

	<b>U.S. DEPARTMENT OF THE INTERIOR OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT</b>  <b>DIRECTIVES SYSTEM</b>	<b>Subject Code:</b> REG 18
		<b>Transmittal Number:</b> 979
		<b>Date:</b> 6-26-13
<b>Subject:</b> Tribal Consultation and Protection of Tribal Trust Resources		
<b>Approval:</b> Joseph G. Pizarchik 		<b>Title:</b> Director

1. **Purpose.** This directive sets forth the policies and procedures that the Office of Surface Mining Reclamation and Enforcement (OSM) will follow to ensure that any OSM action with tribal implications is consistent with:

- a. Presidential Executive Order 13175, dated November 6, 2000;
- b. Presidential Memorandum on Tribal Consultation, dated November 9, 2009; and
- c. Department of the Interior Policy on Consultation with Indian Tribes, as adopted in Secretarial Order 3317, dated December 1, 2011.

2. **Summary of Changes.** This directive supersedes REG 18, dated March 28, 1996, (transmittal number 853) and has been revised to reflect and implement the three documents listed in Paragraph 1(above) of this directive. In addition, extraneous language has been removed and obsolete provisions have been either updated or deleted, as appropriate.

3. **Definitions.**

- a. **Abandoned Mine Reclamation Fund.** A special trust fund established for the reclamation of abandoned mine lands and for other activities authorized by Title IV of the Surface Mining Control and Reclamation Act (SMCRA).
- b. **Allotted lands or individual allotments.** "either a parcel of land owned by the United States in trust for an Indian, i.e., a 'trust allotment,' or owned by an Indian subject to a restriction on alienation in favor of the United States or its officials, i.e., a 'restricted fee allotment.'" (Black's Law Dictionary) See: the General Allotment Act of 1887 (Dawes Act); the Dawes Commission to the Five Civilized Tribes of March 3, 1893; the Burke Act of May 8, 1906; the Lacey Act of March 2, 1907; and numerous allotment acts in Oklahoma.
- c. **Federal permitting entity (FPE).** The OSM organizational unit with responsibility for receiving and processing SMCRA permit applications and other materials related to lands for which OSM is the regulatory authority. For Indian lands the FPE is the OSM regional office with jurisdiction over the lands within the permit application.
- d. **Federal Indian Trust Responsibility.** A legal obligation under which the United States "has charged itself with moral obligations of the highest responsibility and trust" toward

Indian tribes (Seminole Nation v. United States, 1942). The Federal Indian trust responsibility is also a legally enforceable fiduciary obligation on the part of the United States to protect tribal treaty rights, lands, assets, and resources, as well as a duty to carry out the mandates of Federal law with respect to American Indian and Alaska Native tribes and villages.

See <http://www.bia.gov/FAQs/index.htm>

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

f. Indian mineral owner. (1) any individual Indian or Alaska native who owns land or mineral interests in land the title to which is held in trust by the United States or is subject to a restriction against alienation imposed by the United States, or (2) any Indian tribe, band, native, pueblo, community, rancheria, colony, or other group which owns land or mineral interest in land the title to which is held in trust by the United States or is subject to a restriction against alienation imposed by the United States. This definition does not include owners of lands patented to a village or regional corporation pursuant to the Alaska Native Claims Settlement Act, Pub. L. 92-203.

g. Indian tribe. Any Indian tribe, band, group, or community having a governing body recognized by the Secretary. The Secretary publishes a list of federally recognized Indian tribes annually in the Federal Register and at <http://www.bia.gov/DocumentLibrary/index.htm>.

h. OSM action with tribal implications. Any OSM regulation, rulemaking, policy, guidance, legislative proposal, grant funding formula changes, or operational activity that may have a substantial direct effect on an Indian tribe on matters including, but not limited to:

- (1) Tribal cultural practices, lands, resources, or access to traditional areas of cultural or religious importance on federally managed lands;
- (2) The ability of an Indian tribe to govern or provide services to its members;
- (3) An Indian tribe's formal relationship with OSM; or
- (4) The consideration of OSM's trust responsibilities to Indian tribes.

This term does not include matters that are in litigation or in settlement negotiations, or matters for which a court order limits OSM's discretion to engage in consultation.

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

j. Tribal Liaison Officer (TLO). One or more individuals designated by the Director to carry out responsibilities defined in this directive.

k. Tribal official. An elected or appointed tribal leader or official designated in writing by an Indian tribe to represent the tribe in government-to-government consultations.

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

m. Tribal trust resources. Those natural resources, either on or off Indian lands, retained by, or reserved by or for, Indian tribes through treaties, statutes, judicial decisions, and executive orders, which are protected by a fiduciary obligation on the part of the United States.

4. **Policy.**

a. OSM personnel must ensure that bureau actions identify, conserve, and protect lands and other resources that the Department holds in trust for federally recognized Indian tribes and tribal members.

b. In fulfilling these responsibilities, OSM must consult with Indian tribes on a government-to-government basis.

c. There is no Federal trust responsibility for tribal fee lands.

d. OSM, in consultation with the Bureau of Indian Affairs, will ensure that it fulfills its trust responsibility for the protection of trust resources on allotted lands.

e. As required under Executive Order 13175, it is the policy of OSM to:

(1) Respect Indian tribal self-government and sovereignty, honor tribal treaty and other rights, and strive to meet the responsibilities that arise from the unique legal relationship between the Federal Government and Indian tribal governments.

(2) With respect to Federal statutes and regulations administered by Indian tribal governments, grant Indian tribal governments the maximum administrative discretion possible.

(3) When undertaking to formulate and implement policies that have tribal implications,:

(a) Encourage Indian tribes to develop their own policies to achieve program objectives;

(b) Where possible, defer to Indian tribes to establish standards; and

(c) In determining whether to establish Federal standards, consult with tribal officials as to the need for Federal standards and any alternatives that would limit the scope of Federal standards or otherwise preserve the prerogatives and authority of Indian tribes.

(4) Have an accountable process to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.

(5) To the extent practicable and permitted by law, not promulgate any regulation that has tribal implications and that either preempts tribal law or imposes substantial direct compliance costs on Indian tribal governments and is not required by statute, unless:

(a) The funds necessary to the direct costs incurred by the Indian tribe in complying with the regulation are provided by the Federal Government; or

(b) Prior to the formal promulgation of the regulation the bureau consults with tribal officials early in the process of developing the proposed regulation.

(6) On issues relating to tribal self-government, tribal trust resources, or Indian tribal treaty and other rights, explore and, where appropriate, use consensual mechanisms for developing regulations, including negotiated rulemaking.

(7) Increase flexibility for Indian Tribal Waivers by reviewing the processes under which Indian tribes apply for waivers of statutory and regulatory requirements and take appropriate steps to streamline those processes.

f. An Indian tribe may request that OSM initiate consultation when the tribe believes that OSM is considering an action with tribal implications. Requests should be made in writing to the TLO, or other appropriate individuals, and should describe the specific action with tribal implications. However, in the event that an Indian tribe may choose not to engage the TLO, OSM is not relieved of its obligation to engage in consultation as described by this policy. If OSM initiates consultation with a tribe but does not receive a response, OSM should make reasonable and periodic efforts to repeat the invitation and, whenever feasible, should allow an Indian tribe to join an ongoing consultation. These efforts of engagement shall be appropriately documented.

g. In implementing this policy, OSM personnel must consider the following documents:

(1) Executive Order No. 12866, Sept. 30, 1993 (“Regulatory Planning and Review”), which requires agencies where appropriate, to address specific or unique needs of tribal communities.

(2) Presidential Memorandum, April 29, 1994, entitled “Government-to-Government Relations with Native American Tribal Governments,” which requires Federal agencies, to the greatest extent practicable and to the extent permitted by law, to consult with tribal governments before taking actions that affect federally recognized Indian tribes. Activities that affect Indian tribal rights or trust resources should be implemented in a knowledgeable, sensitive manner respectful of tribal sovereignty. Agencies are required to assess the impact of Federal government plans, projects, programs, and activities on tribal trust resources and assure that tribal government rights and concerns are considered during the development of such plans, projects, programs, and activities.

(3) Executive Order 13175, dated November 6, 2000, entitled “Consultation and Coordination with Indian Tribal Governments.”

(4) Presidential Memorandum of November 5, 2009, which obligates the Department of the Interior to meet the spirit and intent of Executive Order 13175.

(5) Secretarial Order 3317, the Department of the Interior Policy on Consultation with Indian tribes, dated December 1, 2011.

5. **Responsibilities.**

a. The Director

(1) Is responsible for being aware of the impact of OSM programs, projects, and actions on Indian lands and trust resources.

(2) Is responsible for ensuring that OSM personnel are fully aware of their responsibilities to identify, protect and conserve tribal trust lands and resources and to consult with Indian tribes.

(3) Will appoint one or more Tribal Liaison Officials.

b. The Assistant Director-Program Support is responsible for ensuring national policy direction and guidance.

c. The Regional Directors are responsible for ensuring compliance with the policies and procedures in this directive.

d. The Tribal Liaison Officer (TLO)

(1) Works with OSM employees to achieve compliance with this directive.

(2) Promotes and facilitates consultation and collaboration between OSM and Indian tribes.

(3) Advocates opportunities for, and consideration of, the positions of Indian tribes, to the extent those opportunities and positions are consistent with OSM’s mission and legal requirements.

(4) Serves as the principal point of contact with the Department’s Tribal Governance Official.

(5) Strives to establish and maintain a trusting, ongoing relationship with Indian tribes, consistent with applicable law and executive orders.

(6) Serves as the initial point of contact for Indian tribes to request or inquire about consultation.

(7) Prepares an annual report on the tribal consultation activities that he or she conducted or facilitated during the preceding year.

6. **Procedures.**

a. As required by the Departmental Manual, 512 DM 2, OSM must assess early in the planning, development or review of proposed programs, AML reclamation projects, mining operations or other activities, including rulemaking actions, the potential impact of the proposed activities on Indian lands and tribal trust resources.

b. Unless otherwise required by law, OSM must avoid actions that may negatively impact tribal treaty rights or tribal trust resources.

c. If OSM's evaluation of a proposed activity reveals any potential impact on Indian lands or trust resources, OSM must consult directly with the federally recognized tribal government with jurisdiction over the Indian lands or tribal trust resources that may be affected. Consultations with tribal governments must be open and candid so that all interested parties may evaluate for themselves the potential impact of the proposal on Indian lands and tribal trust resources.

d. If OSM's evaluation of the proposed activity reveals any potential direct or indirect impacts on tribal trust lands or tribal trust resources, OSM must also consult with the appropriate office of the Bureau of Indian Affairs and, if appropriate, the Office of the Solicitor.

e. OSM must ensure that any anticipated effects of proposed reclamation projects or coal mining operations on Indian lands and tribal trust resources are explicitly addressed in the planning and decision documents for those projects or operations, including, but not limited to, environmental assessments or environmental impact statements, permits, and other decision documents. These documents must clearly state the rationale for OSM's recommended decision on the proposal and explain how the decision will be consistent with the Department's and OSM's responsibilities to identify, protect, and conserve tribal trust resources and Indian lands.

f. When considering an action with tribal implications, OSM must notify the appropriate Indian tribe(s) of the opportunity to consult pursuant to this directive. OSM will strive to ensure that a notice is given at least 30 days prior to scheduling a consultation. If exceptional circumstances prevent notice within 30 days of the consultation, the notice must explain the abbreviated notification. The tribe may request an extension for timelines associated with this Policy. The notice will include:

(1) A description of the topic(s) to be discussed in sufficient detail of the topic to be discussed to allow Tribal leaders an opportunity to fully engage in the consultation,

- (2) A timeline of the process,
- (3) Possible outcomes, and
- (4) The opportunity to provide feedback prior to the consultation, including any request for technical assistance or request for clarification of how the consultation process conforms to this directive.

g. OSM will carry out the consultation stages described below for an Action with Tribal Implications, except as described under paragraph h of this section.

(1) **Initial Planning Stage.** OSM will consult with Indian tribes as early as possible when considering an action with tribal implications. OSM may conduct a meeting or other forms of interaction with tribes in order to receive and evaluate comments received as part of the initial planning stage. OSM will work with other Federal agencies, where appropriate, to avoid duplicative consultations.

(2) **Proposal Development Stage.** The proposal development stage begins once OSM discloses the scope of an action with tribal implications. Indian tribes should be considered appropriate collaborative partners, particularly where negotiated rulemaking or a Tribal Leader Task Force is created.

OSM will maximize the opportunity for timely input by Indian tribes, consistent with both Tribal and OSM schedules. OSM will solicit the views of affected Indian tribes on the process timeline for consultation on a Action with Tribal Implications. OSM will work with Indian tribes to structure a process, to the extent feasible, that considers specific Indian tribes structure, traditional needs, and schedules of the Indian tribe. OSM will make all reasonable efforts to comply with the expressed views of the affected Indian tribes regarding the process timeline at this Stage, taking into account the level of impact, the scope, and the complexity of the issues involved in the Action with Tribal Implications, along with the other factors driving the schedule. The process will be open and transparent. OSM will proceed with the expectation that interested Indian tribes will respond within a reasonable time period.

When the matter under consultation involves confidential or culturally sensitive information, OSM will work with the Indian tribe to develop a consultation process that addresses the sensitivity of the information to the extent permitted by Federal law. If litigation or legal requirements impact OSM's schedule for conducting consultation, OSM will explain these constraints to the Indian tribe.

Examples of appropriate processes for the Proposal Development Stage include, but are not limited to, the following:

(a) **Negotiated Rulemaking.** Where appropriate, OSM shall consider using negotiated rulemaking for developing significant regulations or other formal policies in accordance with the Federal Advisory Committee Act (FACA) and the Negotiated Rulemaking Act.

(b) **Tribal Leader Task Force.** A Tribal Leader Task Force may be used, in appropriate circumstances, on regional or issue-specific matters (e.g., regional guidance). In each

instance, the composition of the Task Force shall be collaboratively determined by the Indian tribes, provided that the Task Force shall be a process open to all Indian tribes and, to the extent possible, represent a cross-section of Tribal interests with respect to the matter at issue. The location and number of meetings to be held will conform to the expressed views of the Indian tribes, to the extent practicable and permitted by law and in accordance with FACA.

(c) Series of Open Tribal Meetings. OSM may provide open invitations for Tribal leaders to attend a series of open meetings. Open meetings can be used for national, regional or subject-matter specific issues.

(d) Single Meetings. OSM may host Tribal Officials in a single meeting to discuss a Departmental Action with Tribal Implications under consideration. Single meetings are particularly appropriate for local or regional issues, or a tribe-specific issue.

If OSM determines that the Administrative Procedure Act or other Federal law or regulation expressly prohibits continued discussion at a specified point in the decision-making process, OSM will inform the Indian tribes at the earliest opportunity in this stage in the process.

(3) Implementation of Final Federal Action Stage.

(a) OSM may consider implementing a post-consultation review process where it is consistent with law, regulations, and EO 13175. The review process must not limit the Department's deliberative process privilege regarding internal considerations or any other applicable privilege.

(b) OSM may invite feedback from the Indian tribe of the consultation process at this Stage.

(c) OSM must also consider the need for training or technical assistance concerning the final Federal action.

(d) If the action with tribal implication involves rulemaking, the preamble to the regulation must include a description of the extent of OSM's consultation with tribal officials, a summary of the nature of their concerns and OSM's position supporting the need to issue the regulation, and a statement of the extent to which the concerns of tribal officials have been met. OSM will also make available to the Director of the Office of Management and Budget any written communications submitted to the agency by tribal officials.

h. Consultation and Coordination Procedures for Regulatory Programs:

(1) OSM responsibilities and consultation requirements for surface coal mining and reclamation operations on Indian lands are set forth generally in 30 CFR Part 750.

(2) Consultation requirements for proposed permitting actions may vary somewhat depending upon the ownership status of the lands involved in a particular permitting proposal. For proposed permitting actions involving lands within Federal reservation boundaries and off-reservation tribal trust lands, the FPE must consult with the affected Indian tribe. For

proposed permitting actions involving tribal fee lands, the FPE must consult with the tribal owner of the mineral and/or surface estate. OSM must:

(a) Provide the appropriate tribal government offices with copies of proposed permitting actions, submitted by applicants, for their review and comment prior to OSM taking a final action on the proposal.

(b) Give the Tribal governments a minimum of thirty days to provide comments.

(c) Consider the tribe's comments in reaching its decision on the proposed permitting action. If OSM disagrees with the tribe's comments on a permitting proposal, OSM must provide the tribe with a timely written response clearly explaining the rationale for OSM's position.

(d) Provide the affected tribe with copies of all relevant correspondence relating to the permitting action, as well as copies of the Federal permit, including all revisions, for approved mining operations. Tribal governments are invited to all meetings with OSM and other interested parties on proposed OSM actions with Tribal implications.

(e) Make reasonable and periodic efforts to repeat the invitation if OSM initiates consultation with a tribe but does not receive a response, and, whenever feasible, should allow an Indian tribe to join an ongoing consultation. These efforts must be appropriately documented.

(f) As appropriate, conduct quarterly meetings with the tribes and representative of the Bureau of Indian Affairs and the Bureau of Land Management to discuss ongoing mining and reclamation activities on tribal trust lands.

(3) Exceptions to the consultation procedures in paragraph (2) may occur with respect to certain minor revisions when expedited review of such revisions is necessary due to unforeseen circumstances and the environmental impacts of approving such revisions would be negligible. Such situations might include relocation of topsoil stockpiles, minor realignments of existing roads, or minor modifications to existing office facilities or other structures. In these circumstances, OSM may issue a permitting decision on the proposed revision without prior consultation with the affected Indian tribe or other Federal agencies or may conduct such consultation by telephone in lieu of the normal consultation process, if all parties agree.

(4) For allotted lands located outside the boundaries of Federal Indian reservations that are not supervised by an Indian tribe and are thus subject to state regulation in primacy states, OSM is responsible for ensuring that the state regulatory authority consults with the appropriate BIA office concerning mining and reclamation proposals involving those lands.

7. **Reporting Requirements.** Each year, the Director will submit a report to the Department's Tribal Governance Officer that summarizes the bureau's efforts during the preceding year to conduct and promote consultation with Indian tribes. To prepare this report,

the Western Regional Director will combine and consolidate individual reports from the Tribal Liaison Officers. These reports will be submitted no later than 60 days after the end of the fiscal year.

The report must include:

- a. The scope of consultation activities, including a narrative within the report describing significant consultation efforts.
- b. A description of budget expenditures in the execution of consultation activities.
- c. The effectiveness of consultation activities.
- d. A list of the topics upon which OSM conducted consultation.
- e. Any Departmental training on consultation that was provided to either OSM employees or Indian tribes.
- f. Any innovations in consultation.
- g. The engagement of senior leadership in consultation activities.
- h. When possible, comments from Indian tribes with whom OSM has conducted consultation.
- i. A discussion of any post-consultation reviews conducted.
- j. Forthcoming consultation opportunities.

8. **Effect on Other Documents.** This directive supersedes OSM Directive REG-18, "Protection of Indian Lands and Indian Trust Resources," issued on March 28, 1996.

9. **References.**

- a. Department of the Interior Manual, Part 512, Chapter 2, "Departmental Responsibilities for Indian Trust Resources."
- b. Presidential Memorandum of April 29, 1994: "Government-to-Government Relations with Native American Tribal Governments" (59 FR 22951; May 4, 1994).
- c. Executive Order 12866, "Regulatory Planning and Review," September 30, 1993.
- d. Advisory Memorandum dated February 24, 1995, from Assistant Secretary for Indian Affairs, "Guidance on the Federal/Tribal Government-to-Government Policy."
- e. Executive Order 13175, "Consultation and Coordination with Indian Tribal Governments," November 6, 2000, 65 FR 67249-67252.

f. Presidential memorandum for the heads of executive departments and agencies on Tribal Consultation, November 5, 2009, complete and consistent implementation of Executive Order 13175.

g. Secretarial Order 3317, Department of the Interior Policy on Consultation with Indian tribes, December 1, 2011.

h. Department of the Interior Policy on Consultation with Indian tribes, as referenced in Secretarial Order 3317, dated December 1, 2011.

10. **Effective Date.** Upon issuance

11. **Distribution.** By electronic means

12. **Keywords.** Tribal consultation, Indian lands, trust resources, trust responsibilities, allotted lands.

13. **Appendices.**

Department of the Interior Policy on Consultation with Indian tribes, as referenced in Secretarial Order 3317, dated December 1, 2011.

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