \$500 for each of the recipient's dependents.

Earlier legislative proposals for the regulation of surface mining on Indian lands, which treated tribes essentially in the same manner as states are treated under the Act, explicitly made provision for similar funding and assistance for tribes in developing and implementing tribal programs. (H.R. 11500, 93d Congress, 2d Session (1974), and S. 7 as amended, 95th Congress, 1st Session (1977)). It is anticipated that federal legislation for an Indian lands program would provide at least the equivalent of these funding, educational, and technical assistance programs to tribes (See Tribal Recommendations, Chapter Twelve).

## **CHAPTER 11**

### **SPECIAL POLICY ISSUES**

## CHAPTER 11

### SPECIAL POLICY ISSUES

#### Introduction

Indian tribal governments are responsible for the well being of their peoples and for the protection and development of their lands and resources. Regulation of surface mining is therefore an appropriate and important function in the fulfillment of these objectives. A number of factors may influence the desire and the ability of tribes to undertake full regulation of surface mining under the Act. Some of these factors are a result of the fact that tribes are coal resource owners and are increasingly becoming the active producers of their own resources. Other factors are a result of the unique relationship that tribes have to the federal government which acts as their trustee. In addition, the scale of tribal governments, past reclamation practices, special cultural characteristics and other factors unique to Indian tribes may influence a tribe's regulatory role under the Act.

Each of these factors gives rise to issues which should be examined so that programs designed to allow Indian tribes to elect to assume regulatory authority will, where necessary, take into account the special status and circumstances of tribal government. This chapter will consider some of these issues with a view to determining whether they would significantly affect the design of such programs. The discussion of these special policy issues is organized into three broad categories: 1) Conflict of Interest Issues, 2) Special Cultural-Religious Considerations, and 3) Tribal Proprietary Data Needs.

## CONFLICT OF INTEREST ISSUES

In order for a regulatory system to be considered effective and equitable, it should contain safeguards against problems arising from conflicts of interest. Generally, it is thought to be necessary that: 1) there be some separation between the regulators and those who are regulated; 2) that the regulators not have a private interest in the results of decisions they make in that capacity; 3) that regulatory decisions be open to public scrutiny and comparison with some objective standard; and, 4) that there be some avenue of appeal available from those decisions. The Surface Mining Act of 1977, in common with many other laws of the United States, contains provisions intended to protect the public from injuries resulting from conflicts of interest involving the regulatory agencies established and functioning under the Act. The purpose of this report is to examine the question of whether or not conflicts of interest are likely to lead to significant problems if coal-owning tribes undertake regulatory functions and responsibilities under the Act.

### Conflicts of Interest Involving Individuals

Because governmental entities have long been expected to make decisions and take actions which affect both public assets and interests and the private interests of individuals acting in governmental capacities, numerous laws require that public officials divest themselves of certain of their private assets and interests, that they disclose others of their interests, and that they be accountable to the public for their decisions. Provisions of this sort are contained in the Surface Mining Act and apply to individuals acting in regulatory capacities (Section 201(f); 30 CFR Parts 705 and 706). If the Act is amended to enable



Indian tribes to regulate surface mining on Indian lands, these provisions undoubtedly will apply to individuals serving in tribal regulatory agencies. Should individual Indians who are appointed to regulatory positions have private interests in mining enterprises, they would be in much the same situation as would non-Indians who possessed mining interests and were appointed to state regulatory agencies. In either case, the relevant provisions of the Surface Mining Act would be applicable, and the persons involved would have either to give up their interests in the enterprise or to resign from their regulatory positions.

#### Conflicts of Interest and the Owner-Regulator Relationship

The foremost objectives of the Surface Mining Act are to prevent mining activities from irreparably injuring the environments (broadly construed) in which they are carried on, and to ensure that any unavoidable damages which do result from mining operations are repaired. In the past, surface mining has irreparably damaged some lands and has led to serious pollution problems, destruction of historically and culturally valuable areas, impairment of public health, and considerable expense on the part of communities attempting to remedy these problems. The Act seeks to prohibit surface mining in places where damages are likely to be severe or not repairable, and to place the onus of reclamation and repair on the owners and operators of mines. These requirements obviously increase the costs of surface mining for mine owners and operators. They have been judged necessary, however, due to the environmental degradation resulting from years of widespread inattention to environmental considerations and generations of mine operators who disregarded the side effects of their enterprises. In this context, a question has been raised as to whether the coal-owning Indian tribes can

be expected to fulfill the requirements of regulatory agencies, when to do so will increase their costs as owners and, in some cases, as mine operators.

Although conflict of interest laws exist to protect the public from instances in which government officials might find themselves torn between their private interests and the public's welfare, democratic governmental bodies at all levels are generally presumed to be capable of acting in the public interest. This is not to say that conflicts among competing interests do not arise or that governmental officials always make the right choices among them. The overwhelming majority of governmental decisions involve balancing one public benefit with another or avoiding injury to one public interest at the cost of diminishing some other public good. Some decisions are affected by the particular external conditions prevailing at the time; were there not a pressing current need for additional sources of energy, for instance, surface mining might be viewed with greater disfavor by U.S. policy makers and be even further restricted. Some public interests increase or diminish over time, with changes in value systems, or as a result of advances in information and technology. The environmental standards of today were thought infeasible until recently and may seem inadequate a few years hence. In any event, governmental entities are generally assumed to be acting in the general interest, and their members are usually subject to a variety of sanctions if their actions are considered harmful to the public interest as it is then perceived.

The Surface Mining Act grants states the authority to regulate surface mining in part because this presumption exists. That is, it is

assumed that state governments have an interest in preventing environmental degradation and public health hazards as well as an interest in the profits, rents, royalties, and taxes which they derive from the exploitation of mineral resources, and that they will attempt to choose between these interests in such a way as to maximize the long term public welfare. This presumption is basic to many areas of governmental regulation. Nationalized industries are overseen by other governmental agencies. Other environmental statutes, such as the Clean Air Act, provide for state regulation of the activities of other governmental entities as well as those of private enterprise (42 USC 7401 et seq.). At all levels of government, police and other law enforcement personnel regulate the actions of the governments by which they are appointed as well as those of private groups and individuals. From this standpoint, tribal regulation of surface mining on Indian reservations would be quite consistent with the customary practice.

The selection of the unit of government to exercise regulatory authority under any statute rests to some extent on the appropriateness of various governmental units for the tasks in question. In dealing with its own lands (e.g., the public domain or national forest), Congress has not suggested that any entity other than the federal government should have a regulatory role, except where specifically provided in the Surface Mining Act. This is not because Congress or federal agencies are unlikely to make mistakes or because it is impossible for them to pursue environmentally unsound policies. Instead, it is because the federal government is the public representative of its constituency and, despite its faults and limitations, is deemed to be the best available custodian of the interests of its citizens. The relationship of an

Indian tribe to its communal lands is similar to that of the federal government to federal lands.

In a similar view, the states own a significant portion of the lands on which surface mining is now taking place or is being contemplated. In fact, the Act contemplates that states and other governmental entities actually may engage in surface mining activities themselves, at the same time that they are responsible for the regulation of such activities under the Act (Sections 524 and 520(a)(1)). In some regions, particularly the West and Appalachia, coal mining states also depend heavily on royalties, severance taxes, leasing fees, and other revenues derived directly or indirectly from mining activities within their borders. Although they are faced with the possibility that dilemmas may arise from the owner-regulator relationship, it has not been suggested that they should be precluded from undertaking associated environmental regulatory responsibilities. It is recognized that the states already possess some of the information necessary to decide which sites should be mined, and that they are in a better position than the federal government to develop locally relevant comprehensive land use plans for the areas in question. Furthermore, there exists a longstanding presumption that the states are the most appropriate overseers of intra-state affairs. In this context, Indian tribes are analogous to the states. For most internal matters, they are deemed the most appropriate custodians of tribal interests, and the possibility of conflicts arising from the owner-regulator relationship should not affect their positions any more than it has those of the states.

The possibility that the owner-regulator relationship may lead to conflicts of interest has not been weighed very heavily in the case of

the states. In addition to the factors considered above, which tend to diminish its significance, the dual capacity situation also tends to increase the interest of states in maintaining the environmental standards set forth in the Surface Mining Act. As owners of the lands involved, the states have an interest in their usefulness for other purposes once the surface minable coal has been removed. Unlike private mining companies, whose principal interest is in the profits to be obtained from mining, the states have a general interest in public health issues and a more specific interest in avoiding the costs associated with large scale health problems which might result from unsound mining practices. States also have an interest in assuring that communities downstream or downwind from mining areas are not blighted and do not have their industries adversely affected by mining-generated pollution. And, whereas private companies may suffer competitively if they attempt to consider environmental matters, state governments are not subject to competitive pressures in this respect. In particular, they do not have to accept the lowest bid on a contract if they can foresee the likelihood that the practices involved may cause them to incur additional costs elsewhere or to have to forego revenues from other sources. All of these factors would apply similarly to tribal owner-regulators and would enhance their interest in maintaining the strict environmental standards required by the Surface Mining Act.

During the 1974 U.S. House of Representatives floor debate on an earlier legislative surface mining proposal, under which tribes would have been treated as states and would have had the option of assuming full regulatory authority over surface mining on tribal lands, this state-tribal governmental analogy was stressed by Congressman Morris

Udall (Arizona), who stated, "Mr. Chairman. . . the Indian tribes are operating in good faith. The fact is that we are treating the tribes as we do states, and just like Montana, Wyoming, or Arizona, they will operate in good faith." (Cong. Rec., H. 6834, July 22, 1974).

#### Prevention of Conflict of Interest Under P.L. 95-87

To assume that state and tribal governments will generally act to promote the general interest does not also assume that they have always done so in the past or that they are always immune from making bad choices or from yielding to short term interests at the expense of longer term considerations. The Surface Mining Act provides additional safeguards against the possibility that environmental considerations might suffer in any conflict among competing public interests. Because in the past environmental factors were often unrecognized or neglected, the Act provides that specific standards in this area must be met. The incorporation of such standards into legislation is itself a result of changing public awareness of, and concern over, environmental issues. It indicates that some environmental factors are now considered to be so highly significant that they are to be placed beyond the discretion and actions of local implementing governmental entities. Thus, the possibility of conflicts of interest involving environmental issues is greatly diminished by the Surface Mining Act, no matter who regulates the activities subject to the Act. Minimum acceptable standards have been specified and the Department of the Interior is responsible for seeing that they are met. Any regulatory agency which does not ensure that these standards are maintained in the operations under its jurisdiction--whether state, federal, or tribal--faces withdrawal of the

Department's approval of its program and suspension of its regulatory authority under the Act.

In addition to the environmental standards which it mandates, the Surface Mining Act sets forth other requirements which further reduce the likelihood of conflicts of interest in which environmental concerns might suffer. An approved regulatory program must make provision for informing the public about issues under consideration, enabling the public to participate in some aspects of the regulatory process, publication of regulatory decisions, and administrative or judicial review of decisions. States or tribes which might undertake regulatory responsibilities under the Act are by no means being given a blank check; nor are they entirely free from continued federal supervision. If an amendment to the Act makes it possible for Indian tribes to assume regulatory responsibilities under the Act, the same safeguards against conflicts of interest in which environmental standards might suffer would apply. Moreover, regulatory agencies which must satisfy these requirements are likely to be scrupulous about maintaining the standards set by the Act. In this respect, as in others, there is no reason to presume that tribal regulatory authorities, like state regulatory agencies, would not be further insulated from potential conflicts of interest.

#### Tribal Interest in Environmental Protection

In many ways, the coal-owning tribes are more likely than most other communities to be concerned about avoiding environmental degradation on the reservations. The Indian tribes possess less land than most of the states which are in comparable situations, and they can much less

easily afford to risk having mining operations render the land unsuitable for other purposes once the coal has been removed. Nor can the tribes walk away from areas blighted by environmentally unsound mining practices. In addition, because Indian communities are often in closer proximity to existing and potential mining sites on the reservations than is the case on non-Indian lands, they are more likely than non-Indian communities to suffer if mining activities result in air and water pollution in surrounding areas. Thus, the tribes have a strong interest, rather a conflict of interest, in preventing serious environmental damage to, and assuring sound reclamation of, mined lands.

Furthermore, the Indian tribes have significant cultural attachments to their reservations; the reservations are homelands to be preserved and protected, and they are not so sizeable that the surface minable portions of the reservations can be ignored or written off. In most of the states where surface mining is now being carried on or is planned for the future, the bulk of the population generally does not live on or center their communal lives on surface minable lands. There are strong similarities, however, between the vehemence with which some towns have recently fought the location of chemical factories or nuclear power plants in their vicinities and the attitudes of the Indian tribes towards mining which is not subject to stringent environmental constraints. Indians tribes have only accepted mining, along with other industrial enterprises, as a part of their lives in relatively recent years. For many more years clean air and water, unspoiled lands, and the existence of many species of wildlife have been a central element of their heritage.



The significance of the reservation as a tribal homeland, in combination with the strong element of communal ownership and responsibility, make the economics of good environmental protection extremely clear to tribes. In some non-Indian communities, the connections between the revenues the state derives from mining activities and the costs to the community of suffering the ill effects of pollution and paying the price of environmental reclamation are complex and indirect. Different segments of a state's population derive varying benefits from the revenues and bear different shares of the costs. The relationships between the two are difficult to evaluate in immediate or in personal terms. For the coal-owning tribes, these relationships are much simpler and more direct. The community as a whole may derive less revenue from mining operations which are environmentally sound and which include provisions for reclamation, but it will also spend less as a community to repair the damages which result from environmental degradation, and it will not lose the potential future uses of mined lands. Because the tribal community is less segmented than most states, not only does the overall relationship hold true, but individual members can more readily perceive its effects on their own lives. Instead of a conflict of interest in which tribes might be swayed towards gaining greater profits from mining at the expense of environmental considerations, the readily apparent costs of such actions should reinforce the other incentives the tribes have to uphold the environmental provisions of the Act.

Tribal actions in the past few decades support the assumption that the coal-owning tribes would be scrupulous in their observance of environmental standards. The tribes have taken a strong interest in

preventing industrial pollution generally. Several tribes have established agencies to monitor air and water quality and to enforce existing standards. The action of the Northern Cheyenne tribe in petitioning EPA to reclassify its reservation under the Clean Air Act is the only instance in the country in which a community voluntarily requested that this stringent standard be applied. Tribal demands for increased environmental protection have been a dominant theme in recent tribal-federal relations concerning energy developments on and around Indian reservations. Even tribes which have done little to undertake regulatory responsibilities or which have little industrial activity to regulate have acted to preserve wildlife, unspoiled areas, and sites of historical or cultural importance. In general, tribal interest in maintaining high environmental standards is supported by the record of recent actions and by traditional perspectives; this strong commitment to environmental protection would provide further safeguards against any conflict of interest during the process of mine regulation by tribes on Indian lands.

## SPECIAL CULTURAL-RELIGIOUS CONSIDERATIONS

The consideration of tribal cultural or religious issues during the mining process is clearly an internal tribal matter. In evaluating the alternatives for regulatory schemes, tribes may wish to consider their individual cultural or religious interests, the possibility of adverse impacts by surface mining on those interests, and the possible inclusion of special provisions in their regulatory scheme to protect such interests. Tribes, of course, have many means of incorporating such considerations into the mining process already, though their existing controls over decisions such as whether to mine at all or not, where to mine, the content of lease terms and conditions, and so forth.

The Surface Mining Act may provide tribes with certain other mechanisms, in addition to existing controls such as leasing authority, to prevent the adverse impact of coal mining activities on their cultural and religious interests. Tribes, for example, may wish to protect historically significant sites and burial or other sacred sites from disturbance or desecration by formally designating those areas as unsuitable for mining, under Section 522 of the Act. One related concern which should be addressed by any such designation process for Indian lands is the tribal need to maintain the confidentiality of these sites' locations. It is estimated that, in Colorado alone, 23,000 out of 30,000 ancient Indian sites have been looted to one degree or another. ("Looters Plague Indian-Ruin Custodians", The Denver Post, July 15, 1979, P. 69). This concern is discussed in greater detail in the next section of this chapter.

Where mining is permitted on Indian lands, tribes may wish to accommodate their cultural and religious interests through special

mining and reclamation provisions. A tribe, for example, may wish to require accommodations in mining and reclamation plans for plant species of particular ethnobotanical significance to the tribe. In such cases, mines might be designed so as to minimize disturbance to such species, or reclamation plans could be required to include revegetation with culturally important types of plants.

There is no doubt that Indian tribes have the authority to protect lands and resources of special cultural or religious significance lying within reservation boundaries. In addition, similar areas located on federal lands outside reservation boundaries also may be eligible for exemption from mining activities. In this instance, a tribe could challenge any proposed mining which threatened damage or desecration to off-reservation sacred areas, through the formal designation of lands unsuitable petition process provided for federal lands under Section 522. Moreover, this designation process must exist under any approved state program or any federal program for state lands (30 CFR 764 and 765). Some Indian cultural or religious interests also could be asserted, therefore, with respect to mining activity on state and federal lands as well as on Indian lands (30 CFR 762.11(b)(2)).

## TRIBAL PROPRIETARY DATA NEEDS

Under the Surface Mining Act, a significant amount of information relating to coal resources and the land must be developed by regulatory authorities or submitted by coal operators. While some of this information is classified as "proprietary data" and protected from public scrutiny, most information must be made available to the public. There are special policy considerations with respect to Indian lands, however, which suggest that, whatever regulatory scheme is adopted, additional information on Indian lands may be considered "proprietary data" and should be protected as such.

### Public Access to Data Under the Act

The information developed or gathered by a regulatory authority, to which the Act requires that the public have access, is described briefly below. A detailed listing is provided in the Tables 11-1 and 11-2 on pages 21 and 28.

Program Submission to OSM. A program submission must contain: information pertaining to the regulatory agency's legal authority, including laws and regulations, for governing surface coal mining and reclamation; information describing the procedures and processes for all aspects and functions of a regulatory program; information on the current status and extent of coal exploration, mining, and reclamation activities within the jurisdiction; and information on the organization, staffing and budget of the regulatory agency. All of this information must be available for public inspection and comment (30 CFR Parts 731 and 732).

Designation of Lands Unsuitable for Mining. For an approved program, the regulatory authority must develop a data base and inventory system with the following characteristics:

- ° Information on the designations that are "mandatory" under the Act; e.g., data from federal agencies on lands within The National Parks System, The National Wildlife Refuge System, The National System of Trails, The National Wilderness Reservation System, The Wild and Scenic Rivers System (including proposed rivers), National Recreational Areas, Federal lands within National Forests, places of the National Register of Historic Places; and information on areas within 100 feet of the right-of-way of public roads, 300 feet of a public school building, church, community or institutional building or public park, and within 100 feet of a cemetery;
- ° Information enabling the agency to determine the feasibility of reclamation in areas covered by petitions to designate areas unsuitable for mining.
- ° Information enabling the regulatory agency to prepare required assessments of the impacts of a designation or determination, including data on the coal resources of the area, the demand for those resources, the environment, the economy, and the supply of coal;
- ° Information that becomes available from petitions, publications, experiments, permit applications, mining and reclamation operations, and other sources.

This data base and inventory system must be accessible to the public (30 CFR Parts 760 and 764).

Additionally, the petitions that are received and information that is submitted in relation to the petitions, as well as information regarding the designation (including data on mineral content which is potentially toxic in the environment, but not proprietary information on the chemical and physical properties of the coal), must be made public (30 CFR Part 764).

Permit Applications. All information submitted to support an exploration permit must be made available for inspection and copying, unless: the person supplying the information has requested, in writing, that information not be disclosed; the regulatory authority has determined that the information is confidential because it concerns trade secrets or is privileged commercial or financial data relating to the competitive rights of the person that filed for the exploration permit; and, the regulatory authority has provided both the persons requesting and opposing the release of information with notice and an opportunity to be heard (30 CFR Part 776).

Mining and reclamation permit applications also must be made available for the public to inspect and copy, except for: certain information in the application which must be made available only to persons with an interest which may be adversely affected (specifically, data on coal seams, test boring, core samplings, soil samples); certain information in the application which must be kept totally confidential (specifically, any data on the chemical and physical properties of the coal to be mined (except information regarding mineral or elemental contents of the coal which are potentially toxic to the environment); and information required only under Section 508 of the Act (Reclamation Plan Requirements) which is not on public file pursuant to state law (30 CFR Part 786).

Bond release. Before a performance bond may be released, the applicant must prepare a detailed notice for publication in newspapers as part of the application procedure. Affected parties are provided copies of the bond release application, records of any informal conferences pertaining to the application and the decisions and reviews of the regulatory agency (30 CFR Part 807).

Inspection and enforcement records. Copies of all records, reports, inspection materials, and other information developed by the regulatory authority must be available to the public, except for certain conditions applicable to exploration permits, certain conditions applicable to mining and reclamation permits, information which must be protected in preparation for hearings and enforcement proceedings, and the identity of citizens reporting violations of law (30 CFR Part 840).

Special Policy Considerations for Indian Lands

As the above discussion shows, most information required under the Act must be made available to the public. Exceptions are made for "proprietary data," such as certain chemical or physical properties of the coal, trade secrets, and privileged commercial or financial information. Thus, express exceptions are made where necessary to protect the competitive rights and legitimate privacy interests of the operator.\*/-

These same considerations are applicable in the context of Indian lands. Special policy considerations with respect to Indian lands, however, might include additional information under the concept of "proprietary data", since its disclosure likewise could affect the tribe's competitive rights and legitimate privacy interests.

The possibility of disclosure of two types of information is of great concern to the coal-owning tribes, and appears to jeopardize their competitive rights and their right to privacy. The disclosure of the extent of the coal reserves on tribal lands might adversely affect the

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\*/- Express exception also is made for certain investigative and enforcement information where necessary to ensure the effective functioning of the regulatory authority.



tribe's position in negotiating future agreements for coal development. This might seriously compromise the commercial competitive rights of the tribe, as resource owner, which should be protected, as are those of non-tribal coal owner-operators. In a similar way the disclosure of other information might harm the tribe's legitimate privacy interests. For example, tribes have a special cultural and religious identity in American society, and information relating to the location of burial grounds and sacred sites may be particularly sensitive. This information should be no less privileged than an operator's financial statement, or other information which is subsumed under the category of "proprietary data." (See the discussion of cultural special policy issues which precedes this section).

Whatever regulatory scheme is adopted, due consideration must be given to the special needs of the tribes in protecting such proprietary data. A mechanism already exists for the states to protect proprietary and other data. The information to be withheld, under the specific statutory and regulatory criteria for proprietary data, typically is to be determined on a case-by-case basis by the regulatory authority. In other words, the regulatory authority determines what information relates to competitive rights and legitimate privacy interests when the issue arises. Indeed, the states may protect other information (relating to reclamation plans) by law, whether or not they are the mining regulatory authority, and whether or not the information is proprietary. Tribes should be given similar flexibility in determining what information should be protected from public disclosure.

Tribal policy on proprietary data and limiting access by tribal members and others to tribal information should be an internal tribal

decision. It should be up to tribal members to determine internally whether they want public access to certain types of data, or whether they prefer to delegate to elected authorities the determination of what information should be exempted from disclosure, in order to better protect legitimate tribal interests as a whole. In any event, many tribal land actions, unlike those of the states, are reviewed and are subject to approval by the federal government under trust agreements. This should ensure that the interests of the public are protected without the public disclosure of information which the tribes reasonably may deem sensitive.

TABLE 11-1

INFORMATION THAT MUST BE DEVELOPED BY THE REGULATORY AGENCY

Program Submission To OSM

| <u>a) Legal Authority:</u>                                                                                                                                                                                                                                                                            | <u>30 CFR CITATION</u> |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------|
| <ul style="list-style-type: none"> <li>° A copy of State laws which regulate coal exploration and surface coal mining reclamation.</li> </ul>                                                                                                                                                         | 731.14(a)              |
| <ul style="list-style-type: none"> <li>° A copy of the State regulations issued to implement and enforce the State laws.</li> </ul>                                                                                                                                                                   | 731.14(a)              |
| <ul style="list-style-type: none"> <li>° A copy of any regulations which are in the process of being enacted and which are essential for the approval of the program.</li> </ul>                                                                                                                      | 731.14(a)              |
| <ul style="list-style-type: none"> <li>° Copies of other State laws and regulations (and related amendments) which directly affect the regulation of coal exploration mining and reclamation.</li> </ul>                                                                                              | 731.14(b)              |
| <ul style="list-style-type: none"> <li>° A legal opinion from the State Attorney General or the Chief Legal Officer of the State which demonstrates that the State has or will have the legal authority to implement, administer, and enforce the program consistent with the OSM program.</li> </ul> | 731.14(c)              |
| <ul style="list-style-type: none"> <li>° A section-by-section comparison of the State laws and regulations with the Federal Act and regulations explaining any differences and their legal effect.</li> </ul>                                                                                         | 731.14(c)              |
| <ul style="list-style-type: none"> <li>° A copy of the legal document which designates one State agency as the regulatory agency and which delegates to it all necessary authorities for the program.</li> </ul>                                                                                      | 731.14(d)              |

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INFORMATION THAT MUST BE DEVELOPED BY THE REGULATORY AGENCY

b) Process and Procedures:

30 CFR CITATION

Narrative descriptions, flow charts, or other documents indexed to sections of the OSM regulations for:

- ° Providing for public participation in developing, revising and enforcing state regulations, programs and permits. 731.14(g)(14)
- ° Designating lands unsuitable for surface coal mining operations with provisions for:
  - termination designations
  - public participation in the designation process.731.14(g)(11)
- ° Administering and enforcing the performance standards. 731.14(g)(16)
- ° Receiving notices of intent for exploration, reviewing them, and approving or disapproving them. 731.14(g)(1)
- ° Receiving applications for new, revised, or renewed permits for surface coal mining operations, reviewing them, and approving or disapproving them. 731.14(g)(1)
- ° Assessing permit fees. 731.14(g)(2)
- ° Coordinating permit issuance with other State, Federal and local agencies. 731.14(g)(9)
- ° Implementing, administering, and enforcing a system for performance bonds, liability insurance and other guarantees. 731.14(g)(12)
- ° Inspecting and monitoring exploration, mining, and reclamation operations, including provisions for public participation. 731.14(g)(4)
- ° Enforcing administrative, civil, and criminal sanctions for violations of any mining and reclamation laws and regulations. 731.14(g)(5)
- ° Assessing and collecting civil penalties. 731.14(g)(7)

INFORMATION THAT MUST BE DEVELOPED BY THE REGULATORY AGENCY

Process and Procedures: (continued)

30 CFR CITATION

- ° Providing administrative and judicial review of actions in the State program, including inspection and enforcement actions.
- ° Providing a small operator assistance program consistent with Part 795 of the OSM regulations.
- ° Training, examining, and certifying blasters.
- ° Ensuring public notices and holding public hearings.
- ° Consulting with State and Federal agencies responsible for managing fish, wildlife, cultural, historic, archeological, and other environmental values and resources.
- ° Monitoring, reviewing and enforcing restrictions against direct and indirect financial interests of state employees in the mining and reclamation activities.

731.14(g)(15)

731.14(g)(16)

731.14(g)(13)

731.14(g)(8)

731.14(g)(10)

731.14(g)(12)

Status of Coal Mining Activity

Statistical information on exploration, mining and reclamation activities within the State. This information will be used to evaluate the adequacy of the proposed program (e.g., staffing, funding, etc.). Information may include:

731.14(h)

- ° Annual coal production for the three years prior to the program submission indicating:

(h)(1)

- both underground and surface production
- the type of mining (e.g., area, contour, etc.).

- ° The number of mines producing coal during those three years indicating:

(h)(2)

- both underground and surface mines
- the type of coal produced (e.g., bituminous and sub-bituminous).

INFORMATION THAT MUST BE DEVELOPED BY THE REGULATORY AGENCY

Status of Coal Mining Activity: (Continued)

30 CFR CITATION

- ° The acreage approved or permitted for coal exploration and underground or surface mining during those three years. (h) (3)
- ° The number of applications for permits, revisions, or renewals for explanation or mining and reclamation for those three years. (h) (5)
- ° The number of exploration and underground and surface mining activities that are: (h) (7)
  - under permit and actively mined
  - being actively reclaimed
  - virtually completed with reclamation activities.
- ° A map showing the geographic distribution of existing mining activity during the period immediately preceding the program submission (h) (4)
- ° The frequency of State inspection for each permit during the interim regulatory program. (h) (6)
- ° Projection, if available from existing studies of the annual coal production, exploration and mining and reclamation operations for the 3 to 5 years after the program submission, indicating: (h) (8)
  - tonnage
  - type of coal to be produced
  - underground and surface production.

Organization and Staffing

731.14(e)

- ° A description and charts indicating:
  - the existing and proposed structural organization of the regulatory agency
  - the structural organization of any other agencies, division, or departments which will have duties in the state program
  - the coordination system between those agencies
  - the lines of authority within each agency
  - the staffing functions within each agency
  - the staffing functions between agencies

INFORMATION THAT MUST BE DEVELOPED BY THE REGULATORY AGENCY

Organization and Staffing: (continued)

30 CFR CITATION

- ° A copy of supporting agreements between agencies which will have duties in the State program. (f)
- ° A summary table of existing and proposed program staff, showing:
  - job functions
  - titles
  - required job experience and training(i)
- ° An explanation of the projected use of proper personnel and technical personnel that are available to the regulatory agency from other agencies indicating:
  - job functions
  - titles
  - required job experience and training(k)
- ° A description of how the proposed staffing plan will be adequate for program workload, including:
  - permitting
  - legal actions
  - inspections(j)
- ° A description of the existing and proposed use of physical resources, including:
  - vehicles and equipment
  - office and lab space
  - office locations(m)

INFORMATION THAT MUST BE DEVELOPED BY THE REGULATORY AGENCY

Budget:

30 CFR CITATION

- ° A description of the actual capital and operating budget for the State program, including data on:
  - prior and current fiscal years
  - the projected budget for each of the next two fiscal years (assuming supplemental funding from OSM)
  - the source of the funds

731.14(e)

Designating Lands Unsuitable:

The regulatory agency must develop a data base and inventory system with the following capabilities.

764.21

- ° It enables the agency to determine the feasibility of reclamation in areas covered by the petitions.

764.21(a)

- ° It includes information on the designations that are "mandatory" under the Act, e.g., data from federal agencies on lands within:

764.21(b)

- The National Parks System, The National Wildlife Refuge System, The National System of Trails, The National Wilderness Reservation System, The Wild and Scenic Rivers System (including proposed rivers) and National Recreation Areas.
- Federal lands within National Forests
- Publically-owned parks
- Places on the National Register of Historic Places
- 100 feet of the right-of-way of public roads
- 300 feet of a public school, building, church, community or institutional building or public park
- 100 feet of a cemetery



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INFORMATION THAT MUST BE DEVELOPED BY THE REGULATORY AGENCY

Designating Lands Unsuitable: (continued)

30 CFR CITATION

- ° It enables the regulatory agency to prepare required assessments of the impacts of a designation or termination, including data on:
  - the coal resources of the State
  - the demand for those resources
  - the environment
  - the economy and the supply of coal
- ° It includes information that becomes available from: 764.21(c)(2)
  - petitions
  - publications
  - experiments
  - permit applications
  - mining and reclamation operations
  - other sources.

764.21(c)(1)

TABLE 11-2

PUBLIC ACCESS TO DATA COLLECTED OR DEVELOPED BY THE  
REGULATORY AGENCY

| <u>Program Submission To OSM</u>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       | <u>30 CFR CITATION</u>                                                                       |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------|
| <ul style="list-style-type: none"> <li>° The full text of the program submission shall be available for revision at the Office of the Regional Director, the Central Office, and the field offices of the state agency submitting the proposal.</li> <li>° Copies of all written comments shall be available for public inspection and copying.</li> <li>° Copies of the views of the Administrator of EPA, the Secretary of Agriculture, and the heads of other relevant federal agencies shall be available for public inspection and copying.</li> <li>° All decisions on the programs will be published in the <u>Federal Register</u>.</li> </ul> | <p>732.11(a)(1) and<br/>732.12(a)(91)</p> <p>732.12(c)</p> <p>732.13(b)(1)</p> <p>732.13</p> |
| -----                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  |                                                                                              |
| <u>Designating Lands Unsuitable</u>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |                                                                                              |
| <ul style="list-style-type: none"> <li>° The State data base and inventory system for designating lands unsuitable shall be available to the public.</li> <li>° The complete petitions that are received and information that is submitted in relation to the petitions.</li> <li>° Information regarding the designation, including data on mineral content which is potentially toxic in the environment, but not proprietary information on the chemical and physical properties of the coal.</li> </ul>                                                                                                                                            | <p>760.4(b)</p> <p>764.15(b)(2)</p> <p>764.25(c)</p>                                         |
| -----                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  |                                                                                              |
| <u>Permit Applications</u>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             |                                                                                              |
| <ul style="list-style-type: none"> <li>° All information submitted to support an exploration permit shall be made available for inspection and copying subject to the following three conditions:</li> </ul>                                                                                                                                                                                                                                                                                                                                                                                                                                           | 776.17                                                                                       |

PUBLIC ACCESS TO DATA COLLECTED OR DEVELOPED BY THE  
REGULATORY AGENCY

30 CFR CITATION

- a person has requested, in writing, that information not be disclosed.
- the regulatory authority has determined that the information is confidential because it concerns trade secrets or is privileged commercial or financial data relating to the competitive rights of the person that filed for the exploration permit.
- the regulatory authority has provided both the persons requesting and opposing the release of information with notice and an opportunity to be heard.

° A full copy of a complete mining and reclamation permit application shall be made available for the public to inspect and copy, subject to the following conditions:

786.15(a)

- certain information in the application shall be made available to persons with an interest which may be adversely affected, specifically, data on:

786.15(a)(1)

- coal seams
- test borings
- core samplings
- soil samples

- certain information in the application shall be kept confidential and not made part of the public record; specifically, any data on the chemical and physical properties of the coal to be mined (except information regarding mineral or elemental contents of the coal which are potentially toxic to the environment), and

786.15(a)(2)

- information referenced under Section 508 of the Act (Reclamation Plan Requirements) which is not on public file pursuant to State law.

786.15(a)(3)

Bonding

- ° The applicant must prepare a detailed notice for publication in newspapers as part of the procedure for requesting release of the bond.

807.11(b)

- ° Affected parties are provided copies of the bond release application; records of any informal conferences, and the decisions and reviews of the regulatory agency.

807.11(b)

PUBLIC ACCESS TO DATA COLLECTED OR DEVELOPED BY THE  
REGULATORY AGENCY

Inspections and Enforcement

30 CFR CITATION

- ° Copies of all records, reports, inspection materials, and other information developed by the regulatory authority shall be available to the public subject to the following conditions:
  - the conditions applicable to exploration permits (See Section 776.17 above)
  - the conditions applicable to mining and reclamation permits (See Section 786.15 above)
  - special handling may be required to protect preparation for hearings and enforcement proceedings.

840.14(b)

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## CHAPTER 12

### TRIBAL EVALUATIONS AND RECOMMENDATIONS

## CHAPTER 12

### TRIBAL EVALUATIONS AND RECOMMENDATIONS

#### Introduction

The legislative history of the Surface Mining Control and Reclamation Act shows clearly that Congress wishes to consider and honor the views and recommendations of Indian tribes before instituting a regulatory program for Indian lands.

Congress emphasized its commitment to a direct tribal role in the development of a surface mining program for Indian lands by requiring the Secretary of the Interior to provide for participation by the tribes in the Section 710 Indian Lands Study. Also, the individual views of each affected tribe are to accompany the proposed legislation that the Department of the Interior will ultimately submit to Congress.

This chapter describes the tribal evaluative process of the Indian Lands Study and the general recommendations that emerged from it.

#### TRIBAL EVALUATIVE PROCESS

Tribal involvement in the Indian Lands Study began in September, 1977, when the coal-owning tribes first met with OSM officials to express their views on how the study should be conducted. Subsequently, and particularly after May of 1978, CERT, OSM and representatives from the major coal-owning tribes held numerous meetings to discuss the form and the content of the study. The original proposal set forth by tribes in a series of national Indian organization resolutions was to have the entire study done by tribes themselves or to have it done by some representative group which they would designate.<sup>\*/</sup> The Office of Surface

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<sup>\*/</sup> This proposal was approved unanimously by the National Congress of American Indians through a general assembly vote in Dallas on September 21, 1977. Nearly 100 hundred tribes from across the United States were present at the Dallas assembly.

Mining initially agreed to this proposal, then later shifted to a position that it (OSM) would conduct the study, but would in the process "consult" with tribes. A number of contentious meetings were held over a one-year period between the tribes and OSM. The final result was that the "substantive" portion of the study would be done by the tribes themselves through the group which they designated (CERT), but that the Solicitor's Office of the Department of Interior would perform the legal, or "jurisdictional" portion of the study.<sup>\*\*/</sup>

In September, 1978, CERT entered into a contract with OSM to undertake all aspects of the Section 710 Indian Lands Study except for the legal-jurisdictional analysis, which was to be done by the Solicitor's Office of the Department of the Interior. CERT structured its study to provide the affected tribes with the resources and analysis they needed to evaluate and comment on the issues being studied. The initial months were dedicated to developing a clear understanding of the regulatory program created by the Surface Mining Act. Tribes then related this program to their specific reservation setting. By July, 1979, the tribes involved in the study had reached a consensus on recommendations regarding several fundamental characteristics that they felt should be present in a surface mining control and reclamation program for Indian lands.

Consensus on these issues was achieved through the great time and effort that the individual tribes dedicated to this study. For example,

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<sup>\*\*/</sup> This result was protested vigorously by the tribes as contrary to the congressional intent, manifested in Section 710 of the Act, that tribes be guaranteed adequate participation in the Indian Lands Study, of which the Jurisdiction Study is a part, and as contrary to the express wishes of the tribes. (See, e.g., Letter of Allen Rowland, President, Northern Cheyenne Tribe, to Cecil D. Andrus, Secretary of Interior, dated June 7, 1978.)

CERT entered into sub-contracts with six major coal-owning tribes to do detailed assessments of their needs for and role in a regulatory program under the Act. Their efforts included extensive data gathering and the analysis of a comprehensive set of factors affecting surface mining reclamation and control. Monthly meetings were held throughout the course of the study with the subcontracting tribes to coordinate the research effort and to formulate recommendations. In addition, a series of national workshops were designed and coordinated during the course of the study to discuss the substance of the Indian Lands Study with all 25 of the affected coal-owning tribes.

The first workshop was held in Denver, in March, 1979. Its purpose was to introduce the Surface Mining Act and the Indian Lands Study to all of the coal-owning tribes. The two-day workshop presented an overview of the provisions in the Act for environmental performance standards, permits, inspections and enforcement. The legislative history behind Section 710 and the basic purpose of the Indian Lands Study were discussed. Following these general presentations, CERT representatives met with the tribes to discuss the study in greater detail. The ensuing comments and questions clarified the tribes' understanding of the Act and targeted the issues that were of greatest concern. For example, one of the basic principles embodied in Section 710 -- that of enabling tribes to assume full regulatory authority over Indian lands -- was firmly supported by the tribal representatives. Many of the participants described their experience in implementing regulatory programs in land use planning, forestry, zoning, taxation, air quality and other similar areas. At this early juncture, the tribes underscored the need for enhancing tribal sovereignty and the trust responsibilities of the



federal government in any regulatory scheme for Indian lands. They also emphasized the importance of educational and training programs, the availability of special funding and technical assistance, and the integration of this regulatory program with other powers and activities in managing the development of their resources. These concerns helped focus the preliminary analysis of issues regarding the structure, content and needs of a tribal regulatory program under SMCRA.

The second workshop was held in Denver in May, 1979. By this time, the tribes had reviewed CERT analyses and background reports on the Act and on alternative regulatory models for Indian lands. Subcontracting tribes, moreover, had researched their governmental and judicial capabilities for such programs and were in the process of evaluating the models. Consequently, this meeting served two main purposes: (1) to answer any remaining questions about the Surface Mining Act, and (2) to initiate a more focused and detailed discussion of alternative tribal programs and the types of legislative provisions that would be needed to accomplish them. At this meeting, CERT staff presented extensive analyses of the Act and the regulatory models. The tribes were provided with additional background papers on the institutional factors affecting tribal regulatory programs. Both the discussion and the materials set the stage for the formulation of recommendations at the final session.

The last national workshop of the 25 coal-owning tribes was held in Seattle, Washington, in July 1979. Its focus was the discussion of recommendations regarding proposed legislation for implementation of a national Indian lands mining and reclamation program. The meeting began with a presentation by CERT staff which reviewed the provisions of the Act, the regulatory models, special policy issues and the legislative

history of the study. The explanation of the legislative history provided the context and structure for suggestions offered by the tribal representatives. Numerous recommendations were discussed and analyzed by the participants. By the end of the meeting, a unanimous consensus of those attending was reached on seven key recommendations. The remainder were acknowledged as important issues, but no specific proposals for resolving them were endorsed by the group as a whole. It was decided that recommendations other than those to which the tribes unanimously agreed would be submitted on an individual tribal basis. The final recommendations and the rationale for them are discussed in detail below.

#### ISSUES AND RECOMMENDATIONS

Congress authorized the Indian Lands Study for the purposes of conducting research and analysis on questions related to surface mining control and reclamation legislation for Indian lands, and also to provide a vehicle for developing tribal recommendations on the complex issues associated with such legislation. After detailed analysis of SMCRA, alternative models for Indian lands programs, and special policy considerations related to the regulation of mining on Indian lands, the tribes participating in the CERT study identified seven principles which they felt should form the core of any legislative proposals concerning surface mining control and reclamation on Indian lands. These issues and recommendations are presented below.

#### Core Recommendations

The following recommendations should be viewed with two caveats in mind: (1) all of the participants agreed that these items should form the the basis for the Secretary's legislative proposal, but each tribe

reserves the right to comment on any specific legislative language submitted by the Department of the Interior and to suggest additional provisions; and (2) they reflect the views of the officially designated representatives from each tribe participating in the study, but do not represent binding policies of the governing bodies of those tribes. Formal endorsement of these recommendations is expected to occur at national Indian organization meetings later this year.

Recommendation 1:

Surface mining control and reclamation legislation for Indian lands should include provisions which would afford the tribes the option, similar to that currently available to states on state lands, of electing to assume full tribal regulatory authority over all mining and reclamation activities on Indian lands which are regulated by the Act.

The tribes strongly endorse legislation which would provide them the option of assuming full regulatory authority over coal mining activities on Indian lands. Many consider this authority the sine qua non of an acceptable Indian lands program under SMCRA. This recommendation is supported by earlier legislative proposals for regulation of surface coal mines on Indian lands, by the principles embodied in Section 710 of SMCRA, and by a number of policy considerations discussed by the tribes.

Over the years of consideration of the Act, Congress came to the clear conclusion, in developing substantive proposals for regulatory schemes on Indian lands, that tribes should be treated much as states are under the Act [See Appendix for detailed legislative history of prior Indian lands proposals]. Both the 1974 House regulatory schema (H.R. 11500) and the 1977 Senate regulatory schema (S. 7 as amended) envisioned the development, submission and approval of tribal programs. The same showings of legal authority and programmatic capability as

required of states were envisioned for tribes seeking tribal programs. In the course of deliberations on the proposals, tribal governments frequently were compared with state governments. Prior congressional momentum, culminating in Section 710 of the Act, therefore, seems to favor the approach recommended by the tribes under which they, like states, may elect to assume primary jurisdiction over surface coal mining operations on their lands.

At each of the workshops, the participating tribes expressed full support for the principles enunciated in Section 710 of the Act. They accepted:

- ° the definition of "Indian lands" (but reserving judgment on any modifications which might arise from DOI's jurisdictional study);
- ° the treatment of tribes analogously to states for the purpose of designating the regulatory authority on Indian lands, and
- ° the preservation of the federal-tribal trust relationship.

The tribes' rationale for supporting these concepts involved the following policy considerations.

First, these definitions and designations are consistent with the tribes' unique status as quasi-sovereign nations and with the special tribal-federal relationship. The Surface Mining Act affects the disposition of land and minerals held in trust by the tribes and the federal government for the Indian people. Through their constitutions and codes, tribal members have vested the responsibility for managing these resources in the governing bodies of the tribes. These powers are subject only to the plenary powers of Congress and, in specific circumstances, the oversight of the Secretary of the Interior. When Congress exercises its plenary powers over tribal affairs -- as it does in

SMCRA, the Clean Air Act, or other similar national legislation -- it is appropriate for Congress to expressly confirm the tribes' full authority over their environment and the direct tribal-federal relationship. In so doing, tribal, federal and state governments are spared the unnecessary jurisdictional conflicts that arise when legislation is ambiguous on this matter.

Second, the provision allowing full regulatory authority under the Act is important from a practical standpoint. In the floor debate over the 1974 House bill, Congressman (now Senator) Melcher of Montana defended such a scheme for tribal regulatory programs, stating:

[This scheme] is important, if Indians on their own reservations are going to go ahead and allow coal development. They want that jurisdiction themselves. They would prefer not to be under the jurisdiction of any State. They would prefer also to have the opportunity to establish that jurisdiction for themselves, meeting the requirements of this bill. If they can do so, this title and this section of the bill says they may have that opportunity. Without this right they are apprehensive about coal development on their reservations. If they fail to meet the requirements, then the Secretary of the Interior would have to take over for them. If they seek higher standards, that is their right, too, under this bill as it is drafted. Congressional Record H. 711-2 (July 25, 1974).

This rationale is no less viable today. Indeed, given current national energy needs, it is perhaps even more important today that tribes not be inhibited in developing their coal resources if they wish to do so. Tribal representatives frequently noted that no regulatory program under the Surface Mining Act will apply unless the tribe has previously signed a development agreement or lease for the coal. Many tribes including some with very large coal resources such as the Northern Cheyenne, have suggested that they may not be interested in developing their coal resources at all unless they have complete control

over the operation. The Northern Ute Tribe also expressed the importance to them of direct tribal control over their mineral developments, as follows: "Self-determination is the primary goal of the Ute people. Total control of land and other natural resources by the Ute people are the most important aspects of this major goal." (The Ute Indian Tribe, Overall Economic Development Plan, 1976). In fact, the Ute Tribe not only has the strong desire to manage its own resources but also is required to do so by its constitution. (The Ute Indian Tribe, P.I. 7, p.1).

The key decisions of a regulatory agency -- for example, designations for mining suitability and permit issuance -- affect whether and how tribal coal resources are to be developed. In the past, many tribes have relied on the federal government and/or private companies for such decisions. This often has resulted in environmental degradation, poorly planned mining operations, and the loss or underutilization of other tribal resources.

The participating tribes therefore continually stressed the importance of exercising tribal control over existing and future development. Having the option to develop full regulatory programs to implement SMCRA (or, alternatively, to designate the federal agency as the regulator) is thus an essential element of the tribes' determination to control reservation development. Many participants indicated their tribes' intention to exercise the full gamut of tribal powers as resource owners and as governmental units. Both environmental standards and approval powers will be incorporated into new or renegotiated contracts. These terms of the agreement may be inserted on an ad hoc, contract-by-contract basis or through the enactment of tribal laws and

regulations applicable to the mining operation. Allowing tribes to assume full authority under the Act would prevent duplicative regulation and would streamline procedures. This would be consistent with the congressional policies expressed in Section 710 of the Act.

Third, allowing tribes to assume full regulatory authority is consistent with the congressional practice of assigning such functions to the governmental unit most committed to implementing them. Tribes clearly are in the strongest position to carry out the provisions of SMCRA. This factor was summarized by one tribe in the following manner:

One big strength that a tribal regulatory agency has . . . is that they have to live with their decisions. It is tribal land that is being affected, not land a few hundred miles away. If some mistake is made (polluted water, unreclaimed land) the tribe can not pack up and move on. A tribal regulatory agency, therefore, would be working under greater pressure than even state or federal agencies to make environmentally and economically sound decisions. (Northern Cheyenne, P.I. 7, p. 12)

Fourth, tribal regulatory programs would best serve the public participation provisions of the Act. It was noted that, because of geographic, cultural and language barriers, tribal members would have more access to and/or participate more actively in a locally controlled tribal program than a distant federal or state run program.

Fifth, the principles of Section 710 were supported by the tribes out of confidence in their capabilities to implement full regulatory programs. The analyses conducted by the subcontracting tribes, and discussed in Section II of this report, showed that such programs would be within the ambit of their constitutional powers and their ability to develop the administrative and technical capabilities required to implement a program comparable to that of the states. Such a program is seen

as an important step in building the complete range of tribal capabilities envisioned by the Indian Self-Determination Act of 1973 (P.L. 93-638).

Finally, tribal evaluation and analysis of this principle assumed that any tribal programs would be similar to those for states, but that the proposed legislation and any related Department of the Interior regulations would include provisions that are necessitated by certain unique characteristics of Indian lands and Indian tribes. Such modifications and flexibility are essential to the successful implementation of any regulatory program on Indian lands. Some of the suggested variations are highlighted in the remaining recommendations.

Recommendation 2:

Surface mining control and reclamation legislation for Indian lands should include provisions which would afford tribes the additional option of electing to assume various partial regulatory programs via cooperative agreements with the federal government.

Although the tribal representatives strongly support having the option of assuming full regulatory authority, they acknowledged that, for several reasons, it might make sense for some tribes to assume full responsibility for only parts of the regulatory program. If tribes are treated identically with states, however, it would be impossible for them to do so. Under SMCRA, a state may obtain primary regulatory authority only if it submits a complete program covering all aspects of the regulation of surface mining. The Secretary of Interior cannot approve a partial state program.

The participating tribes objected to applying this "all-or-nothing" policy to Indian lands and felt that the diversity of their needs as well as their special federal trust status could justify variance in the



legislation. The suggested solution is the additional allowance for partial tribal programs, as an individual tribal option, where responsibility for various program functions is divided or shared between the tribes and the federal government. This option would also create the potential for phasing in a full tribal program gradually over time, or in increments.

Both the discussions and analyses conducted by the tribes identified various circumstances in which a partial regulatory program might best suit the need of an individual tribe. First, in some cases a tribe with on-going or currently contemplated mining may need to develop agreements for an interim partial regulatory program while it is establishing the full range of legal and programmatic capabilities for full program submission . For example:

- ° A tribe might have the technical expertise and desire to review a mine plan or to conduct inspections geared to the standards in the Act, but might not have had sufficient time to enact a tribal codes conforming with the necessary standards.
- ° In another case, a tribe might have passed the necessary laws and regulations, but might have had insufficient time to hire the necessary staff.
- ° Alternatively, an operator might submit a permit application before OSM had completed its review of the tribal program.

The delays which so far have characterized the development of a national program for surface mining regulations on Indian lands have increased the need for legislative provisions authorizing such interim tribal agreements.

A second reason for providing the partial program alternative to tribes would be to allow a tribe which does not currently possess all of the required program capabilities the opportunity to acquire these

capabilities and related regulatory experience gradually, through co-operation with the federal government during the phased development of a full program. The tribes of the Ft. Berthold Reservation expressed an interest in this option, stating:

It is the tribe's desire to become a full Indian Regulatory Authority. Because of the existing deficient technical capabilities of the tribe, it is recommended that a joint tribal/federal program be established initially with a phase-in to a full regulatory program over a period of three (3) to five (5) years. The phase-in period will be dependent on the tribe's ability to develop the needed technical capabilities. (Fort Berthold, P.I. 7, II.A.)

One likely area for a joint program, identified by Fort Berthold, is the intensively technical process of designating lands unsuitable for mining.

Third, a tribe may prefer to institute a partial program due to the size of the workload of the tribal program. If a tribal regulatory agency expects to review only one mine plan over a time frame of a several years, for example, it may be unable to justify hiring the necessary range of experts for a such a sporadic effort. Similar situations could arise with different program areas of staff expertise or other program costs. The Northern Ute Tribe, for example, noted:

Since there is no surface mining on the Uintah and Ouray Reservation at present, it is difficult to know whether the tribe may, in the future, want full regulatory authority over mining or whether it would want to assume a partial program, such as one in which the tribe does the planning and has the final review and approval, yet let the federal government perform the inspections, etc. The tribe's decision to [fully] regulate surface coal mining may likely depend on the size of the operation both in itself and in comparison to other energy resource development which may be going on within the reservation at the same time (for example: oil and gas, oil shale, uranium and tar sands). It is very clear, however, that the tribe does want to control all its resources for the best interest of the tribe. (The Ute Tribe, P.I. 7, p. 12)

Thus, program size is another factor in choosing between a full and partial tribal program.

A fourth reason for providing tribes an option to assume partial regulatory programs under the Act is to provide greater flexibility in the event that unforeseen legal or procedural problems arise. For example, any problems regarding the respective roles of tribal and federal agencies may be resolved through tribal-federal agreement if the Act provides enough flexibility for partial programs.

Another circumstance which may warrant a partial tribal program would be where a tribe determines for internal governmental policy reasons that the implementation of a particular segment of the program would pose a problem for the tribe. For example, certain administrative provisions for decision-making, hearings, appeals, and reporting could conflict with some tribes' preferred system of government. These and other reasons for supporting the additional partial program option were prompted by the active analyses of alternative regulatory models described in Chapter 9.

The desired allocation of responsibility between a tribe and the federal government in a partial program could be established through cooperative agreements. SMCRA already provides for such flexibility, by authorizing cooperative agreements (between the federal government and the states) for the regulation of mining on federal lands (Section 523 of the Act). This approach was advocated by the participating tribes. Fort Berthold, for example, states:

Cooperative agreements between the tribe and federal regulatory program will be the essence of a joint, phase-in program . . . The ability of this regulatory authority to establish and maintain such agreements is one of the most important functions it will have. The importance of such agreements is inversely proportional to the technical capabilities

of the regulatory authority. That is, where the regulatory authority is newly established and their technical capability is relatively low, the need for cooperative agreements is high. This relationship will shift over time toward more in-house tribal technical capability. (Fort Berthold, P.I. 7, II. B.)

As noted in the discussion of full regulatory programs, Indian tribes possess and plan to exercise their existing governmental powers and contractual authority to decide whether to designate lands unsuitable for mining, to approve mine plans and to pursue other development matters. A provision allowing tribes an additional option of assuming responsibility only for certain parts of the regulatory program would respect the tribes' unique status as resource owners and governmental units, and accommodate any problems that a particular tribe might have with implementing a full program.

Recommendation 3:

Surface mining control and reclamation legislation for Indian lands should include provisions which would assure adequate federal funding of tribal regulatory programs.

The tribes agreed that lack of funds should not impair the principle that tribes must be able to assume regulatory authority over coal mining activities on tribal lands. The states are eligible for federal funding under SMCRA, and the tribes recommend that they be eligible for similar federal funding programs, tailored to meet tribal needs, under Indian lands legislation.

The Secretary of the Interior is authorized to make annual grants to the states for both development and implementation of a state program (Section 705 of the Act; 30 CFR Part 735). States may apply for two annual program development grants. The first development grant may cover up to 80% of program development costs, and the second development grant may cover up to 60% of such costs. The amount of the subsequent

annual implementation grants depends upon the number of development grants received by a state. If no development grant was awarded, a state's implementation grant may cover up to 80% of its program implementation costs for the first year, 60% for the second year and 50% for each following year. If one development grant was awarded, a state's implementation grant may cover up to 60% of costs the first year and 50% for each following year. Finally, if a state was awarded two annual development grants, it is eligible for only a 50% implementation grant each year.

Tribes, like states, should be eligible for federal funding for the development of their regulatory programs and for their implementation. Such funding should be adequate to ensure that the tribes are able to assume the degree of regulatory authority which they elect to assume. This means that relatively higher levels of federal funding should be available to the tribes, particularly during the initial years of the tribal program.

Increased funding for tribal programs is required for several reasons. First, the tribes are not in the same financial position as states and often do not have the same potential for raising revenues as states. As noted by the Crow Tribe:

As a rule, tribes do not have the financial resources to build a regulatory agency from the ground up, and failure to financially support the program could effectively prevent tribal regulation of surface mining. Also, it is important that the programs and agency be established prior to commencement of mining on Crow lands. Consequently, the Crow Tribe will require full initial funding. A formula should be arrived at which will gradually reduce the federal portion to an equitable share as the program starts to bring in supporting funds through filing fees, taxes, etc. (Crow Tribe, P.I. 7, P. 2)

Similarly, the Northern Ute Tribe states:

"The initially high rate of federal funding is necessary because the tribe is not at present receiving income from surface mining and yet, at the same time, recognizes a need to start implementing some of the provisions of the Act (especially the planning processes) before any coal surface mining would begin." (The Ute Tribe, P.I. 7, p. 13).

Moreover, the relative costs of developing and implementing a regulatory program will be greater for tribes than for states. Nearly all coal states have had a surface coal mining and reclamation program of some variety for a number of years. Thus, the states already have on hand a significant amount of resource data as well as the technical staff, equipment, and facilities required for an approvable program. As noted by the Northern Cheyenne, tribes not only lack existing regulatory authority under that Act but also have not had access to many of the related programs which would be helpful in developing an approved program:

Tribes have in the past been excluded from many resource planning programs which have funded state studies. State programs have also often excluded tribes. In cases where the tribe has obtained these federal funds it has often had to do so through the state or after a long struggle with the federal agency. The initial extra funding for the tribes would primarily provide the tribes with "catch up" money. (Northern Cheyenne, P.I. 7, p. 5).

This same concern was voiced by the Ute Tribe:

[M]any tribes, at present, know less about their resources and regulating their resources than states. Although the gap is becoming narrower as tribes such as the Ute have begun fish and wildlife management programs, water management programs, etc., it does exist. Tribes have been at a disadvantage in obtaining many of the federal funds available to states for conducting natural resource inventories and management programs. The initial federal funding of a tribal regulatory authority would allow the tribes to carry out some of this necessary resource inventory and planning. (Ute Tribe, P.I. 7, pp. 13-14).

For these reasons, the tribes recommend a SMCRA funding formula of 100% of tribal program development costs, and 100% of tribal program administration and enforcement costs for the initial years of the program.

The tribes' recommendation for such substantial federal funding is supported not only by their special need for such funds, as discussed above, but also by several other considerations. First, under SMCRA, the states have been eligible for grants of up to 100% of all incremental costs (costs over and above existing state regulatory costs) incurred in implementing the interim regulatory program (Section 502(e)(4); 30 CFR Part 725). The tribes likewise should be eligible for total funding of increased regulatory authority in the initial years.

Second, in all likelihood, the federal government would institute a regulatory program for Indian lands, and therefore incur all regulatory costs, in the absence of an approved tribal program. Thus, reimbursement to tribes of costs which would otherwise be born by the federal government is only reasonable. Currently, when states undertake mining regulatory programs which encompass federal trust lands, they also receive funding for the portion of the cost which otherwise would be born by the federal agency (Section 705). Tribes should be accorded similar treatment when they assume responsibility for a federally-mandated program on tribal trust lands.

Significantly, all prior legislative proposals for regulatory schemas on Indian lands have envisioned the availability of substantial federal grant monies for the development, administration and enforcement of tribal programs, including funds for training and hiring necessary personnel. The 1974 House bill would have authorized \$2 million annually for these purposes, and the 1977 Senate bill would have authorized \$3 million.

Finally, in order to encourage the development of integrated tribal natural resources management and regulatory programs, it is recommended that tribes should not be limited in their use of SMCRA grants as matching funds for other related federal grants, or in the use of other federal funds to complement their surface mining regulatory effort.

Recommendation 4:

Surface mining control and reclamation legislation for Indian lands should include provisions which would establish special training and educational programs designed to assist tribes in acquiring skills and capabilities required for mining regulatory programs.

The Surface Mining Act authorizes OSM to provide states with technical assistance and training for implementing their regulatory programs. The technical and procedural complexity of the program created by the Act was expected to impede states' abilities to assume full regulatory authority, even those states which already had established surface mining programs. To meet this need, OSM has been directed to provide:

- ° technical assistance and training for the development, administration, and enforcement of state programs, and
- ° assistance in preparing and maintaining an inventory of information on surface coal mining and reclamation operations for each state. (Section 705)

There was unanimous agreement among the participating tribes that this support and additional related assistance should be extended to Indian tribes. Although many of the coal-owning tribes have instituted other planning and regulatory programs, the range of highly technical capabilities required under the Act warrant special attention to technical assistance needs.



Tribes are in a more difficult position than states in terms of technical capabilities not only because they have no existing surface mining regulatory programs but also because they have not received the direct assistance for developing data, staff, and procedures that states have obtained under other environmental laws. Because this would be the first federal program to accord tribes this regulatory status, such technical assistance and training will play a critical role in ensuring the successful implementation of tribal surface mining programs.

There are several other reasons why technical assistance will be important to the tribes. First, there are certain functions which require highly specialized technical skills for only very short periods of time. It may not be cost-effective for a tribe to obtain the special expertise for such relatively short periods.

Second, technical assistance will aid the tribes in achieving self-sufficiency in performing various regulatory functions. It may operate as one kind of on-the-job training. This aspect is discussed in greater detail under Recommendation Five.

The tribes further recommend that technical assistance be available not only from OSM but also from any other relevant federal agency. Prior legislative proposals for Indian lands have made such provision for special technical assistance to the tribes. The 1974 House bill H.R. 11500, for example, authorized technical and professional assistance from any federal agency on a reimbursable or non-reimbursable basis.

Recommendation 5:

Surface mining control and reclamation legislation for Indian lands should include provisions which would establish special technical assistance availability to tribal regulatory programs.

Titles III, XIII, and IX of the Surface Mining Act provide federal funds and assistance for research and education programs to develop both the technical and human resources that are needed by government and industry to manage surface mining activities. As indicated earlier, the Act sponsors three major efforts in this area:

- Funding of State mining and mineral resource research institutes. Their purpose is twofold: (1) to conduct research, demonstrations and experiments, and (2) to provide for the education and training of mining engineers and scientists through these studies. The institute for each State is to be located at an existing qualified state institution (Section 302);
- Funding of energy resource graduate fellowships (Section 901); and
- Funding of ten university coal research labs whose dual function is to conduct research and development and to train students through these studies.

Such education and training assistance is of great importance to the coal-owning tribes. The participants strongly felt that these programs should be extended to specifically include tribes (e.g., an Indian-based research institute) and individual tribal members (e.g., fellowships, research funds, etc.).

The tribes are committed to the long-range goal of staffing tribal regulatory agencies and mining operations with tribal members. Training and educational programs developed under SMCRA for Indian lands should be designed to help tribes achieve this goal. As stated by the Northern Ute Tribe:

The tribe would need additional staff for a mining regulatory agency. The Resource Division has a good core of people that could initially be drawn on to help set up the agency (minerals director, planner, field representative, fish and wildlife director, etc.). Given the tribe's ability to hire competent staff, both Indian and non-Indian, the tribe should not have any more problems with acquiring needed staff than states are having.

Ideally, these jobs would be performed by tribal members. Recognizing limitations at this time, the Ute Tribe supports the recommendations that education training programs and technical assistance be made available to tribes and tribal members . . . (Ute Tribe, P.I. 7, pp. 8-9)

To fully accomplish this goal of tribal self-determination, Indians must be eligible for special education and training programs. Such programs might include undergraduate and graduate scholarships for Indians studying subjects such as mining engineering, land-use planning, energy and environmental law, and environmental sciences. Special funds could be provided for on-the-job training programs for Indian trainees in such specialized areas as permit review and mine inspection. On-the-job training could be given by qualified federal or tribal personnel operating under a tribal program or by OSM personnel in the normal course of their own work.

These and other programs would assist the tribes in improving their capability for sound energy resource development as well as for an approved and self-sufficient mining regulatory program.

In making provision for such education and training programs, the tribes should be given considerable flexibility. For example, tribes should be able to send their members not only to an Indian or tribal mineral institute but also to other training programs, such as those conducted by the industry, state or federal governments, or educational institutions, according to the tribes' perceptions of their regulatory or other needs. Tribes specifically should be given access to OSM's national training facilities and courses in Beckley, West Virginia.

Finally, the eligibility of a tribe or its members to participate in these various education and training programs should not depend on

the tribe having an approved tribal program. These education and training programs should begin on the effective date of the legislation, and all tribes and tribal members should be eligible to participate in these programs, without regard to whether a tribal regulatory program has yet been developed, submitted, or approved.

Recommendation 6:

Surface mining control and reclamation legislation for Indian lands should include provisions which would furnish compensation to tribes for the loss of those tribal coal resources which cannot be mined as a result of the Act's prohibition of mining in alluvial valley floors.

The participating tribes strongly felt that those tribes who cannot mine all or part of their coal resources due to the Act's prohibition of mining in alluvial valley floors should be compensated.

The tribes' primary hope of improving their economic status, and obtaining the social benefits that implies, is in developing the resources on the lands that are left them. Unlike other resource developers, those tribes cannot simply look elsewhere to mine coal. The Act, although for legitimate environmental purposes, has deprived some tribes of access to significant portions of their energy resources. The tribes believe that, under the circumstances, they should be compensated for their economic loss.

Section 510(b)(5) of the Act provides for an alluvial valley floor coal exchange program, involving exchanges of federal coal leases or of fee titles to coal which has been precluded from mining because of its location in these areas. An operator is eligible for such a coal exchange if he has not produced coal in commercial quantities or obtained specific permit approval from the state to mine alluvial valley floor areas, but has made "substantial financial and legal commitments" prior to January 1, 1977, in connection with such an operation.

The exchange provision alone does not meet tribal needs. A major goal of tribes and of much federal Indian policy since 1934, has been to reconsolidate the Indian reservation land base after its fragmentation by earlier federal policies, such as allotment and reservation homesteading, which are now generally acknowledged as disastrous. The reluctance of tribes to see their mineral resource base further fragmented by alluvial valley exchange of tribal coal, in addition to numerous tribal constitutional and federal statute restrictions on the alienation (by sale or exchange) of tribal trust resources, means that a more direct form of compensation must be provided for Indian tribes.

Furthermore, there should be no requirement that a tribe have made "substantial financial and legal commitments" in connection with the mining of such coal. That requirement makes no sense in the context of tribal coal resource ownership and development, or in light of the mutual goals of tribes and the federal government to see that viable tribal economies develop on Indian reservations.

It is specifically recommended, therefore, that affected tribes who precluded from mining their coal in alluvial valleys be given the option of electing to receive direct monetary compensation, according to the projected value of unmineable coal reserves, or a grant of a transferable federal coal lease for a comparable quantity of federal coal, or a combination of the two. Federal compensation for the congressional action prohibiting tribal access to their coal in alluvial valley floor areas is particularly appropriate given the federal-tribal trust relationship in the management of Indian resources.

Recommendation 7:

Surface mining control and reclamation legislation for Indian lands should include provisions which allow for flexibility in developing and implementing tribal regulatory programs in order to accommodate local or tribe-specific requirements and conditions.

The participating tribes agreed that they should be afforded sufficient flexibility in designing their regulatory programs to take into account considerations unique to the tribes and to tribal lands.

One of the policies of SMCRA is that state programs be developed which meet the minimum federal requirements, and at the same time, "reflect local requirements and local environmental and agricultural conditions" (Section 201(c)(9)).

As discussed in Chapter Two, OSM has promulgated regulations implementing the statutory requirements for an approved state regulatory program. As a general rule, state provisions may be more stringent than federal provisions, but never less stringent. State provisions also may vary somewhat from federal regulations but not from the requirements of the Act. This defines generally the concept of minimum federal standards for the regulation of surface mining.

To provide for variances from federal provisions, necessitated by "local requirements and local environmental and agricultural conditions," OSM included in the final regulations a concept known as the "state window" (30 CFR 731.13). It represents a special procedure for the submission and approval of state provisions with approaches that vary from those in the federal regulations. The "state window" allows variances from the federal regulations which are necessitated by local considerations, as long as the state provisions provide no less stringent protection for the environment and public safety and health.

The coal-owning tribes expressed their expectation that an Indian Lands program also would include a similar, but more flexible "tribal window," which would acknowledge and respect the broad cultural and physical diversity which exists on Indian lands. This mechanism should allow for meaningful program flexibility necessitated by physical, environmental or agricultural factors, and cultural considerations.

As stated in Part II of this study:

Tribal coal lands in the West [where most Indian coal reserves are located] share the common characteristics of having generally thin soil over usually flatlying sedimentary rocks, and an arid or semi-arid climate . . .

Within the generally common themes of bedrock geology and arid climate, the 25 reservations exhibit many variations of landforms, soil types, and vegetation. [These range] from the desert shrublands of Navajo and Hopi coal lands to the dryland wheat fields and grazing lands of the Fort Berthold Reservation in North Dakota and the ponderosa pine forests on portions of the Crow and Northern Cheyenne Reservations. . .

The potential for reclaiming surface mined land in the West is highly site specific and mining and reclamation practices at a specific site will have to be developed based on a number of factors, including:

- ° Adequate evaluation of the detailed ecological and physical conditions at the site.
- ° Careful planning for the land use that is chosen for the site after mining is completed.
- ° Availability and appropriate selection of technology and reclamation techniques to deal with potential environmental problems at the site.
- ° Skillful application of the required technology and practices.

Thus, it is anticipated that the tribes will require considerable flexibility to accommodate special environmental and agricultural conditions on Indian lands.

The "tribal window" also should enable tribes to vary their regulatory program when certain "local requirements" -- other than local environmental or agricultural conditions -- require deviation from the federal standards. Such "local requirements" would include various cultural considerations such as those discussed earlier in this study. One example is the tribes' religious and privacy interests in maintaining the confidentiality of the locations of burial grounds or other sacred sites. To accommodate this special need, there must be flexibility in defining "proprietary data" which is exempt from public disclosure and in establishing the system for designating lands unsuitable for mining. For these reasons, the participating tribes recommend that added flexibility be provided for tribal programs.

#### Other Recommendations

The seven primary recommendations discussed above received strong support from all the participating tribes and unanimously were agreed to by the tribal representatives at the final workshop in Seattle, Washington, on July 11, 1979.

Many secondary recommendations were considered and judged by the tribes involved to be of a nature best handled on an individual, tribe-by-tribe basis, rather than collectively. Some of these areas of significant concern were: public participation in a tribal regulatory program; the status and funding of tribal courts; the need for greater elaboration of environmental standards, and the application of them to existing leases; and, the need to reaffirm the trust relationship between the tribes and the federal government.



The matter of "public participation" was of considerable interest to the tribes. The Southern Ute Tribe, for example, recommends that the requirements for public participation be limited to tribal members and those residing on land contiguous to reservation lands. (Southern Ute Indian Tribe, Recommendation No. 12). Fort Berthold Reservation notes that "[C]itizen participation is equally important with respect to the tribes. The relationship of the tribe to its members and resources is more pronounced than that of state government. It has been the commitment of the Indian people to rule by councils and common consent. It has been a long standing tribal practice to hold community involvement meetings . . . ." (Fort Berthold, P.I. 7, II.B.) Fort Berthold makes extremely detailed proposals for public participation procedures in connection with the regulatory model it advocates for its own lands. (Fort Berthold, P.I. 7, Appendix, Exhibit B).

Several tribes recommended that the legislation specifically acknowledge the role of the tribal courts in reviewing issues arising from the regulatory process. The Southern Ute Tribe recommended that administrative review be conducted by a Tribal Regulatory Commission, with judicial review in tribal court. (Southern Ute Tribe P.I. 7, Recommendation No. 6) Fort Berthold and the Northern Cheyenne also indicated their desire to assume the entire administrative and judicial review function. (Fort Berthold, P.I. 7, p. iv.; No. Cheyenne, P.I. 7, P. 11) Along with recognition of the tribal courts' role under a tribal program many tribes supported special funding for training court personnel in areas critical to the Act and to sustain the increased tribal court workload. As expressed by the Crow Tribe:

The tribal courts should be vested with review authority over contested tribal regulatory agency decisions and funding should be available to sustain this function by the tribal courts. It is appropriate that tribal courts should maintain jurisdiction over tribal law. Increased work-load and personnel requirements will necessitate some funding assistance. Also, education and training for judges will be an important factor in successfully implementing the regulatory program. (Crow Tribe, P.I. 7, Recommendation 6).

The Southern Ute Tribe was particularly concerned about the maintenance of stringent environmental standards. The tribe proposed that the reclamation requirements of the Act as they applied to Indian lands be spelled out more fully. This tribe also proposed that existing leases be reexamined in relation to the criteria for designating lands unsuitable for mining.

It also was stressed, consistent with Section 714(f) of SMCRA, that "surface owner consent" is an internal matter for the tribes and is not appropriate for federal legislative action.

One issue provoking considerable discussion was the relationship among the relevant federal agencies and, in turn, their relationships with tribes. The discussion reflected the various tribes' experience in attempting to deal with the federal government. Some of the tribes, therefore, thought it particularly important to incorporate a statement of the nature of the trust relationship between the tribes and the federal government into the legislation. The Crow Tribe also recommended that, "Program managers within federal agencies . . . be provided with training to better acquaint themselves with tribal issues, including tribal sovereignty, unique characteristics of tribal governments, etc." (Crow Tribe, P.I. 7, Recommendation 5).

It also was felt that the federal-tribal trust relationship, in the context of surface mining regulation, should be broadly interpreted. Thus, the Southern Ute Tribe recommends that "the Indian tribes have the

option to make cooperative agreements with the Bureau of Indian Affairs, the Office of Surface Mining or any other applicable federal agency, and in addition that federal agencies work together through cooperative or other agreements." (Southern Ute Tribe, P.I. 7, Recommendation No. 8). Similarly, the Crow Tribe recommends that the legislation "clearly identify the role of the Office of Surface Mining and Enforcement in relation to other agencies involved with mineral activities on Indian lands - the U.S. Geological Survey and the Bureau of Indian Affairs." (Crow Tribe, P.I. 7, pp. 4-5)

Finally, although only one tribe explicitly cited it as a proposal to be included in legislation, all of the tribes alluded to their basic responsibility for their people, their lands, and their culture. Because they have this responsibility, they think they should make the decision as to what type of regulatory scheme is best for their individual tribes. The Northern Cheyenne stressed this as a legislative recommendation, stating that:

The legislation should recognize that the primary governmental responsibility for developing, authorizing, issuing and enforcing regulations for surface mining and reclamation operations on Indian lands shall be the tribe. It is, therefore, the tribe that has the option of choosing the most appropriate regulatory authority. (Northern Cheyenne Tribe, P.I. 7, Recommendation 7.)

The above discussion represents a sampling of the many issues which individual tribes will address in the future. The discussion reflects the importance which the tribes attach to the regulation of surface mining on Indian lands, the effort they have expended in analyzing the special issues associated with such regulation, and their determination to maintain effective control of their resource development.

## SUMMARY OF RECOMMENDATIONS

The tribes involved in the Indian Lands Study recommend that DOI's proposed surface mining control and reclamation legislation for Indian lands should include the following key elements:

1. Provisions which would afford tribes the option, similar to that currently available to states on state lands, of electing to assume full tribal regulatory authority over all mining and reclamation activities on Indian lands which are regulated by the Act. Most tribes consider this recommendation absolutely critical to any acceptable Indian lands program under SMCRA.
2. Provisions which would afford tribes the additional option of electing to assume various partial regulatory programs via cooperative agreement with the federal government.
3. Provisions which would assure adequate federal funding of tribal regulatory programs.
4. Provisions which would establish special training and educational programs designed to assist tribes in acquiring skills and capabilities required for mining regulatory programs.
5. Provisions which would provide for special technical assistance availability to tribal regulatory programs.
6. Provisions which would furnish compensation to tribes for the loss of those tribal coal resources which cannot be mined as a result of the Act's prohibition of mining in alluvial valley floors.
7. Provisions which allow for flexibility in developing and implementing tribal regulatory programs in order to accommodate local or tribe-specific requirements and conditions.

Detailed recommendations relating to these general features are discussed in Chapter 12 of this report.

## APPENDICES

- APPENDIX A: Section 710 of the Surface Mining Act
- APPENDIX B: Definitions
- APPENDIX C: Environmental Performance Standards
- APPENDIX D: Designation of Lands Unsuitable for  
Surface Mining Activities
- APPENDIX E: Permit System Requirements
- APPENDIX F: Enforcement Requirements
- APPENDIX G: Legislative History of SMCRA, Regarding  
Surface Mining and Reclamation on  
Indian Lands

## Appendix A

### Section 710 of the Surface Mining Act ("Indian Lands")

The Indian Lands Study was mandated by Congress in Section 710 of the Surface Mining Control and Reclamation Act of 1977. Section 710 is presented below.

#### INDIAN LANDS

SEC. 710. (a) The Secretary is directed to study the question of the regulation of surface mining on Indian lands which will achieve the purpose of this Act and recognize the special jurisdictional status of these lands. In carrying out this study the Secretary shall consult with Indian tribes. The study report shall include proposed legislation designed to allow Indian tribes to elect to assume full regulatory authority over the administration and enforcement of regulation of surface mining of coal on Indian lands.

(b) The study report required by subsection (a) together with drafts of proposed legislation and the view of each Indian tribe which would be affected shall be submitted to the Congress as soon as possible but not later than January 1, 1978.

(c) On and after one hundred and thirty-five days from the enactment of this Act, all surface coal mining operations on Indian lands shall comply with requirements at least as stringent as those imposed by subsections 515(b)(2), 515(b)(3), 515(b)(5), 515(b)(10), 515(b)(13), 515(b)(19), and 515(d) of this Act and the Secretary shall incorporate the requirements of such provisions in all existing and new leases issued for coal on Indian lands.

(d) On and after thirty months from the enactment of this Act, all surface coal mining operations on Indian lands shall comply with requirements at least as stringent as those imposed by sections 507, 508, 509, 510, 515, 516, 517, and 519 of this Act and the Secretary shall incorporate the requirements of such provisions in all existing and new leases issued for coal on Indian lands.

(e) With respect to leases issued after the date of enactment of this Act, the Secretary shall include and enforce terms and conditions in addition to those required by subsections (c) and (d) as may be requested by the Indian tribe in such leases.

(f) Any change required by subsection (c) or (d) of this section in the terms and conditions of any coal lease on Indian lands existing on the date of enactment of this Act, shall require the approval of the Secretary.

(g) The Secretary shall provide for adequate participation by the various Indian tribes affected in the study authorized in this section and not more than \$700,000 of the funds authorized in section 712(a) shall be reserved for this purpose.

(h) The Secretary shall analyze and make recommendations regarding the jurisdictional status of Indian Lands outside the exterior boundaries of Indian reservations: *Provided*, That nothing in this Act shall change the existing jurisdictional status of Indian Lands.

## Appendix B: Definitions

Terms used in this report correspond in meaning with those of the Surface Mining Act. These terms are defined in Section 701 of the Act, which is presented below. Frequently used terms are underlined.

### DEFINITIONS

#### SEC. 701. For the purposes of this Act—

(1) "alluvial valley floors" means the unconsolidated stream laid deposits holding streams where water availability is sufficient for subirrigation or flood irrigation agricultural activities but does not include upland areas which are generally overlain by a thin veneer of colluvial deposits composed chiefly of debris from sheet erosion, deposits by unconcentrated runoff or slope wash, together with talus, other mass movement accumulation and wind-blown deposits;

(2) "approximate original contour" means that surface configuration achieved by backfilling and grading of the mined area so that the reclaimed area, including any terracing or access roads, closely resembles the general surface configuration of the land prior to mining and blends into and complements the drainage pattern of the surrounding terrain, with all highwalls and spoil piles eliminated; water impoundments may be permitted where the regulatory authority determines that they are in compliance with section 515(b) (8) of this Act;

(3) "commerce" means trade, traffic, commerce, transportation, transmission, or communication among the several States, or between a State and any other place outside thereof, or between points in the same State which directly or indirectly affect interstate commerce;

(4) "Federal lands" means any land, including mineral interests, owned by the United States without regard to how the United States acquired ownership of the land and without regard to the agency having responsibility for management thereof, except Indian lands: *Provided*, That for the purposes of this Act lands or mineral interests east of the one hundredth meridian west longitude owned by the United States and entrusted to or managed by the Tennessee Valley Authority shall not be subject to sections 714 (Surface Owner Protection) and 715 (Federal Lessee Protection) of this Act.

(5) "Federal lands program" means a program established by the Secretary pursuant to section 523 to regulate surface coal mining and reclamation operations on Federal lands;

(6) "Federal program" means a program established by the Secretary pursuant to section 504 to regulate surface coal mining and reclamation operations on lands within a State in accordance with the requirements of this Act;

(7) "fund" means the Abandoned Mine Reclamation Fund established pursuant to section 401;

(8) "imminent danger to the health and safety of the public" means the existence of any condition or practice, or any violation of a permit or other requirement of this Act in a surface coal mining and reclamation operation, which condition, practice, or violation could reasonably be expected to cause substantial physical harm to persons outside the permit area before such condition, practice, or violation can be abated. A reasonable expectation of death or serious injury before abatement exists if a rational person, subjected to the same conditions or practices giving rise to the peril, would not expose himself or herself to the danger during the time necessary for abatement;

## Appendix B

### Definitions -

(Cont.)

(9) "Indian lands" means 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;

(10) "Indian tribe" means any Indian tribe, band, group, or community having a governing body recognized by the Secretary;

(11) "lands within any State" or "lands within such State" means all lands within a State other than Federal lands and Indian lands;

(12) "Office" means the Office of Surface Mining Reclamation and Enforcement established pursuant to title II;

(13) "operator" means any person, partnership, or corporation engaged in coal mining who removes or intends to remove more than two hundred and fifty tons of coal from the earth by coal mining within twelve consecutive calendar months in any one location;

(14) "other minerals" means clay, stone, sand, gravel, metal-liferous and nonmetalliferous ores, and any other solid material or substances of commercial value excavated in solid form from natural deposits on or in the earth, exclusive of coal and those minerals which occur naturally in liquid or gaseous form;

(15) "permit" means a permit to conduct surface coal mining and reclamation operations issued by the State regulatory authority pursuant to a State program or by the Secretary pursuant to a Federal program;

(16) "permit applicant" or "applicant" means a person applying for a permit;

(17) "permit area" means the area of land indicated on the approved map submitted by the operator with his application, which area of land shall be covered by the operator's bond as required by section 509 of this Act and shall be readily identifiable by appropriate markers on the site;

(18) "permittee" means a person holding a permit;

(19) "person" means an individual, partnership, association, society, joint stock company, firm, company, corporation, or other business organization;

(20) the term "prime farmland" shall have the same meaning as that previously prescribed by the Secretary of Agriculture on the basis of such factors as moisture availability, temperature regime, chemical balance, permeability, surface layer composition, susceptibility to flooding, and erosion characteristics, and which historically have been used for intensive agricultural purposes, and as published in the Federal Register.

(21) "reclamation plan" means a plan submitted by an applicant for a permit under a State program or Federal program which sets forth a plan for reclamation of the proposed surface coal mining operations pursuant to section 508;

(22) "regulatory authority" means the State regulatory authority where the State is administering this Act under an approved State program or the Secretary where the Secretary is administering this Act under a Federal program;

(23) "Secretary" means the Secretary of the Interior, except where otherwise described;

(24) "State" means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, American Samoa, and Guam;



## Appendix B

### Definitions -

(Cont.)

(25) "State program" means a program established by a State pursuant to section 503 to regulate surface coal mining and reclamation operations, on lands within such State in accord with the requirements of this Act and regulations issued by the Secretary pursuant to this Act;

(26) "State regulatory authority" means the department or agency in each State which has primary responsibility at the State level for administering this Act;

(27) "surface coal mining and reclamation operations" means surface mining operations and all activities necessary and incident to the reclamation of such operations after the date of enactment of this Act;

(28) "surface coal mining operations" means—

(A) activities conducted on the surface of lands in connection with a surface coal mine or subject to the requirements of section 516 surface operations and surface impacts incident to an underground coal mine, the products of which enter commerce or the operations of which directly or indirectly affect interstate commerce. Such activities include excavation for the purpose of obtaining coal including such common methods as contour, strip, auger, mountaintop removal, box cut, open pit, and area mining, the uses of explosives and blasting, and in situ distillation or retorting, leaching or other chemical or physical processing, and the cleaning, concentrating, or other processing or preparation, loading of coal for interstate commerce at or near the mine site: *Provided, however,* That such activities do not include the extraction of coal incidental to the extraction of other minerals where coal does not exceed 16 $\frac{2}{3}$  per centum of the tonnage of minerals removed for purposes of commercial use or sale or coal explorations subject to section 512 of this Act; and

(B) the areas upon which such activities occur or where such activities disturb the natural land surface. Such areas shall also include any adjacent land the use of which is incidental to any such activities, all lands affected by the construction of new roads or the improvement or use of existing roads to gain access to the site of such activities and for haulage, and excavations, workings, impoundments, dams, ventilation shafts, entryways, refuse banks, dumps, stockpiles, overburden piles, spoil banks, culm banks, tailings, holes or depressions, repair areas, storage areas, processing areas, shipping areas and other areas upon which are sited structures, facilities, or other property or materials on the surface, resulting from or incident to such activities; and

(29) "unwarranted failure to comply" means the failure of a permittee to prevent the occurrence of any violation of his permit or any requirement of this Act due to indifference, lack of diligence, or lack of reasonable care, or the failure to abate any violation of such permit or the Act due to indifference, lack of diligence, or lack of reasonable care;

(30) "lignite coal" means consolidated lignitic coal having less than 8,300 British thermal units per pound, moist and mineral matter free;

(31) the term "coal laboratory", as used in title VIII, means a university coal research laboratory established and operated pursuant to a designation made under section 801 of this Act;

(32) the term "institution of higher education" as used in titles VIII and IX, means any such institution as defined by section 1201(a) of the Higher Education Act of 1968.

ENVIRONMENTAL PERFORMANCE STANDARDS  
Standards for Surface Mining Activities  
Under P.L. 95-87, Section 515

| Requirement                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           | Section                                                                                  |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------|
| <p><u>Objectives</u></p> <p>General</p> <ul style="list-style-type: none"> <li>● Maximize utilization and conservation of the coal</li> <li>● Reclaim areas being mined in an environmentally sound manner</li> <li>● Reclaim mined areas as contemporaneously as practical with the surface coal mining operation</li> <li>● Consider the physical, climatological, and other characteristics of the site in all mining and reclamation activities</li> <li>● Use the best technology available</li> <li>● Minimize disturbances and adverse impacts on fish, wildlife and other environmental values and enhance such resources where practical</li> </ul>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          | <p>515(b)(1)</p> <p>515(b)(16)</p> <p>515(b)(16)</p> <p>515(b)(23)</p> <p>515(b)(24)</p> |
| <p>Restoration</p> <ul style="list-style-type: none"> <li>● Restore the land to condition capable of supporting land uses equal to or better than the pre-mining uses, provided that               <ul style="list-style-type: none"> <li>● such uses do not threaten water quality or availability</li> <li>● such uses are reasonable, practical, and consistent with land-use policies</li> <li>● such uses can be implemented in a timely manner</li> <li>● such uses are consistent with Federal, State, and local law.</li> </ul> </li> <li>● Restore the approximate original contour</li> <li>● Exceptions to restoring original contour include               <ul style="list-style-type: none"> <li>● operations which remove the upper fraction of a mountain ridge, or hill, subject to special performance standards</li> <li>● operations for which the post-mining use will be industrial, commercial, agricultural, residential, or public facility activities, subject to special standards and the review approval of the appropriate state, local and other land-use planning agencies.</li> <li>● operations applying for exceptions must meet special environmental performance standards</li> </ul> </li> </ul> | <p>515(b)(2)</p> <p>515(b)(3)</p> <p>515(c)(2)</p> <p>515(c)(3)</p> <p>515(c)(4)</p>     |

ENVIRONMENTAL PERFORMANCE STANDARDS  
Standards for Surface Mining Activities  
Under P.L. 95-87, Section 515

| Requirement                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           | Section                                                                                                                                      |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------|
| <p><b>Revegetation</b></p> <ul style="list-style-type: none"> <li>● Revegetate all affected lands with a diverse, effective and permanent vegetative cover of the same seasonal variety native to the area and capable of self-regeneration and plant succession.</li> <li>● Assume responsibility for successful revegetation for a period of five full years, except that in areas where the annual average precipitation is equal to or less than 26 inches, the operator will be responsible and liable for ten full years</li> </ul>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             | <p>515(b)(19)</p> <p>515(b)(20)</p>                                                                                                          |
| <p><u>Detailed Standards</u></p> <p><b>Waste Management</b></p> <ul style="list-style-type: none"> <li>● Stabilize and protect all surface areas, including spoils piles, to control erosion and related air and water pollution.</li> <li>● Preserve topsoil from the mining area for revegetation program.</li> <li>● Restore the topsoil or best available subsoil which is best able to support revegetation.</li> <li>● Stabilize and revegetate all waste piles being used for the surface disposal of wastes, tailings, coal processing wastes, others.</li> <li>● Comply with standards developed by DOI and the Chief of Engineers for the design, location, construction, operation maintenance, enlargement, modification, removal abandonment of coal mine waste piles (consisting of mine wastes, tailings, coal processing wastes, and other liquid and solid wastes) that are used either temporarily or permanently as dams or embankments.</li> <li>● Dispose of all debris, acid forming materials or other materials that are a fire hazard in a manner that prevents contamination of water quality and sustained combustion.</li> <li>● Dispose of all spoils within the permit area.</li> <li>● Dispose of all excess spoils in a manner consistent with detailed standards that protect against erosion, contamination of water, mass movements, and other concerns</li> </ul> | <p>515(b)(4)</p> <p>515(b)(5)</p> <p>515(b)(6)</p> <p>515(b)(11)</p> <p>515(b)(13)</p> <p>515(b)(14)</p> <p>515(b)(21)</p> <p>515(b)(22)</p> |

ENVIRONMENTAL PERFORMANCE STANDARDS  
Standards for Surface Mining Activities  
Under P.L. 95-87, Section 515

| Requirement                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        | Section    |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------|
| <b>Water Management</b>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            |            |
| <ul style="list-style-type: none"> <li>● Minimize the disturbances to the prevailing hydrologic balance at the mine site and in associated offsite areas.</li> </ul>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               | 515(b)(10) |
| <ul style="list-style-type: none"> <li>● Minimize disturbances to the quantity and quality of water in the surface and ground water, systems during and after operations and reclamation by:               <ul style="list-style-type: none"> <li>● Avoiding acid or other toxic mine drainage</li> <li>● Preventing additional contributions of suspended solids to the streamflow</li> <li>● Prevent runoff outside the permit area</li> <li>● Comply with all applicable Federal and State laws</li> <li>● Clean out and remove temporary or large settling ponds or other siltation structures after areas are revegetated and stabilized</li> <li>● Restore the recharge capacity of the area to approximate premining conditions</li> <li>● Avoid deepening or enlarging channels for discharging water from the mines</li> <li>● Preserve the essential hydrologic functions of alluvial valley floors in the arid and semiarid areas of the country</li> </ul> </li> </ul> |            |
| <ul style="list-style-type: none"> <li>● Construct water impoundments only with the approval of the regulatory authority</li> </ul>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                | 515(b)(8)  |
| <ul style="list-style-type: none"> <li>● Refrain from constructing roads or other access roads up stream beds or drainage channels which might after the normal waterflow.</li> </ul>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              | 515(b)(18) |

ENVIRONMENTAL PERFORMANCE STANDARDS  
Standards for Surface Mining Activities  
Under P.L. 95-87, Section 515

| Requirement                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    | Section                                                                            |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------|
| <p>Other Specifications</p> <ul style="list-style-type: none"> <li>● Use explosives in a manner consistent with Federal and State laws.</li> <li>● Submit blasting plans</li> <li>● Retain records of all use of explosives</li> <li>● Conduct blasting operations with persons certified by the regulatory agency.</li> <li>● Refrain from surface mining within 500 feet of active or abandoned underground mines, unless approved by the regulatory agency.</li> <li>● Construct, maintain and restore access roads, to prevent erosion, siltation, water pollution, damage to fish or wildlife or their habitat, or public or private property.</li> </ul> | <p>515(b)(15)</p> <p>515(b)(12)</p> <p>515(b)(17)</p>                              |
| <p>Other Specifications</p> <ul style="list-style-type: none"> <li>● Protect off-site areas from slides or damages</li> <li>● Provide for an undisturbed natural barrier to slides or erosion.</li> </ul>                                                                                                                                                                                                                                                                                                                                                                                                                                                      | <p>515(b)(21)</p> <p>515(b)(25)</p>                                                |
| <p><u>Provisions for Special Operations</u></p> <p>Operations on prime farm lands</p> <p>Auger operations</p> <p>Steep-slope mining operations</p> <p>Mountain-top removal</p> <p>Alluvial valley floors</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                   | <p>515(b)(7)</p> <p>515(b)(9)</p> <p>515(d)</p> <p>515(c)(2)</p> <p>515(b)(10)</p> |

# Appendix D

## DESIGNATION OF LANDS UNSUITABLE FOR SURFACE MINING ACTIVITIES Areas Formally Excluded From Mining By P.L. 95-87, Section 522(e)

| Requirement                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         | Section   |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------|
| <u>Public Lands</u><br><br>National Park System<br>National Wildlife Refuge Systems<br>National System of Trails<br>National Wilderness Preservation System<br>Wild and Scenic Rivers Act and National Recreation Areas designated by Act of Congress                                                                                                                                                                                                                                                                                                                                                                               | 522(e)(1) |
| Custer National Forest<br><br>Any other national forest unless <ul style="list-style-type: none"> <li>- Secretary of DOI finds that there are no significant recreational , timber, economic, or other values which may be incompatible with surface mining, and</li> <li>- The surface operations and impacts are incident to an underground coal mine, or</li> <li>- The areas are west of the 100th meridian do not have significant forest cover, and surface mining is in compliance with the Multiple-Use Sustained Yield Act, Federal Coal Leasing Amendments Act, National Forest Management Act, and P.L. 95-87</li> </ul> | 522(e)(2) |
| Publically owned parks or places included in the National Register of Historic Sites, unless approved jointly by the Federal, State or Local agencies with jurisdiction over the area and the regulatory agency under P.L. 95-87                                                                                                                                                                                                                                                                                                                                                                                                    | 522(e)(3) |
| <u>Other Lands</u><br><br>Lands within 100 feet of the outside right of way line of public roads, except <ul style="list-style-type: none"> <li>- Where the mine haulage and access roads adjoin the right-of-way</li> <li>- If public notice, hearings, and written findings determine that interests of the landowners and the public are protected</li> </ul>                                                                                                                                                                                                                                                                    | 522(e)(4) |
| <ul style="list-style-type: none"> <li>- Within 300 feet from any occupied dwelling, unless waived by the owner, public buildings, schools, churches, community or institutional buildings, and public parks.</li> <li>- Within 100 feet of a cemetery</li> </ul>                                                                                                                                                                                                                                                                                                                                                                   | 522(e)(5) |

DESIGNATION OF LANDS UNSUITABLE FOR SURFACE MINING  
Areas That May Be Designated Unsuitable By the Regulatory Agency  
Under P.L. 95-87, Section 522

| Requirement                                                                                                                                                                                                                                                                                                                                                  | Section      |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------|
| <u>Areas may be designated unsuitable, upon petition, under the following circumstances:</u><br><br>If the operation will be incompatible with existing state or local land use plans                                                                                                                                                                        | 522(a)(3)(A) |
| If the operation will affect fragile lands or historic lands, especially if the operation could significantly damage important <ul style="list-style-type: none"> <li>◦ historic values</li> <li>◦ cultural values</li> <li>◦ esthetic values</li> <li>◦ scientific values, or</li> <li>◦ natural systems</li> </ul>                                         | 522(a)(3)(B) |
| If the operation will affect renewable resource lands, such as aquifers and aquifer recharge areas, and if the operation could result in <ul style="list-style-type: none"> <li>◦ a substantial loss or reduction of long-range water supply</li> <li>◦ a substantial loss or reduction of the long-range productivity of food and fiber products</li> </ul> | 522(a)(3)(C) |
| If the operation will affect natural hazard lands in which the operation could substantially endanger life and property, especially <ul style="list-style-type: none"> <li>◦ areas subject to frequent flooding</li> <li>◦ areas subject to unstable geology</li> </ul>                                                                                      | 522(a)(3)(D) |
| <u>Unreclaimable Lands</u><br><br>The agency, upon petition, must designate an area as unsuitable if the agency determines that reclamation consistent with the standards in this Act is not technologically and economically feasible                                                                                                                       | 522(a)(2)    |

Appendix E

PERMIT SYSTEM

Information to be Submitted by the Applicant  
Under P.L. 95-87, Sections 507 & 508

| Requirement                                                                                                                                                                                                                                                                            | Section                |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------|
| <u>Corporate Status</u>                                                                                                                                                                                                                                                                |                        |
| Identification of the applicant, including business status, and special data if applicant is a partnership, corporation, or other business entity.                                                                                                                                     | 507(b)(1)<br>507(b)(4) |
| Statement on any current or previous surface coal mining permits in the United States.                                                                                                                                                                                                 | 507(b)(3)              |
| Statement on whether the applicant, any subsidiary, or affiliate or other related persons has held a Federal or State mining permit within the previous 5 years which has been suspended, revoked or similarly penalized.                                                              | 507(b)(5)              |
| <u>Access to the Permit Area</u>                                                                                                                                                                                                                                                       |                        |
| Names and addresses of every legal owner of record of the property (surface and subsurface) to be mined.<br>Names and addresses of holder of any leasehold interest in the property.<br>Names and addresses of any purchaser of record of the property under the real estate contract. | 507(b)(1)              |
| Names and addresses of owners of all surface and subsurface areas adjacent to the permit areas.                                                                                                                                                                                        | 507(b)(2)              |
| Copy of applicants advertisement in newspaper of general circulation which describes ownership, location and boundaries of the site.                                                                                                                                                   | 507(b)(6)              |
| Statement and documents upon which applicant bases his right to enter and commence surface mining operations.                                                                                                                                                                          | 507(b)(9)              |
| Maps or plans showing-The boundaries of the land to be affected,<br>- boundaries of affected property owners<br>- man-made features of the area<br>- archeological sites<br>- location of all buildings within 1000 feet of the site.                                                  | 507(b)(13)             |
| <u>Mining Operation</u>                                                                                                                                                                                                                                                                |                        |
| Description of type and methods of coal mining operation<br>Description of engineering techniques to be used<br>Description of the equipment to be used                                                                                                                                | 507(b)(7)              |



PERMIT SYSTEM  
Information to be Submitted by the Applicant  
Under P.L. 95-87, Sections 507 & 508

| Requirement                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 | Section                                           |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------|
| Description of the anticipated start-up and termination dates of each phase of the operation                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                | 507(b) (8)                                        |
| Statement on the number of acres to be affected                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             | 507(b) (8)                                        |
| Maps and plans showing land within the permit area upon which the applicant has the legal right to enter and commence operations.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           | 507(b) (6)                                        |
| Maps or plans showing <ul style="list-style-type: none"> <li>- location of spoil, waste, or refuse areas</li> <li>- location of topsoil preservation areas</li> <li>- location of all impoundments for waste or erosion control</li> <li>- location of any settling pond or water treatment facility</li> <li>- location of constructed or natural drainways</li> <li>- location of any discharges into any surface body of water</li> <li>- profiles at the appropriate cross-sections of the final surface configuration that will be achieved under the reclamation plan</li> </ul>                                                                                                                                                                                                      | 507(b) (14)                                       |
| Identification of any previous mining limits<br>Identification of known underground mines                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   | 507(b) (14)                                       |
| <u>Environmental Baseline Data</u><br><u>Water</u> <ul style="list-style-type: none"> <li>● Identification of the watershed and location of the surface stream or tributary into which surface and pit drainage will be discharged</li> <li>● Determination of the probable hydrologic consequences of the operations, on and off-site with regard to:               <ul style="list-style-type: none"> <li>- the hydrologic regime</li> <li>- quantity and quality of water in surface and ground water system.</li> </ul> </li> <li>● Collection of data for the mine site and surrounding areas to enable the regulatory agency to evaluate the cumulative impacts upon the hydrology of the area, particularly on water availability. (Exceptions made for small operations)</li> </ul> | 507(b) (10)<br><br>507(b) (11)<br><br>507(b) (11) |

PERMIT SYSTEM  
Information to be Submitted by the Applicant  
Under P.L. 95-87, Sections 507& 508

| Requirement                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        | Section                      |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------|
| <p><b>Geology</b></p> <ul style="list-style-type: none"> <li>● Cross-section maps or plans of the actual area to be mined showing <ul style="list-style-type: none"> <li>- elevation and location of test borings or coal sampling.</li> <li>- nature and depth of strata of overburden</li> <li>- location of subsurface water and its quality</li> <li>- nature and thickness of coal or rider seam above the coal seam to be mined</li> <li>- nature of the stratum below the coal seam to be mined.</li> <li>- all mineral crop lines and strike and dip of the coal seam to be mined</li> <li>- location of aquifers</li> <li>- estimated elevation of the water table</li> </ul> </li> </ul> | 507(b)(14)                   |
| <p><b>Other</b></p> <ul style="list-style-type: none"> <li>● Description of climatological factors as requested by the regulatory agency</li> <li>● Identification of prime farm lands, accompanied by a soil sample consistent with Department of Agriculture standards.</li> </ul>                                                                                                                                                                                                                                                                                                                                                                                                               | 507(b)(12)<br><br>507(b)(16) |
| <p><u><b>Coal Resource</b></u></p> <p>Statement of results of test borings or core samplings from the permit area including</p> <ul style="list-style-type: none"> <li>- logs of the drill holes</li> <li>- thickness of the coal seam</li> <li>- analysis of the chemical properties of the coal</li> <li>- sulfur content of the coal</li> <li>- chemical analysis of potential and/or toxic forming sections of the overburden</li> <li>- chemical analysis of the stratum immediately below the coal to be mined</li> </ul>                                                                                                                                                                    | 507(b)(15)                   |
| <p><u><b>Reclamation Plan</b></u></p> <p><b>General</b></p> <ul style="list-style-type: none"> <li>● Identification of lands subject to surface coal mining operations over the life of the operations</li> <li>● Identification of the size, sequence, and timing of subareas for which individual permits will be sought</li> </ul>                                                                                                                                                                                                                                                                                                                                                              | 508(a)(1)                    |

PERMIT SYSTEM  
Information to be Submitted by the Applicant  
Under P.L. 95-87, Sections 507 & 508

| Requirements                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  | Section                                                             |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------|
| <p>Land Use</p> <ul style="list-style-type: none"> <li>● Description of the pre-mining land-use including information on <ul style="list-style-type: none"> <li>- existing uses</li> <li>- if mining has occurred previously, the use prior to that mining activity</li> <li>- the capability of the land prior to mining to support a variety of uses</li> <li>- the productivity of the land prior to mining, especially with regard to classification as prime farm lands and yields of food, fiber, forage, or wood products.</li> </ul> </li> <li>● Description of the post-mining use of the land, including a discussion of <ul style="list-style-type: none"> <li>- the utility and capacity of the reclaimed land to support a variety of alternative uses</li> <li>- the relationship of such use to existing land-use policies and plans</li> <li>- the comments of any surface owners</li> <li>- the comments of any State and local governments that have the authority to regulate the proposed land use</li> </ul> </li> <li>● Description of how the post-mining land use is to be achieved</li> <li>● Description of the support activities that will be necessary to achieve the post-mining use</li> </ul> | <p>508(a)(2)</p> <p>508(a)(3)</p> <p>508(a)(4)</p> <p>508(a)(4)</p> |
| <p>Reclamation Methods</p> <ul style="list-style-type: none"> <li>● Describe the engineering techniques to be used</li> <li>● Describe the equipment to be used</li> <li>● Provide the plan for controlling surface water management</li> <li>● Provide the plan for backfilling, soil stabilization, compacting, grading and revegetation</li> <li>● Provide the plan for soil reconstruction, replacement, and stabilization for prime farm lands</li> <li>● Provide an estimate of the costs per acre for the reclamation</li> <li>● Provide a detailed timetable for accomplishing each step in the reclamation plan</li> <li>● Describe the measures to be taken to protect <ul style="list-style-type: none"> <li>- the quality of surface and ground water systems (on and off site)</li> <li>- the rights of present users to such water</li> <li>- the quantity of surface and ground water system (on and off-site)</li> </ul> </li> </ul>                                                                                                                                                                                                                                                                          | <p>508(a)(15)</p> <p>508(a)(7)</p> <p>508(a)(13)</p>                |

PERMIT SYSTEM  
Information to be Submitted by the Applicant  
Under P.L. 95-87, Sections 507 & 508

| Requirement                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       | Section                                                                                |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------|
| <p>Compliance with other standards</p> <ul style="list-style-type: none"> <li>● Demonstrate that consideration has been given to maximizing the utilization and conservation of the coal</li> <li>● Show that consideration has been given to making the operations consistent with the plans of surface mines and appropriate State and local land-use plans and programs</li> <li>● Describe steps that will be taken to comply with applicable air, water and other health and safety laws</li> <li>● Describe the consideration given to developing the plan consistent with local physical, environmental and climatological conditions</li> <li>● Indicate all interest or options held by the applicant or pending interests of the applicant in lands which are contiguous to the permit area.</li> </ul> | <p>508(a)(6)</p> <p>508(a)(8)</p> <p>500(a)(9)</p> <p>500(a)(10)</p> <p>508(a)(11)</p> |

## Appendix F

### ENFORCEMENT Standards for Enforcement Activities Under P.L. 95-87 Sections 517, 518, 519, & 521

| Requirement                                                                                                                                                                                                                                                                                                                                                                                                       | Section                 |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------|
| <u>Inspections and Monitoring</u><br><br>Permittees must establish and maintain appropriate records<br>Permittees must report monthly to the agency<br>Permittees must install, use, and maintain necessary monitoring equipment and methods<br>Permittees must evaluate the results in accordance with methods of the agency<br>Permittees must provide any other information requested by the regulatory agency | 517(b)(1)               |
| Regulatory Agency must establish monitoring sites if the operation affects aquifers. Sites are for monitoring: <ul style="list-style-type: none"> <li>• quantity and quality of surface drainage</li> <li>• ground water quantity and quality</li> <li>• precipitation at the site</li> </ul>                                                                                                                     | 517(b)(2)               |
| DOI must respond to all reports from the public on possible violations.<br><br>DOI must notify the State, if appropriate                                                                                                                                                                                                                                                                                          | 517(h)<br><br>521(a)(1) |
| <u>Sanctions</u><br><br>Issue cessation orders in cases where the violation, condition or practice <ul style="list-style-type: none"> <li>• creates an imminent danger to public health and safety</li> <li>• is or may reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources</li> </ul>                                                                      | 521(a)(2)               |
| Issue notices of violations for cases that may not cause imminent and significant danger to public health, safety and the environment.                                                                                                                                                                                                                                                                            | 521(a)(3)               |
| Issue cessation order if the operator fails to take actions required under a notice of violation.                                                                                                                                                                                                                                                                                                                 | 521(a)(3)               |

## ENFORCEMENT

### Standards for Enforcement Activities Under P.L. 95-87 Sections 517, 518, 519 & 521

| Requirement                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          | Section   |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------|
| <p>Issue a show cause order on why the permit should not be suspended or revoked it</p> <ul style="list-style-type: none"> <li>° there is a pattern of violations</li> <li>° there is an unwarranted failure to comply (negligence)</li> <li>° there have been willful violations</li> </ul>                                                                                                                                                                                                                         | 521(a)(4) |
| <p>Request civil actions for relief (including permanent or temporary injunctions, restraining order, and other similar actions) if the permittee or agent</p> <ul style="list-style-type: none"> <li>° violates or fails to comply with any order or decision</li> <li>° interferes with, hinders or delays agency in carrying out responsibilities</li> <li>° refuses to admit agency to the mine</li> <li>° refuses to permit inspections</li> <li>° refuses to permit access to or copying of records</li> </ul> | 521(c)    |
| <p>Levy civil penalties for all violations cited in cessation orders</p> <ul style="list-style-type: none"> <li>° determine whether to levy civil penalties for other violations,</li> <li>° permittee's history of previous violations</li> <li>° severity of the violation</li> <li>° negligence of the permittee</li> <li>° demonstrated good faith of the permittee in abating the violation</li> </ul>                                                                                                          | 518(a)    |
| <p><u>Performance Bond Release</u></p> <p>Perform inspections and evaluate reclamation of the site noting</p> <ul style="list-style-type: none"> <li>° the degree of difficulty of complete reclamation</li> <li>° whether surface or subsurface water is being polluted</li> <li>° probability that any pollution will continue to occur</li> <li>° estimated cost of abating such pollution</li> </ul>                                                                                                             | 519(b)    |

## ENFORCEMENT

### Standards for Enforcement Activities Under P.L. 95-87 Sections 517, 518, 519 & 521

| Requirement                                                                                                                                                                                                                                                            | Section |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------|
| Release whole or part of bond <ul style="list-style-type: none"><li>° when operator completes backfilling, regrading, and drainage control (60% of the bond for that area may be released)</li><li>° after revegetation has been established</li><li>° other</li></ul> | 519(c)  |

APPENDIX G

LEGISLATIVE HISTORY  
OF THE  
SURFACE MINING CONTROL AND  
RECLAMATION ACT OF 1977  
  
REGARDING  
THE REGULATION OF SURFACE MINING  
AND RECLAMATION ON INDIAN LANDS



I. ANALYSIS OF PRIOR LEGISLATIVE PROPOSALS FOR THE  
REGULATION OF SURFACE COAL MINES ON INDIAN LANDS

The earliest bills for the regulation of surface mining and reclamation did not recognize Indian lands as involving unique considerations. To the extent Indian lands were noted at all, they were treated as a stepchild of the federal government and lumped in with federal lands. As such, they were subject to various schemes, including: (1) continued jurisdiction by the various federal agencies, with upgraded permit conditions or regulations; (2) assumption of jurisdiction by states under an approved program, and (3) regulation under a federal program, with or without the possibility of regulation by the states pursuant to cooperative agreements between the federal government and the states.

As time passed, and Congress apparently focused more on the regulation of operations on Indian lands, the two legislative directions taken were: (1) further study of Indian lands issues, and (2) regulatory schemas for Indian lands which treated the tribes much as states are treated under the Act, i.e. tribes could choose between a tribal or federal program.

Both the 1974 House regulatory schema (H.R. 11500) and the 1977 Senate regulatory schema (S. 7 as amended) envisioned the development, submission and approval of tribal programs. The same showings of legal authority and programmatic capability required of states were envisioned for tribes seeking tribal programs. Tribal governments frequently were compared with state governments. While there was some concern expressed

with respect to conflicts-of-interest, from the perspective of black-mailing operators rather than lax environmental protection, it seems this was not viewed generally as an insurmountable problem. The early House bill, for example, provided for (1) waiver of sovereign immunity by tribes submitting tribal programs, and (2) judicial review in tribal courts, with trial de novo in Federal District Court after exhaustion of tribal court remedies.

These regulatory schemas for Indian lands, moreover, envisioned the availability of federal grant monies for the development, administration and enforcement of tribal programs, including funds for training and hiring necessary personnel. The House bill also authorized technical and professional assistance from any federal agency on a reimbursable or non-reimbursable basis. The 1974 House bill would have authorized \$2 million annually for these purposes, and the 1977 Senate bill would have authorized \$3 million. [Compare this with total authorization in Section 712 of the Act.]

Adoption of the current Indian lands study version apparently was based primarily on a desire to accommodate the tribes and to provide a vehicle for Indian consensus, rather than on Congressional concern over the Indians' proper role in the regulation of surface coal mining or their ability to assume that role.

There was some concern over altering the status with respect to jurisdiction over Indian lands, both within reservations and outside reservation boundaries. [This was discussed generally and specifically with reference to the definition of "Indian lands." Also, many jurisdictional questions do not appear to have been answered by the two legislative proposals which were advanced for regulation of mining on

Indian lands. This concern is underscored by the last-minute addition of Section 710(h).] One reason cited for this concern, however, was the tribes' own lack of consensus on the issue.

The Congressional momentum, therefore, seems to favor an approach under which tribes, like states, may obtain primary jurisdiction over surface coal mining operations on their lands, or else be regulated under a federal program.

Details of this legislative history follow.

## II. LEGISLATIVE HISTORY

### A. 90th Congress

The Senate Committee on Interior and Insular Affairs held hearings (April 30 and May 1-2, 1968) on S. 3132, S. 3126 and S. 217. These bills made no explicit reference to Indian lands. They either (1) made no change with respect to federal jurisdiction over mining (on federal and Indian lands), requiring only that the appropriate federal agencies ensure that conditions were imposed on strip mine operations on those lands which were as stringent as those to be applied on state lands, or (2) apparently allowed for the regulation of mines on federal and Indian lands by the state under an approved state program. There were no Indian witnesses at the hearings, and the committee reported no bills.

### B. 91st Congress

No hearings were held, and no bills were reported.

### C. 92nd Congress

#### 1. Senate

The Senate Subcommittee on Minerals, Materials, and Fuels held four days of hearings (November 16-17 and December 2, 1971, and February 24, 1972) on a number of bills (S. 77, S. 630, S. 993, S. 1160, S. 1240, S. 1498, S. 2455, S. 2777, S. 3000 and S. 3283).

Many of these bills either were not comprehensive regulatory schemas or were of the two types described above. One of the bills which did not alter federal jurisdiction over federal and Indian lands [providing only that "The heads of all federal departments or agencies which have jurisdiction over land on which mining operations are permitted are authorized to promulgate environmental regulations to govern

such mining operations. . . to assure at least the same degree of environmental protection and reclamation on lands under their jurisdiction as is required by any law and regulation established under an approved state program for the state in which such land is situated . . ."] did specifically exclude from state programs "federally owned land or land held in trust by the United States for Indians." (Sections 301(a) and 201(a) of S. 993).

Another of the bills provided explicitly for regulation of mining on Indian lands by the federal government, under approved federal plans developed and administered by federal departments with jurisdiction over such lands (S. 3282). This bill was introduced by Sen. Randolph (D-WVA) after the close of hearings.

There was one Indian witness at the Senate hearings -- Mr. Tom Andrews of the Black Mesa Defense Fund, Santa Fe, New Mexico. His testimony, attached, was strongly pro-environment and recommended that, while various Interior agencies retained jurisdiction over Indian lands, the Environmental Protection Agency should develop an Environmental Impact Statement for each mining operation proposed for federal and Indian lands.

The Senate Committee on Interior and Insular Affairs reported out a bill (S. 630 Senate Report No. 92-1162, in September, 1972).

## 2. House of Representatives

The House Committee on Interior and Insular Affairs also conducted hearings (September 20-21, October 21 and 26, and November 29-30, 1971) during the 92nd Congress. The hearings covered a number of bills (H.R. 60, H.R. 444, H.R. 4556, H.R. 5689, H.R. 9736, and H.R. 10758). These bills were of the first three types discussed above, i.e. continued

federal jurisdiction with upgraded regulations by the affected federal departments (with or without explicit reference to Indian lands) or the possibility of state assumption of jurisdiction over federal and Indian lands.

Testimony again was presented by individuals from the Black Mesa Defense Fund (Messrs. Jack Loeffler and Scott Denman). This time, abolition of strip mining was advocated, and a discussion of whether their views were representative ensued.

The House committee reported out a bill (H.R. 6482, H. Rep. 92-1462). The bill provided for primary federal responsibility in regulating strip mining, subject to approved state plans. The following discussion took place on the House floor:

MR. RHODES. First, may I ask you this question. Do the provisions of this bill apply to Indian lands as well as to any other lands in the country?

MR. EDMONDSON. The provisions of this bill, as I understand it, would apply to any coal mining operation with the requisite tonnage in the United States.

MR. RHODES. So that if these Indian lands are located in the State of Arizona, for instance, and if the State of Arizona does have a law regulating strip mining, still the mines on Indian lands would be subject to this bill and not subject to the law of the State of Arizona. Is that not correct?

MR. EDMONDSON. This is not correct if the State of Arizona has an effective law that is recognized as adequate to meet the problems of reclamation. It can administer the program for all of the lands within the State of Arizona.

MR. RHODES. Including Indian lands?

MR. EDMONDSON. Including all the lands of the state where coal is being mined.

MR. RHODES: Including Indian lands?

MR. EDMONSON: Including all the lands where coal is being mined.

MR. RHODES. The gentleman does not seem to want to answer my question.

MR. EDMONDSON. Including any Indian lands where coal is being mined; the bill covers all the country.

MR. RHODES. The gentleman has answered my question.

Cong. Rec. 35043-4 (October 11, 1972).<sup>\*/</sup>

Thus, H.R. 6482 provided for regulation of strip mining on all lands within a state, including federal and Indian lands, by the federal government or by the state under an approved program.

### 3. Legislation

The House passed H.R. 6482 in October, 1972, but the 92nd Congress adjourned before the Senate considered either the House bill or the bill reported out by the Senate committee (S. 630).

#### D. 93rd Congress

##### 1. Senate

The surface mining bills introduced in the Senate and pending before the Senate Committee on Interior and Insular Affairs in the 93rd Congress were: S. 425 (Jackson, Buckley, Mansfield, Metcalf, and Moss) (As introduced, this bill directed the Secretary of Interior to regulate surface mining on Indian lands as well as federal lands

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<sup>\*/</sup> Mr. Rhodes continued:

My problem, of course, is that the Federal Government along with the utilities of the area, has invested millions of dollars in the Navajo power plant at Page, Ariz. The fuel for this plant will be provided from Black Mesa, which is Hopi coal, and it will be strip mined. I am told that much of the land from which this will be taken is in excess of 20° slope. I am also told that this could reduce the supply of coal to the extent that the Navajo plant may not be operable for the number of years originally contemplated. I would like to remind the House that there is approximately \$100 million of federal money already appropriated, and there will be approximately \$35 million more federal money supplied for the construction of the Navajo plant. To me, it seems that this would be enough reason, even if there were no other, to take another look at this bill to see what we are doing to the federal investment in the Navajo plant.

Id.

under a "Federal Lands Program". It also provided for cooperative agreements with states regarding regulation on federal and Indian lands. S. 923 (Jackson and Fannin -- Administration proposal tracking S. 993 92nd Congress); S. 1163 (Baker); S. 1185 (Case); S. 1612 (Metcalf), and S. 946 (Stevenson), which dealt with demonstration projects.

The Senate committee held hearings on bills then before it (S. 425 and S. 923) on March 13-16, 1973. There was no testimony by Indian representatives. The committee agreed to mark up S. 425 and met in public mark-up sessions for 10 days to consider amendments to the bill. On September 10, 1973, the committee completed action on the bill and ordered S. 425 favorably reported to the Senate with recommendation that the bill as amended be passed.

As reported, the Senate bill (S. 425) provided for an Indian lands study. The Committee Report (S. Rep. No. 93-402) explains:

As introduced, S. 425 directed the Secretary of the Interior to regulate surface mining on Indian lands, as well as federal lands. During its deliberations on the bill, the Committee initially decided to give the Indian tribes the opportunity to develop their own regulatory programs in much the same manner as the states.

However, since no Indian testimony was taken during the Committee's hearings, nor did the Department of the Interior address itself to the effect of regulation or how Indian tribal governments could participate, the Committee decided to exempt temporarily all Indian lands from the Act.

The Committee intends to have hearings on this subject as soon as the study report called for by this section has been received. These hearings will give Indians an opportunity to express their views and give their recommendations directly to Congress. In the



interim, the Committee expects the Secretary of the Interior to protect the surface values of all Indian lands from the potential ravages of surface mining through his authority to approve all mineral leases and permits. The Committee expects that the Secretary will include terms and conditions in such leases which will meet the criteria set out in this Act . . . (P. 74)

In the case of mining operations on Indian lands, the Committee was requested by representatives of a number of affected tribes, to postpone federal regulation of mining on Indian lands until greater consultation could be sought from the tribes, giving them an opportunity to design mining and reclamation programs for their own lands. The bill therefore also provides for a study by the Secretary of the Interior, to examine the question of applying the provisions of the Act to Indian lands . . . (P. 40)

During floor debate, Senator Metcalf stated, "I understand that an amendment will be offered that provides that Indians may come within the purview of the bill." Congressional Record, 33209, (October 8, 1973). No such amendment was offered, however, and the Senate bill passed without amendment to the Indian lands study provision.

## 2. House of Representatives

A number of surface mining bills were introduced in the House in the early months of the 93rd Congress. When the Subcommittees on the Environment and Mines and Mining of the House Committee on Interior and Insular Affairs held hearings on the subject of surface mining regulations in the 93rd Congress (April 9-10 and 16-17, May 14-15, 1973), the following bills were pending before the committee: H.R. 3 (Mr. Hays, et al.), H.R. 181 (Mr. Dingell, et al.), H.R. 726 (Mr. McDade), H.R. 1000 (Mr. Hechler, et al.), H.R. 1411 (Mr. Peyser), H.R. 1603 (Mr. Perkins), H.R. 2380 (Mr. Price of Illinois), H.R. 2425 (Mr. Shoup), H.R. 2551 (Mr. Hechler, et al.), H.R. 2677 (Mr. Hechler, et al.), H.R. 2861 (Mr. Price of Illinois), H. R. 3518 (Mr. Vigorito), H.R. 4863 (Mr. Saylor -- the

Administration bill), H.R. 5377 (Mr. Hechler, et al.), H.R. 5651 (Mr. Udall, et al.), H.R. 5988 (Mr. Saylor, et al.), (The bill tracked S. 425 as introduced, providing for federal regulation on Indian lands with the possibility of cooperative agreements with the States), H.R. 6603 (Mr. Foley), H.R. 6709 (Mr. Dingell).<sup>\*/</sup>

Upon the conclusion of hearings, during which there was no Indian testimony, a new bill was prepared as a Committee Print known as "Draft No. 3", which incorporated many features of the bills pending before the Committee as well as provisions addressing concerns raised during the Subcommittee hearings. By a vote of the joint subcommittees on August 2, 1973, Draft No. 3 was adopted as the mark-up vehicle and the joint Subcommittees held 29 days of public mark-up sessions. On November 12, 1973, the joint subcommittees agreed to report the amended text of Draft 3 as a clean bill (H.R. 11500) to the full committee.

Full committee deliberations began on February 20, 1974. After 19 days of public mark-up sessions, action was completed on May 14, 1974, and the committee favorably reported H.R. 11500 as amended to the House. H.R. 11500, as reported out of committee, contained a regulatory scheme for Indian lands under which tribes were treated essentially the same way as states. The relevant statutory provision, Title III of H.R. 11500 is explained in the House Committee report No. 93-1072.

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<sup>\*/</sup> Subsequently, the following bills were introduced: H.R. 8743 (Mr. Burton), H.R. 8787 (Mr. Burton), H.R. 8812 (Mr. Saylor), H.R. 9135 (Mr. Seiberling), H. Res. 36 (Mr. Hechler), H.R. 12898 (Mr. Hosmer), H.R. 13108 (Mr. Hosmer), H.R. 15000 (Mr. Hechler).

On the House floor, Congressman Hosmer (California) offered two amendments regarding Indian lands. The first amendment would have exempted Indian lands from regulation under the Act, leaving surface mining control and reclamation on the reservations to continued Interior supervision of tribal contracts and leases. This amendment was defeated. Congressional Record, H. 6833-4, (July 22, 1974). During the floor debate on this amendment, there was some discussion of the conflict-of-interest question.

The second amendment would have replaced Title III of H.R. 11500 with the Senate's language calling for an Indian lands study. Congressional Record, H. 7112-3, (July 25, 1974). In the floor debate on the second amendment, Congressman Melcher (Montana) stated:

Mr. Chairman, the amendment offered by the gentleman from California (Mr. Hosmer), although it may be similar or identical to the language in the Senate-passed bill, is not truly what the Senate wanted nor is it truly what the Indians wanted.

At the time the Senate enacted its bill last fall, there had not been agreement among the Indian tribes which have a great deal of coal on their lands as to what provisions affecting their land they wanted in the strip mine bill. Since last fall, we have held a series of meetings with various Indian tribes which have coal in order to determine what their wishes were. They elected to have a section contained in this bill giving them jurisdiction over reclamation programs on their own reservations. We have carefully worked out the details with them on this title of the bill. Except for one section of the bill, they are in agreement.

Mr. Chairman, I think I can tell the members of the House truthfully and honestly that the tribes with the greatest amount of coal in this country are in favor of the House today enacting this title as is. As to the section where they have disagreement, they would like to have that reconsidered in the conference committee between the House and the Senate when the final version of the bill is drafted.

I hope that the House will agree to this title. It has been carefully worked out with Indian tribes. It is important, if Indians on their own reservations are going to go ahead and allow coal development. They want that jurisdiction themselves. They would prefer not to be under the jurisdiction of any state. They would prefer also to have the opportunity to establish that jurisdiction for themselves, meeting the requirements of this bill. If they can do so, this title and this section of the bill says they may have that opportunity. Without this right they are apprehensive about coal development on their reservations. If they fail to meet the requirements, then the Secretary of the Interior would have to take over for them. If they seek higher standards, that is their right, too, under this bill as it is drafted.

I urge defeat of this crippling amendment denying Indians their rights. (Id.)

The second amendment also was defeated, and Title III of H.R. 11500 as passed called for tribal or federal regulatory programs in the same manner as states.

### 3. Conference

The conferees adopted the current Indian lands provision (with the exception of Section 710(h) regarding study of the jurisdictional status of Indian lands), combining an Indian lands study with an interim regulatory program for Indian lands. This was done without discussion in the Conference Report of the conferees' reasons for adopting the more limited provision (H. Rep. No. 93-522).

### 4. Legislation

The House failed to pass the Conference Report under suspension on December 9, 1974. The bill did pass the House on December 13, 1974, and the Senate on December 16, 1974. The President, however, vetoed the legislation on December 30, 1974.

E. 94th Congress, 1st Session

1. House of Representatives

Without further hearings, the House committee reported out H.R. 25 on March 6, 1975. The Indian lands provision was the same as that adopted in conference during the 93rd Congress. (H. Rep. No. 94-45). After floor debate on March 14, 17 and 18, 1975, H.R. 25 passed on March 18, 1975. The Indian lands provision of H.R. 25 was unchanged.

2. Senate

After a brief hearing on February 20, 1975, with no Indian witnesses, the Senate committee reported out S. 7 on March 5, 1975. The bill tracked the Indian lands provision adopted by the conferees of the 93rd Congress. (S. Rep. No. 28). The provision was not changed on the Senate floor during debate on March 10-12, 1975, and the Senate passed H. R. 25 as amended, by substituting the text of S. 7 as amended, on March 20, 1975.

3. Conference

The conferees did not change the House and Senate provision for Indian lands, stating:

The conferees recognize that there are special jurisdictional problems with respect to the regulation of mining on Indian lands, and a lack of consensus on this issue among the various Indian tribes (H. Rep. No. 94-189 at 79).

4. Legislation

The Senate agreed to the Conference Report on May 5, 1975, and the House agreed to it on May 7, 1975. On May 20, 1975, the President vetoed H.R. 25, and the House sustained the veto on June 10, 1975.

F. 94th Congress, 2d Session

1. House of Representatives

After a brief hearing on June 3, 1975, regarding the Presidential veto of H.R. 25, the House committee reported out H.R. 9725 on March 12, 1976, (H. Rep. No. 94-896). This measure was tabled by the Committee on Rules on March 23, 1976.

On August 31, 1976, the committee reported out H.R. 13950. (H. Rep. No. 94-1445). No action was taken on this bill.

Neither of these bills altered the 93rd Congress' conference version of the Indian lands provision.

G. 95th Congress, 1st Session

The 1977 Act

1. House of Representatives

Following hearings with no Indian witnesses, the House again carried forward the Indian lands provision originating in the 93rd Congress. The House committee reported out H.R. 2 on April 22, 1977. (H. Rep. No. 95-218). The House considered the bill April 28-29, 1977, and passed it.

2. Senate

Also following hearings (February 7 and March 1-3 1977) with no Indian witnesses, the Senate retained the 93rd Congress provision for Indian lands. The Senate committee (now the Senate Committee on Energy and Natural Resources) reported out S. 7 on May 10, 1977. (S. Rep. No. 95-128).

On the Senate floor, Senator Abourezk (S. Dakota) introduced an amendment which apparently was unopposed and was accepted. The amendment added a new title to S. 7 governing Indian lands, which provided

for a regulatory scheme under which tribes could opt for tribal or federal programs, much like states. The amendment also provided for an Indian lands study to recommend improvements on that regulatory schema. Congressional Record, S. 8041-3, (May 19, 1977).

Another amendment affecting Indian lands, but relating to the surface owner protection provision of the Act (Section 714 of the Act), was introduced by Senator Abourezk and was accepted. Congressional Record, S. 8043-5 (May 19, 1977) and S. 8093-4, (May 20, 1977).

The Senate passed a strip mine bill on May 20, 1977.

### 3. Conference

The conferees accepted the more limited House provision regarding Indian lands (still without subsection (h) of section 710, regarding study of the jurisdictional status of Indian lands outside the exterior boundaries of the reservation), stating:

One reason that the conferees agreed to the House version of the Indian lands provision was that they did not want to change the status quo with respect to jurisdiction over Indian lands both within reservations and outside reservation boundaries. Nothing in the study provision or any other part of H.R. 2 is intended to make any such change. (H.R. 95-493 at 114).

The bill was reported out July 12, 1977.

### 4. Legislation

The Conference Report was agreed to by the Senate on July 20, 1977, and by the House on July 21, 1977. Section 710 (h) was added as a technical amendment, without discussion. Congressional Record, S. 12444, (July 20, 1977) and H. 7592, (July 21, 1977). President Carter signed the Act on August 3, 1977.

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