

DEPARTMENT OF THE INTERIOR**Office of Surface Mining Reclamation and Enforcement****30 CFR Parts 700, 740, 746 and 750**

RIN 1029-AC53

Indian and Federal Lands**AGENCY:** Office of Surface Mining Reclamation and Enforcement, Interior.**ACTION:** Notice of decision not to adopt proposed rule.

SUMMARY: We, OSM, have decided not to adopt a proposed rule that would have revised the definition of "Indian lands" for purposes of the Surface Mining Control and Reclamation Act of 1977 (SMCRA). The proposed rule also would have revised both the Federal lands program and the Indian lands program.

If adopted as proposed, the definition of Indian Lands would have included allotted lands located within an approved tribal land consolidation area but outside the boundaries of a reservation. Such allotments would then have been subject to OSM's regulatory authority under the Indian Lands Program. The only lands approved for coal mining that would have been brought within the scope of our jurisdiction if the proposed rule were adopted are 48 Navajo allotments overlying leased Federal coal within the existing McKinley Mine permit area in New Mexico. These allotments are currently regulated by the State.

We conclude that the record before us neither adequately supports nor clearly precludes a finding of supervision in fact or in law. Therefore, we conclude that off-reservation Navajo allotted lands may be supervised by the Navajo Nation and thus may be Indian lands; but that any determination as to supervision of specific off-reservation Navajo allotted lands is more properly made on a case-by-case basis.

In this notice of final action, we are setting out our analysis of the applicable law and the record before us. We are publishing this analysis for two reasons. First, we intend this analysis to inform the Navajo Nation and the Hopi Tribe and the public of the reasons for our decision not to adopt the proposed rule. Second, we intend this analysis to advise the public of how we anticipate addressing any pending or future actions concerning supervision of allotted lands.

DATES: This decision is effective April 25, 2007.**ADDRESSES:** The administrative Record for this rulemaking is located at the

Office of Surface Mining Reclamation and Enforcement, Administrative Record, Room 101, 1951 Constitution Avenue, NW., Washington, DC 20240.

FOR FURTHER INFORMATION CONTACT: Ms. Vermell Davis, Office of Surface Mining Reclamation and Enforcement, 1951 Constitution Avenue, NW., Washington, DC 20240; Telephone (202) 208-2802. E-mail address: gvdavis@osmre.gov.

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I. What Amendments Did We Propose Concerning the Definition of Indian Lands? What Action Are We Now Taking on the Proposed Rule?

On February 19, 1999 we proposed a rule clarifying the definition of Indian lands for the purposes of SMCRA, at 30 CFR 700.5. As discussed in more detail below, the proposed rule would have amended the existing definition by including as Indian lands:

"All allotments held in trust by the Federal government for an individual Indian or Indians, the Indian titles to which have not been extinguished, including rights-of-way running through such allotments, where such allotments are located within a tribal land consolidation area approved by the Secretary or his authorized representative under 25 U.S.C. 2203."

In the February 19, 1999 notice of proposed rulemaking, we also proposed amendments to our Indian lands rules at 30 CFR part 750, and to our Federal lands rules at 30 CFR parts 740 and 746, to reflect the proposed change in the definition, and to clarify the effect of the proposed change. These proposed changes are also discussed in more detail below. For a full discussion of the proposed rule, see 64 FR 8464 (February 19, 1999).

We have decided not to adopt any of the proposed rules, for the reasons discussed below.

II. How Do We Define Indian Lands Under the Existing Rule, and What Lands Do We Regulate as Indian Lands Under That Definition?

The term "Indian lands" is defined at 30 CFR 700.5 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 regulatory definition is identical to the definition of Indian lands in SMCRA at 30 U.S.C. 1291(9). Under that definition, we have asserted regulatory jurisdiction over all lands located within the boundaries of Federal Indian reservations, and certain lands outside reservation boundaries where the surface or mineral estate is held in trust for or supervised by an Indian tribe. The off-reservation lands include those portions of the Crow Ceded Strip that are within the permit area of Westmoreland Resources' Absaloka Mine in Montana where the mineral estate (i.e. the coal) is held in trust for and beneficially owned by the Crow Tribe. We also regulate coal mining on certain split-estate lands in the permit area of the McKinley Mine in New Mexico, on which the Navajo Nation ("the Nation" or "the Navajo") owns the surface estate and the mineral rights are privately owned.

As we noted in the proposed rule, the McKinley Mine has a permit area of 18,692 acres. It is an active coal mining operation owned and operated by the Pittsburg & Midway (P&M) Coal Mining Company. The mine straddles the boundary of the Navajo Indian Reservation near the Arizona-New Mexico border. The portion of the permit area that lies within the Navajo reservation and on certain adjacent off-reservation split-estate Navajo fee lands, is regulated by OSM. The remainder of the mine, the so-called south area, is composed of Federal, private, State, and allotted lands and is regulated under a permit issued by the New Mexico regulatory authority ("the State" or "New Mexico").

To date, P&M has mined approximately 2,905 acres in 45 of the 48 allotments included within the McKinley Mine permit area. Within the next two years, P&M plans to mine the leased Federal coal on an additional 18 acres in one of the previously disturbed allotments. Beyond this, there is no further mining planned within allotments at the McKinley Mine.

We assumed regulatory authority over the Navajo fee lands at the McKinley

Mine subsequent to two 1994 district court decisions (*Pittsburg & Midway Coal Mining Co. v. Babbitt*, No. Civ. 90–730 (D.N.M. Sept. 13, 1994); and *New Mexico v. Lujan*, No. 89–758–M (D.N.M. Feb. 14, 1994)). Those decisions upheld the Department's interpretation that such lands are Indian lands for purposes of SMCRA regulation because the Tribe's ownership of the surface estate in fee simple renders the lands supervised by the Tribe within the meaning of section 701(9) of SMCRA.

III. Why Did We Propose the Rule?

The Secretary agreed in a settlement agreement to propose a rule clarifying the definition of Indian lands at 30 CFR 700.5. The settlement agreement concerned consolidated actions filed by the Hopi Tribe and the Navajo Nation, *Hopi Indian Tribe v. Babbitt*, Nos. 89–2055, 89–2066 (D.D.C. June 20, 1995). For purposes of SMCRA and the implementing regulations, the Secretary agreed to propose including within the definition of Indian Lands “all allotments held in trust by the Federal Government for an individual Indian or Indians, the Indian titles to which have not been extinguished, including rights-of-way running through such allotments, where such allotments are located within a tribal land consolidation area approved by the Secretary or his authorized representative under 25 U.S.C. 2203.”

For purposes of this discussion, a brief history of the background of the proposed rule may be helpful. The Surface Mining Control and Reclamation Act of 1977, Public Law 95–87, 30 U.S.C. 1201 *et seq.*, (SMCRA or the Act) provides statutory authority for the development of regulations for surface coal mining and reclamation operations. Section 710 of SMCRA concerns the regulation of surface coal mining operations on Indian lands. Sections 710(d) and (e) identify the applicable SMCRA regulatory provisions for surface coal mining operations on Indian lands. The Secretary of the Interior issued a final rule on September 28, 1984, implementing the requirements of sections 710(d) and (e) of SMCRA (49 FR 38462). A new subchapter, Subchapter E—Indian Lands Program, was added to 30 CFR Chapter VII. Subchapter E included Part 750—Requirements for Surface Coal Mining and Reclamation Operations on Indian Lands, and Part 755—Tribal-Federal Intergovernmental Agreements.

Our regulations at 30 CFR Part 750 specify the applicable requirements for coal exploration and for surface coal mining and reclamation operations on

Indian lands, including permit review and permit processing; permit applications; performance standards; bonding; inspection and enforcement (I&E); and various other provisions. Section 750.6 designates OSM as the SMCRA regulatory authority on Indian lands and describes our permitting, consultation and I&E responsibilities under SMCRA. Section 750.6 also specifies the Indian lands responsibilities of the Bureau of Land Management (BLM), the Bureau of Indian Affairs (BIA), and the Minerals Management Service (MMS).

The final Indian lands rule promulgated in 1984 was challenged on various grounds by certain States (*New Mexico ex rel. Energy and Minerals Dept., Mining and Minerals Div'n v. United States Dep't of the Interior*, Civ. No. 84–3572 (D.D.C.)), and by the National Coal Association and American Mining Congress (*NCA v. United States Dep't of the Interior*, Civ. No. 84–3586 (D.D.C.)).

The Department of the Interior settled those two challenges by entering into separate agreements with the plaintiffs in which we agreed to undertake further rulemaking actions concerning the Indian lands program. The second round of Indian lands rulemaking led to the issuance of a final rule on May 22, 1989 (54 FR 22182). The 1989 final rule, issued jointly by OSM and BIA, amended our regulations at 30 CFR part 750, as well as BIA's regulations at 25 CFR part 200 governing leases of coal on Indian lands.

In the preamble to the 1989 final rule, we clarified that we are the exclusive SMCRA regulatory authority on Indian lands until the United States Congress enacts legislation pursuant to section 710(a) of SMCRA, to allow Indian Tribes to assume full regulatory authority over surface coal mining operations on Indian lands, and the Tribes elect to do so.¹ We also clarified that, for purposes of SMCRA regulatory jurisdiction, we considered off-reservation individual Indian allotments to be Indian lands only if an interest in the surface or mineral estate is held in trust for or supervised by an Indian Tribe. We did not, however, amend the regulatory

definition of Indian lands at 30 CFR 700.5.

The Hopi Tribe and the Navajo Nation challenged the 1989 final rule on several grounds. The Navajo Nation asserted that individual Indian trust allotments are Indian lands subject to OSM regulation under SMCRA and that the Secretary may not lawfully allow or delegate to the States any permitting or regulatory authority under SMCRA on such lands. The Tribes' challenges were subsequently consolidated and, in April 1995, were settled in an agreement between the Department of the Interior and the two plaintiff Tribes. The U.S. District Court for the District of Columbia approved the settlement in June 1995. See *Hopi Indian Tribe v. Babbitt*, Nos. 89–2055, 89–2066 (D.D.C. June 20, 1995).

Under the terms of the settlement, the Secretary agreed, among other things, to propose a rule clarifying the definition of Indian lands at 30 CFR 700.5 for purposes of SMCRA and the implementing regulations. Specifically, the Secretary agreed to propose including as Indian lands “all allotments held in trust by the Federal Government for an individual Indian or Indians, the Indian titles to which have not been extinguished, including rights-of-way running through such allotments, where such allotments are located within a tribal land consolidation area approved by the Secretary or his authorized representative under 25 U.S.C. 2203.”

We proposed the clarified definition of Indian lands on February 19, 1999 (64 FR 8464). We also proposed several changes to the Indian lands program at 30 CFR part 750 to make those regulations consistent with the proposed change in the definition of Indian lands. We further proposed various rule changes to the Indian lands program and to the Federal lands program at 30 CFR parts 740 and 746 to specify the applicable regulatory requirements for mining operations involving the mining of leased Federal coal on Indian lands. We anticipated that the necessity for such requirements would arise for the first time, should we ultimately adopt the revised definition of Indian lands.

We held a public hearing on the proposed rule in Albuquerque, New Mexico on June 8, 1999. The public comment period on the proposed rule was originally scheduled to close on April 20, 1999, but we subsequently extended the comment period through June 21 after we received several requests for an extension. Commenters included the Navajo Nation, the State of New Mexico, the National Mining

¹ SMCRA was amended on December 20, 2006, to provide for tribal primacy. As amended, SMCRA section 710 provides in relevant part as follows:

“(j)(A)(1) In General.—Notwithstanding any other provision of law, an Indian tribe may apply for, and obtain the approval of, a tribal program under section 503 regulating in whole or in part surface coal mining and reclamation operations on reservation land under the jurisdiction of the Indian tribe using the procedures of section 504(e).”

Tax Relief and Health Care Act of 2006, Pub. L. 109–432, Div. C, Title II, Subtitle A.

Association and Pittsburg & Midway Coal Company (McKinley Mine).

IV. What Would Be the Effect of the Proposed Rule?

A. What Lands Would Be Affected?

If adopted as proposed, the definition of Indian Lands would include allotted lands located within an approved tribal land consolidation area but outside the boundaries of a reservation. Such allotments would then be subject to OSM's regulatory authority under the Indian Lands Program. The only lands approved for coal mining that would be brought within the scope of OSM's jurisdiction if the proposed rule were to be adopted are 48 Navajo allotments overlying leased Federal coal within the existing McKinley Mine permit area in New Mexico. These allotments are currently regulated by the State. The McKinley Mine permit area straddles the boundary of the Navajo Reservation near the Arizona-New Mexico border. The portions of the permit area that lie within the reservation boundaries and on an adjacent parcel of off-reservation Navajo fee lands, are collectively referred to as the north area and are regulated by OSM. The remainder of the mine, the so-called south area, is composed of Federal, private, State, and allotted lands occurring in a complex checkerboard pattern, and is regulated by the State of New Mexico. The allotted lands include all or part of 48 individual allotments, 45 of which contain leased Federal coal and three of which contain unleased Federal coal. No other coal mines in the U.S. would be affected by the proposed rule at this time.

B. How Would the Proposed Rule Affect Funding Under SMCRA Title V and Title IV, and Responsibility for AML Reclamation?

Effect on Allocation of Title V Funding and Responsibility for AML Reclamation: As we explained in the proposed rule, we collect AML reclamation fees from coal mining operations pursuant to Title IV of SMCRA and the implementing regulations. Historically, fifty percent of the fees from coal produced from State and private lands within a State, or from coal produced from Indian lands, is allocated to the respective State or Tribal share for use, once appropriated, on eligible reclamation projects and activities. The Navajo Nation, as well as the Crow and Hopi Tribes, have approved Title IV programs. However, beginning with fees collected during fiscal year 2008, States and Indian Tribes that have certified the

completion of all coal-related reclamation under section 411(a) of SMCRA, as the Navajo Nation has done, will receive payments from unappropriated funds in the U.S. Treasury in lieu of that allocation. Noncertified States, such as New Mexico, will receive their 50% allocation in the form of grants for AML reclamation purposes. Tax Relief and Health Care Act of 2006, Public Law 109-432, Div. C, Title II, Subtitle A.

If allotted lands were designated Indian lands as proposed, the resulting change in the jurisdictional status of Navajo consolidation area allotments would mean that the Navajo Nation would receive Treasury payments equal to 50% of the AML reclamation fees generated by coal production on those allotments. The change also would mean that New Mexico would no longer receive 50% of the fees generated by coal production on those allotments.

Effect on Allocation of Title V Funding: In the proposed rule, we noted that the change in definition of Indian lands, if adopted, could also potentially reduce the amount of annual funding that we provide to the State of New Mexico to support the implementation of its Title V regulatory program. As we explained in the proposed rule, the State's Title V funding formula is based, in part, on the total acreage subject to State regulatory jurisdiction; thus, the proposed change in the Indian lands definition could result in a small decrease in the State's annual Title V grant since it would immediately reduce the amount of land subject to State regulation.

V. Why Have We Decided Not To Adopt the Proposed Rule?

With the publication of the February 19, 1999, proposed rule, we met our obligation under the 1995 settlement agreement to propose the change in the definition of Indian Lands. As discussed above, we then reviewed the rulemaking record and decided whether to adopt a final rule in consideration of all of the information in the record. We further considered the extent to which it was appropriate to pursue any other rulemaking to address the question of when allotments are supervised by a tribe. Finally, we evaluated further actions that are likely on the underlying issue.

A. How Did We Determine What Action To Take on the Proposed Rule?

In determining what action to take in this final rulemaking, we were required to evaluate the administrative record to determine whether the record supports a determination that all allotted lands in

an approved tribal land consolidation area are supervised by an Indian tribe. Effectively, to adopt the proposed rule, we would need to find that the Navajo Nation supervises Navajo allotments located outside the reservation but within the Navajo Land Consolidation Area.

As a first step in our evaluation, we determined what is meant by the term "supervised by" in the SMCRA definition. We also extensively researched the legal and historical background of the definition of Indian Lands. As discussed below, we concluded that to "supervise" means to have the function, right, or authority to superintend, regulate, or oversee a person or thing. Thus in general, a tribe supervises lands if the tribe has the function, right, or authority to superintend, regulate, or oversee the lands or what is done affecting the lands.

We then reviewed the record and concluded that the record does not support a determination that all allotted lands in an approved tribal land consolidation area are supervised by an Indian tribe. Specifically, the record does not demonstrate whether or not the Navajo Nation supervises the off-reservation Navajo allotted lands in the approved Navajo tribal land consolidation area.

B. What Are Our Reasons for Not Adopting the Proposed Rule?

1. Summary

After reviewing the entire administrative record, including all comments received on the proposed rule, we conclude that, for the reasons set out below, the record does not support a finding that all allotted lands in an approved tribal land consolidation area are Indian lands for purposes of SMCRA; and that the record also does not support a conclusion one way or the other as to whether off-reservation Navajo allotted lands are supervised by the Nation. Further, as discussed below, we conclude that (1) this jurisdictional issue has arisen only once so far, and is unlikely to arise frequently in the future. (However, the proposed rule would be over-inclusive, because it would also apply without further analysis to any other similarly situated allotments that might occur; and this is not appropriate, because case-by-case analysis of all relevant facts and law is required for any such determination of tribal interests.) and (2) this issue is not suited to a rulemaking of nationwide applicability, but rather should be addressed in case-by-case determinations.

For the above reasons, we conclude that the record before us neither adequately supports nor clearly precludes a finding of supervision in fact or in law. Therefore, we conclude that off-reservation Navajo allotted lands may be supervised by the Navajo Nation and thus may be Indian lands; but that any determination as to supervision of specific off-reservation Navajo allotted lands is more properly made on a case-by-case basis. Hence, we have decided not to adopt the proposed rule.

2. What Is the Meaning of "Supervised by"?

Statutory construction is a two-step process. In the first step, we ask whether the intent of Congress is clear. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984), *reh'g denied*, 468 U.S. 1227 (1984) ("*Chevron*"). If so, we "must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43. We must ascribe to the statutory words their plain and ordinary meaning, absent convincing reasons to the contrary. The words are the best indicators of legislative intent. *See, e.g., Save Our Cumberland Mountains v. Clark*, 725 F.2d 1422 (D.C. Cir. 1982). *See also Chevron*, 467 U.S. 837, 839.

In the second step of statutory construction, if Congress has not "spoken to the precise question at issue," our construction of the statute must be "permissible," *i.e.*, "rational and consistent with the statute." *See Chevron*, 467 U.S. at 842, 843.

a. Is the Statute Ambiguous?

Summary: SMCRA does not define "supervised by," and the legislative history of SMCRA is silent as to Congress' intention. However, a statute is not ambiguous if the terms used have a commonly accepted interpretation. After review of all comments on the proposed rule, and the materials discussed below, we conclude that, in general, a tribe supervises lands if the tribe has the function, right, or authority of superintending, regulating, or overseeing those lands. Thus, the Indian lands criterion, "supervised by," addresses whether the tribe has the function, right, or authority of regulating, superintending, or overseeing the lands in question, and what is done affecting those lands. Although we found many variations in the definitions and synonyms ascribed to these terms, we believe that the thrust of relevant definitions and interpretations may be summarized as follows: "supervise" or "supervision" means the function, right, or authority

of superintending, regulating, or overseeing a person or thing. We conclude that this is the meaning intended by Congress.

No SMCRA Definition or SMCRA Legislative History: The term "supervised by" is neither defined in SMCRA nor explained in the legislative history of the statute. *See Valencia Energy Co.*, 109 IBLA 40 (1989), *aff'd, New Mexico ex rel. Energy, Minerals & Natural Resources Dep't v. Lujan*, No. 89-758-M, 21 ILR 3113 (D.N.M. February 14, 1994) ("*Valencia*").

Commonly Accepted Interpretation of "Supervise" or "Supervision": To ascertain whether the term has a commonly accepted interpretation, and therefore is not ambiguous, we reviewed definitions and interpretations of the word "supervise" given in various dictionaries, a thesaurus and relevant case law. One widely used dictionary says "supervise" means: "to direct and inspect the performance of; superintend." (*The American Heritage Dictionary, Second College Edition* (1982)). Another dictionary says "supervision" refers "to the function of watching, guarding, or overseeing." (*The American Heritage Dictionary of the English Language, Fourth Edition* (2000)). Similarly, other definitions of "supervise include: "superintend, oversee," (*Merriam Webster's Collegiate Dictionary, Tenth Edition* (1996)); and "1. To direct and watch over the work and performance of others (synonyms: boss, overlook, oversee, superintend). 2. To control the course of (an activity)." (*Roget's II: The New Thesaurus* (1980)). In addition, Black's Law Dictionary defines "supervise" as "to have general oversight over, to superintend or to inspect." *Black's Law Dictionary* (7th ed. 1999).

Case law interpreting the word "supervise," gives some similar interpretations of the term. For example:

According to the Century Dictionary,
* * * the word "supervise" means to
oversee; have charge of, with authority to
direct or regulate. * * * *New York Life Ins.*
Co. v. Rhodes, 60 S.E. 828, 831, 4 Ga. App.
25.

* * * * *
Common meaning of "supervise" is to
superintend which means to have charge and
direction of, to direct course and oversee
details, to regulate with authority, to manage,
to have or exercise the charge and oversight
of, to oversee with power of direction, to take
care of with authority. *Nederlandsch-*
Amerikaansche-Stoomvaart-Mattschappij;
Holland-America Line v. Vassallo, Tex. Civ.
App., 365 S.W. 2d 650, 656 [sic].

* * * * *
The words "supervise," "superintend,"
and "oversee," in ordinary use and common
acceptance, have substantially the same

meaning, which is to have or exercise the
charge and oversight of. *Bacigalupo v.*
Fleming, 102 S.E.2d 321, 325, 199 Va. 827.

Words and Phrases, "Supervise" (2001).

Although we found many variations in the definitions and synonyms ascribed to these terms, we believe that the thrust of relevant definitions and interpretations may be summarized as follows: "supervise" or "supervision" means the function, right, or authority of superintending, regulating, or overseeing a person or thing. Under the first prong of the *Chevron* test, and after review of all comments on the proposed rule, and review of the materials referenced in this preamble, we conclude that this is the meaning intended by Congress. Thus, we conclude that the statute is unambiguous as to the meaning of the term "supervised by."

b. What Is Our Alternative Interpretation of the Statute, if a Court Were To Disagree With Our Construction Above?

Although we conclude that the statutory term "supervised by" is, for purposes of the proposed rule, unambiguous, we recognize that, in light of the variations in meaning ascribed to the term in different contexts, it is possible that a court might conclude differently. If a court did so hold, then in the absence of clear statutory language or express Congressional direction, OSM has the authority to make a reasonable or permissible interpretation of the statutory phrase. Congress, when it leaves ambiguity in a statute to be implemented by an agency, is presumed to intend that the ambiguity will be resolved by the agency, and intends the agency to have the discretion allowed by an ambiguity. *Chevron*, 467 U.S. 837, 843; *Smiley v. Citibank*, 517 U.S. 735, 740-41 (1996).

If a court were to disagree with our construction of the term "supervised by" as used in SMCRA § 701.9, as unambiguous, and were to rule that, on the contrary, the term is ambiguous, the term would have to be construed under a *Chevron* Step II analysis. Using that alternative analysis we conclude that a tribe supervises lands if the tribe has the function, right, or authority of superintending, regulating, or overseeing those lands. Thus, for purposes of our review of the record and action on the proposed rule, we conclude that the Indian lands criterion, "supervised by," addresses whether the tribe has the right or authority to regulate, superintend, or oversee the lands in question (or the function of

doing so); or whether the tribe has the right or authority to regulate, superintend, or oversee what is done affecting those lands (or the function of doing so).

c. What Is the Relationship of Tribal Supervision to the Roles of Other Governments on Lands?

A determination as to tribal supervision does not require that we compare state or Federal supervision versus tribal supervision in order to determine whether allotments are Indian lands. Rather, we determine whether the tribe's interests or actions suffice to constitute supervision for purposes of SMCRA. Nothing in the SMCRA definition requires that the tribe have exclusive supervision or primary supervision. Thus, the definition does not require that either a state or the Federal Government be excluded from supervising the land. Similarly, the statute does not require that the tribe have a greater supervisory interest or role than a state or the Federal Government does. Further, the definition does not require that the supervision specifically relate to SMCRA or coal mining. This is consistent with the fact that OSM is the SMCRA regulatory authority on designated Indian lands, and that a state is typically the SMCRA regulatory authority on other lands. Thus, either a state or OSM would have the primary "supervisory" responsibility for regulating surface coal mining operations and their effects on lands under SMCRA. However, the definition does require that a tribe supervise the lands. In this regard, supervision of activities that may significantly affect lands (such as building, grazing, and other land uses, water pollution, etc.) may be evidence of, or an aspect of, supervision of the lands. We believe that, logically, supervision of actions that affect lands is a basic means of supervising the affected lands.

d. Is Our Construction of "Supervised by" Consistent With SMCRA Case Law?

Our construction of "supervised by" and "supervise" is not controverted by the decisions in either of the two cases concerning the interpretation and application of the term under SMCRA. *Valencia Energy Co.*, 109 IBLA 40 (May 26, 1989) ("*Valencia*"), *aff'd sub nom. New Mexico v. Lujan*, No. 89-758-M (D.N.M. February 14, 1994), 21 I.L.R. 3113 (June 1994); and *Pittsburg & Midway Coal Mining Co. v. OSMRE*, 115 IBLA 148 (1990) ("*Pittsburg & Midway*"), *aff'd, The Pittsburg & Midway Coal Mining Co. v. Babbitt*, No. 90-730 (D.N.M. September 12, 1994).

Neither of the two cases has led to a decision that defines the term specifically and unambiguously. Further, neither case has yielded a final decision that addresses the applicability of the term to allotted lands.

Valencia addressed our interpretation that certain lands, in which a tribe held a fee interest in the surface, were "Indian lands" under SMCRA. One of our bases for our interpretation was that land owned by the Nation necessarily constituted land "supervised by" the Nation. We argued to the IBLA that, "if ownership were not supervision, it would be impossible for a property interest to reach the level of supervision." The IBLA agreed. 109 IBLA 40 (1989). In its appeal to the IBLA, *Valencia* had advanced the argument that, "[s]ince the lands in question are not presently within the Tribe's regulatory jurisdiction, * * * it is beyond the power of OSMRE to include such lands within the definition of 'Indian lands.'" 109 IBLA 51. Further, *Valencia* had argued that, since the Navajo Nation had conveyed all its rights to the surface for approximately 50 years, it had no supervisory authority over the land until the expiration of the lease term. *Id.* at 52. In rejecting *Valencia's* arguments, the IBLA concluded that, "where an Indian tribe owns either the mineral estate or the surface in fee of any land outside of the exterior boundaries of an Indian Reservation, such land is 'supervised by an Indian tribe' within the meaning of 30 U.S.C. 1201(9) (1982) and is properly subject to the Federal Program for Indian Lands established in 30 CFR Part 750." *Id.* at 67. The IBLA found that, while an OSM analysis "provided more than a sufficient basis upon which to find that the Navajo Tribe did exercise supervision in fact, we are also of the view that supervision in law, *i.e.*, mere ownership of the surface fee, was sufficient, in and of itself, to compel the conclusion that the lands at issue were 'Indian lands.'" 109 IBLA at 65.

The *Valencia* holding on ownership of either the mineral or surface estate was also followed by the IBLA in *Pittsburg & Midway*. *Pittsburg & Midway* concerned a consolidated set of cases, related to a permit issued by OSM. The permit effectively asserted jurisdiction under the SMCRA Indian lands program over two categories of lands: Off-reservation lands in which the surface estate is owned by the Navajo; and any allotted lands held by members of the Navajo Nation that might be determined by OSM to be supervised by the Tribe. See Memorandum of the Office of Surface Mining Reclamation and Enforcement at 9-10 and Attachments A

and B, and Memorandum of the Office of Surface Mining Reclamation and Enforcement on the Issue of Jurisdiction over Off-Reservation Indian Tribal Split Estate Lands at 5 and n. 2, *Pittsburg & Midway*, 115 IBLA 148 [ref. OHA Docket No. TU-6-2-PR]. At that time, we did not identify any specific off-reservation allotted lands as being supervised by the Nation. The permittee challenged our jurisdiction to issue permits for any off-reservation lands within the mine. The Navajo Nation intervened in the case, and asserted, *inter alia*, that OSM had jurisdiction over all of the mine lands, including the off-reservation allotments.

The permittee argued that "Indian lands" does not apply to lands outside a reservation where a tribe owns only the surface estate, because the SMCRA definition requires that the tribe also own the mineral estate. The IBLA held that we had jurisdiction to issue the permit with respect to the off-reservation lands in which the Navajo held only the surface estate. The IBLA also held that our interpretation of the definition, as set out in *Valencia*, was reasonable and therefore the definition applies to ownership of a split estate. The IBLA noted that it is clear that supervision is one of the rights encompassed in fee simple ownership of land, and rejected the permittee's assertion that "supervision" must mean unfettered management of land. 115 IBLA 156. Concerning one of the consolidated cases, the IBLA concluded that the Administrative Law Judge's decision did not provide a basis for the judge's determination that the off-reservation allotted lands in the permit area are not supervised by the Tribe. *Id.* at 161. The IBLA held further that the question cannot be resolved in the absence of a hearing. Therefore, the IBLA remanded the case for a hearing and decision on the question of whether the off-reservation allotted lands were "Indian lands" because they were "held in trust for or supervised by" the Tribe. *Id.* The remanded case on allotted lands was subsequently stayed in 1992 pending the outcome of the district court appeal of the case (*Pittsburg & Midway Coal Mining Co. v. OSM*, Docket Nos. TU 6-2-PR, TU 7-6-R, TU 6-60-R, order entered October 16, 1992 (OHA Hearings Div.). Subsequently, it is our understanding that the remanded case was informally stayed by consensus of the parties pending final disposition of the litigation that led to the 1995 settlement agreement discussed above. Then the case was informally stayed pending final action on our proposed Indian lands rule published on February 19, 1999. The

remanded case has now been dismissed without prejudice, although OSM stated that it did not support the dismissal, because this rulemaking was pending and dismissal of the case could impede resolution of the "Indian lands" status issue. *Pittsburg & Midway Coal Mining Co. v. OSM*, OSMRE's Response to Order to Show Cause, Docket Nos. TU 6-2-PR, TU 7-6-R, TU 6-60-R (OHA Departmental Hearings Div.).

Regardless of whether the term "supervised by" is construed under *Chevron* Step I or Step II, we conclude that, consistent with *Valencia*, supervision of lands may be supervision in fact or supervision in law (or a mixed question of fact and law). That is, supervision may exist either because a tribe has the right or authority to superintend, regulate, or oversee the lands [supervision in law]; or because the tribe currently or historically superintends, regulates, or oversees the lands [supervision in fact]; or both.

e. Is Our Construction of "Supervised by" Consistent With Other Legislative History Relevant to Congress' Intent in SMCRA?

Our interpretation is also consistent with the interpretation of the phrase "supervised by an Indian tribe" in the legislative history of another bill considered by Congress at the same time it considered SMCRA, the Land Use Policy Planning and Assistance Act of 1973 (LUPA).

In *Valencia*, in evaluating the evidence of Congress' intent on this issue, we noted that LUPA contained a definition of "Indian lands" similar to that in SMCRA and was drafted at approximately the same time as the SMCRA definition of "Indian lands." In explaining the scope of the phrase "supervised by an Indian tribe" in LUPA, the Senate Report on the bill noted that the phrase "is intended to cover lands which are Indian country for all practical purposes but which do not enjoy reservation status." S. Rep. No. 93-197, at 127 (1973). The committee noted that tribal land use planning programs would be largely meaningless if the tribes could not control key reservation tracts that they did not own "or lands outside a reservation which they own or for which they possessed administrative responsibility." *Id.* (Emphasis added). From this, we argued in *Valencia* that lands owned by an Indian tribe are "Indian lands" under SMCRA section 701(9).

Valencia argued that recourse to the legislative history of LUPA was unwarranted because it involved a different piece of legislation, that was

never enacted, and that was considered four years before SMCRA was adopted. *Valencia* also argued that, regardless of what may have been contemplated by the original drafters of the language, their interpretation could not be said to be binding on the Congress that adopted SMCRA. However, the IBLA rejected all of these arguments, noting that: LUPA was considered by the same committee that was formulating an earlier version of SMCRA; the definition of "Indian lands" in the bills was identical; and in the ensuing 4 years, the SMCRA definition of "Indian lands" remained the same. The IBLA concluded that "[i]t is simply logical to assume that a single legislative committee, reviewing two separate pieces of legislation, both containing the same verbatim definition, intended the same interpretation of that definition" in both pieces of legislation. 109 IBLA 50. The IBLA also noted that *Valencia's* argument would have had more force if there had been any indication in the legislative history of a subsequent change in Congress' interpretation, but no such change had occurred, despite Congress' continual reexamination of the provision until passage. 109 IBLA 61 [citing *In re: Permanent Surface Mining Regulation Litigation*, 627 F.2d 1346, 1364 (DC Cir. 1980)]. Noting that the Court of Appeals for the District of Columbia had relied heavily on the legislative history of LUPA in interpreting SMCRA section 710, the IBLA stated that recourse to the legislative history of LUPA to construe the phrase "supervised by an Indian tribe" in SMCRA section 701(9) was proper. 109 IBLA 62. As noted above, *Valencia* was upheld by a district court on appeal.

The legislative history of LUPA using the phrase "lands * * * for which they possessed administrative responsibility" to refer to lands supervised by a tribe, is consistent with our interpretation of the term "supervised by." However, even if it were argued that the IBLA erred and that the legislative history of LUPA does not establish beyond dispute Congress' intent with regard to the interpretation of "supervised by," we are not relying solely upon that legislative history to establish Congress' intent with regard to the phrase. Rather, as discussed above, we conclude that Congress intended the commonly understood meaning; namely, "supervise" or "supervision" means the function, right or authority of superintending, regulating, or overseeing a person or thing. And, as discussed above, if a court were to conclude that Congress' intent was not

clear, we believe that our interpretation is reasonable.

3. Does the Record Demonstrate Navajo Nation Supervision of Off-Reservation Allotted Lands in the Consolidation Area?

After review of the record before us, including all comments, we conclude that the record does not demonstrate that, in general, all tribes supervise their members' allotted lands. The record does not demonstrate any relevant interests or functions that all tribes have on their tribal members' allotted lands. More specifically, as discussed below, the record does not clearly demonstrate whether the Navajo Nation supervises the Navajo allotted lands outside the Navajo reservation, in the approved tribal land consolidation area. The record does not clearly and indisputably establish the extent to which the Nation supervises those lands in law because of any sovereign or congressionally delegated authority on these allotted lands relevant to supervision of the lands under SMCRA. Likewise, it is not clear whether the Nation supervises those lands in fact because of any actions or programs of the Nation that amount to superintending, regulating, or overseeing the lands. Thus, the record does not establish whether the Nation supervises any allotted lands in fact or in law. Equally important, for any interests that the Nation may assert that it has or any actions that the Nation may take on allotted lands, the record does not clearly demonstrate relevance or significance to tribal supervision of those lands under SMCRA. In summary, the record is inadequate to support a determination as to whether any Navajo off-reservation allotted lands are supervised by the Navajo Nation and are thus Indian lands. Therefore, we conclude that the record does not support the proposed rule.

a. Why Is Case-by-Case Analysis Needed for Evaluation of Tribes' Authorities Over Allotted Lands?

We could find no consistent rule articulated by the courts concerning tribal authority over any off-reservation lands or land uses, although in general the commentators and decisions referenced in this notice emphasize the need for full discussion of all relevant factors, including legal and factual parameters concerning a tribe's authority. Tribes' authorities over various types of lands have long been the subject of contention and confusion.

Some courts' decisions make general statements about tribes' authorities.²

The Supreme Court has stated that tribes' inherent sovereign powers are presumed to be retained unless "withdrawn by treaty or statute, or by implication as a necessary result of their dependent status." *United States v. Wheeler*, 435 U.S. 313, 323 (1978). See also Dean B. Suagee, Christopher T. Stearns, *Indigenous Self-Government, Environmental Protection, and the Consent of the Governed: A Tribal Environmental Review Process*, 5 Colo. J. Int'l L. & Pol'y 59, 72, n. 48 (1994).

Some commentators assert that tribes typically have little or no authority or jurisdiction over off-reservation lands.³ In contrast, other authors note that, in general, tribal authority to regulate in Indian country "arises from the inherent

² For example, decisions hold that tribal governments are distinct, independent political communities, [*Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832)] with inherent attributes of sovereignty [*United States v. Mazurie*, 419 U.S. 544, 557 (1975)]. The Supreme Court has described tribes' status as:

"An anomalous one and of complex character," for despite their partial assimilation into American culture, the tribes have retained "a semi-independent position * * * not as States, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the State within whose limits they resided."

White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 142 (1980) [quoting *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 173 (1973)]; see also *United States v. Kagama*, 118 U.S. 375, 381-82 (1886).

³ For example, one author noted that Indian tribes derive powers from three principal sources: inherent tribal sovereignty, treaties with the United States, and delegation from the United States Congress [citing *Montana v. United States*, 450 U.S. 544, 563-65 (1981)]. Walter E. Stern, *Environmental Regulation on Indian Lands: A Business Perspective*, 7-SPG Nat. Resources & Env't 20-21 (1993). However, Stern concluded that, by virtue of Indian tribes' status within the Federal system, their inherent sovereign powers are diminished. "Tribal sovereignty is subject to limitation by specific treaty provisions, by [Federal] statute, * * * or by implication due to the tribes' dependent status. [*Babbitt Ford, Inc. v. Navajo Tribe*, 710 F.2d 587, 591 (9th Cir. 1983), cert. denied, 466 U.S. 926 (1984).]" *Id.* Stern focuses on the fact that "[t]he U.S. Supreme Court emphasizes there is "a significant geographical component to tribal sovereignty" [*White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980).]" and concluded that, "[a]bsent a treaty provision or express congressional delegation of authority, tribal powers extend only to the reservation boundary." *Id.* The author did recognize that some tribes assert jurisdiction over non-Indian off-reservation activities, and specifically acknowledges that "the Navajo Tribe asserts taxing jurisdiction over the "Eastern Navajo Agency" area to the east and south of its reservation." However, the author pointed out that this assertion was then the subject of litigation, citing *Pittsburgh [sic] & Midway Coal Mining Co. v. Yazzie*, 909 F.2d 1387 (10th Cir. 1990). 7-SPG Nat. Resources & Env't 20-21 (1993).

sovereign powers of the native nations;" and assert that

Any judicial determination of the sovereign powers of a native nation begins with the doctrine that tribes retain all inherent powers of national sovereignty that have not been ceded by treaty, excised by federal legislation, or divested by the courts as inconsistent with the federal government's assertion of superior sovereignty. The domestic test for the exercise of native governmental powers thus is not whether a native nation *has* a sovereign power, but whether the tribe has lost it. The initial existence of tribal sovereign powers is presumed.⁴

On several occasions, the Department of the Interior has stated its position on the question of tribal authority over property. However, those positions have emphasized that the powers of a particular tribe must be based on case-by-case detailed analysis of all legal authorities applicable to the tribe.⁵

All of the evaluations of tribal authority that we have reviewed emphasize case-by-case detailed analysis, because the circumstances of each tribe are unique, relative to the tribe's sovereignty, jurisdiction, and interests. Those circumstances may be quite complex, and all relevant legal authorities and all relevant facts must be reviewed before a determination can be made with regard to a particular tribe, particular lands, or particular tribal requirements.⁶

⁴ Judith V. Royster and Rory Snow Arrow Fausett, *Control of The Reservation Environment: Tribal Primacy, Federal Delegation, And The Limits of State Intrusion*. 64 Wash. L. Rev. 581, 593-594 (1989) (Emphasis added; citations omitted).

⁵ In one instance, the Solicitor of the Department of the Interior determined that, in general, the sovereign powers of the tribe extend over the property as well as the person of its members, and are not restricted to lands or funds it owns. Memorandum Opinion of the Solicitor, Department of the Interior, M-27781, Powers of Indian Tribes (55 I.D. 14, 44 (1934)); limited on other grounds, 77 I.D. 49 (1970). However, the opinion emphasized that, while some generalizations can be made about what tribal powers have been recognized in the past, the powers of a particular tribe can only be ascertained by considering all legal authorities applicable to that tribe: "My answer * * * then, will be general, and subject to correction for particular tribes in the light of * * * [any] treaties or statutes * * * restricting or enlarging the general authority of an Indian tribe." Memorandum Opinion, 55 I.D. 17-18.

⁶ Thus, one author notes that tribal, state, and Federal environmental regulatory jurisdiction over natural resources development and other business activities, both on reservations and on other Indian lands, eludes precise definition because of the unique attributes of tribal sovereignty and the relationships between tribes and states, the Federal Government, and private business, as well as the lack of clear direction or standards of review from the courts. Walter E. Stern, *Environmental Compliance Considerations For Developers of Indian Lands*, 28 Land & Water L. Rev. 77, 78 (1993). The determination as to whether a tribe has a particular right, authority, or interest typically requires detailed analysis of complex factual and

A determination should include both generally and specifically applicable parameters, because some legislative schemes are applicable only to specific tribes or groups of tribes. "Accordingly, in addition to general principles of federal Indian law, one must consider any statutes, treaties, judicial decisions, or executive actions that may be directed to a particular tribe or to a class of tribes." Stern, *supra* note 2, at 85 & n. 85. Further, courts generally inquire into all of the facts and circumstances behind each assertion of tribal authority. Because of Indian tribes' dependent status, the Supreme Court has found limitations on tribal authority, which depend on the context in which the issue arises. *Id.*, at 85-86.

b. What Is the Relevance of "Indian Country" Law?

As discussed below, it is now settled law that off-reservation allotted lands are a category of lands included in "Indian country." A number of judicial decisions address the Indian country status of off-reservation lands in which Indians have interests, as well as the interests of the Federal Government and Indian tribes in those lands. We have reviewed the decisions concerning Indian country status to evaluate whether they aid in determining the interests of tribes generally in allotted lands. We found some useful guidance, but could find no cases that clearly establish any generally applicable conclusions as to any interests that all Indian tribes might hold in Indian country. Rather, the reverse is true: as discussed herein, any determination as to the interests of any tribe in lands must be made on a case-by-case basis, considering all relevant facts and law.

The proposed rule language concerning allotted lands is somewhat similar to the language addressing allotted lands in the definition of "Indian country" in 18 U.S.C. 1151. That provision states that:

[T]he term "Indian country" * * * means (a) All land within the limits of any Indian reservation under the jurisdiction of the United States Government * * *, (b) all dependent Indian communities within the borders of the United States * * *, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

Under this provision, for purposes of federal criminal and civil jurisdiction,

legal issues, and each analysis must stand on its own merits. Because of Indian tribes' "anomalous" status as "not * * * possessed of the full attributes of sovereignty," courts struggle constantly with the extent to which inherent tribal powers remain, or alternatively, have been diminished as a result of Indian tribes' dependent status. *Id.*, 86.

Indian allotments are Indian country. By its terms, the definition relates only to federal criminal jurisdiction. It establishes the basis for asserting federal criminal jurisdiction over "Indian country." However, it has been recognized as also generally applicable to questions of Federal civil jurisdiction. See *Alaska v. Native Village of Venetie Tribal Gov't*, 522 U.S. 520, 527 (1998) ("*Venetie*"); and *DeCoteau v. District County Court for Tenth Judicial Dist.*, 420 U.S. 425, 427, n. 2 (1975).

The U.S. Supreme Court has noted that allotments are parcels created out of a diminished Indian reservation and held in trust by the Federal Government for the benefit of individual Indians. *Venetie*, 522 U.S. 529. The court's decision stated that the original reservation in *Venetie* was Indian country "simply because it had been validly set apart for the use of the Indians as such, under the superintendence of the Government" [citing *United States v. Pelican*, 232 U.S. 442, at 449 (1914)] (emphasis in original). The decision then concluded that, after the reservation's diminishment, the allotments continued to be Indian country, as "the lands remained Indian lands set apart for Indians under governmental care; * * * we are unable to find ground for the conclusion that they became other than Indian country through the distribution into separate holdings, the Government retaining control." *Id.* *Venetie* noted that the Supreme Court in numerous cases has relied on a finding of both a Federal set-aside [a setting apart of lands for Indians] and Federal superintendence in determining that Indian lands are Indian country, in order to confirm Federal jurisdiction over them. 522 U.S. 530. The court pointed out that "[t]he federal set-aside requirement ensures that the land in question is occupied by an 'Indian community.'" 522 U.S. 531. The second requirement, of Federal superintendence, "guarantees that the Indian community is sufficiently 'dependent' on the Federal Government that the Federal Government and the Indians involved, rather than the states, are to exercise primary jurisdiction over the land in question. *Id.* The court found that the lands in question in *Venetie* were no longer superintended by the Federal Government. 522 U.S. 533.

The Tribe had contended that the requisite Federal superintendence was present because the Federal Government provides "desperately needed health, social, welfare, and economic programs" to the Tribe. The court rejected this argument, stating that

"health, education, and welfare benefits are merely forms of general federal aid; * * * they are not indicia of active Federal control over the Tribe's land sufficient to support a finding of Federal superintendence. 522 U.S. 534 (emphasis added). The court thus drew a distinction between providing government aid or service to Indians, on the one hand, and controlling land sufficient to establish superintendence of that land, on the other.

The Supreme Court has analyzed what is required for Federal "superintendence" of allotted lands for purposes of 18 U.S.C. 1151. *Venetie, supra*. We believe the logic of the *Venetie* analysis is applicable to evaluation of tribal supervision of lands under SMCRA 701(9). That is, analysis of whether a tribe supervises allotted lands under SMCRA should address not whether the tribe provides services or aid to the allottees, but rather whether the tribe supervises the allotted lands in question.

c. Why Is Further Information Needed?

The record does not clearly or persuasively establish whether or how any Navajo tribal authorities, rights, or functions, singly or cumulatively, constitute tribal supervision of Navajo allotted lands, in law or in fact, either as a result of tribal sovereignty or as a result of delegation from Congress. It is possible that, taken cumulatively, the Nation's rights, authority, or functions on tribal members' allotted lands may properly be deemed supervision of those lands in fact or in law, or both. Information relevant to analysis of tribal supervision in law might include, for example: Treaties, executive orders, Federal statutes, and Federal and tribal case law or tradition relevant to a tribe's interests in or authority over the allotted lands; and any other relevant requirements and programs of a tribe. Further, historical information about the allotted lands and tribal activities affecting the lands may indicate whether a tribe has supervised the allotted lands in fact. However, as discussed below, the record provides relatively little relevant and clearly persuasive information concerning whether the Navajo Nation supervises off-reservation allotted lands.

The 1995 Navajo Nation Code (NNC) does provide that it applies to allotted lands. The 1995 NNC provides that:

The Territorial jurisdiction of the Navajo Nation shall extend to Navajo Indian Country, defined as all land within the exterior boundaries of the Navajo Indian Reservation or of the Eastern Navajo Agency, all land within the limits of dependent Navajo Indian communities, all Navajo

Indian allotments, and all other land held in trust for, owned in fee by, or leased by the United States to the Navajo Tribe or any Band of Navajo Indians.

NNC Title 7, 254 (1995).

However, as discussed below, the record does not clearly establish what authorities or rights the Nation currently asserts in or on allotted lands in the consolidation area, what legal support there is for those authorities or rights, or what actions the Nation takes to implement those authorities or rights on allotted lands. It is not clear from the record before us on the proposed rule what questions, if any, there may be concerning the authority or rights of the Nation over off-reservation allotted lands. Equally importantly, it remains unclear whether or for what reasons any such authorities, rights, or actions should be deemed tribal supervision of allotted lands. And it is unclear whether the Navajo Nation asserts supervision in fact, in law, or both, over the allotted lands. Some of the programs and authorities the Nation asserts or had previously asserted it has on allotted lands, such as "treatment as a state" under the Safe Drinking Water Act (42 U.S.C. 300f *et seq.*), and authority to tax, are asserted by other commenters to be non-existent, unexercised, or too tangential or otherwise irrelevant to the issue of supervision of these lands for purposes of SMCRA. The record includes little or no current documentation or discussion of scope, purpose, effect, authority for, or implementation of these programs, or any others. We have found no judicial decisions or other authority that clearly establish the nature or extent of any Navajo Nation authority or rights over all Navajo allotments in the consolidation area. Thus, the record is inadequate to support a determination as to what supervision, if any, the Nation may have of the off-reservation allotted lands.

4. Is the Proposed Rule Appropriate in Scope? Is This Issue Likely To Be Raised for Other Allotted Lands in the Foreseeable Future?

We considered whether the specific question raised by the proposed rule would likely be raised for other lands in the future. A combination of unusual factors would be needed for this particular jurisdictional issue to arise; allotments would have to be outside the reservation, overlie coal reserves and be within a recognized Indian land consolidation area. We are not aware of any contemplated mining operations that would be likely to raise the issue in the foreseeable future.

Nonetheless, in the future it is possible that other tribal land consolidation areas could be approved that would include allotted lands and thus would be covered by the proposed rule. Under the proposed rule, those allotted lands would be deemed to be supervised by the tribe in question. However, we have no basis for determining at this time whether any such allotted lands would be supervised by a tribe. Such a determination would be particularly inappropriate in view of the fact that, as discussed *infra*, the Federal Government makes determinations about the authority of a particular tribe on particular lands on a case-by-case basis, based on consideration of all relevant law and facts concerning the tribe and lands in question.

5. What Procedural Concerns Does the Proposed Rule Raise?

For determinations in which witness expertise or personal knowledge may be critical, or in which evidentiary weight or credibility may be important, an administrative proceeding should afford interested persons the opportunity to present relevant and probative information or testimony and to comment or cross-examine as appropriate, and thus to address the weight and credence to be given to the record before the decision maker. For several reasons, we believe such opportunity may be particularly important concerning the issues in the proposed rule. The issues and facts in this matter are complex and contentious, and the accuracy and adequacy of a number of commenters' contentions has been called into question. The proposed rule would result in a change in regulatory primacy over Navajo allotted lands under SMCRA, and any such change might affect the responsibilities, funding, and costs of interested persons, including the State, the Navajo Nation, and the McKinley mine operator. Further, there is a paucity of relevant and dispositive documentation in the record before us. We anticipate that case-by-case determinations will provide all interested persons with ample notice and opportunity to participate, and thus will allow development of a more complete record and a more informed decision.

6. Is National Rulemaking Appropriate on This Matter?

Does this issue warrant a change in nationwide regulations? We do not think it does, for the reasons discussed above, and for the following reasons. Ordinarily, questions requiring national

rulemaking involve issues that arise with some frequency and are of importance in multiple areas of the country. We know of only one instance where this issue has arisen—at the McKinley Mine in New Mexico. In the years that we have sought to address this issue, including the many months that it took to prepare the proposed rule and the more than eight years since the proposed rule was published, we have yet to learn of another instance where this jurisdictional issue is relevant. We do not believe that creating nationally applicable regulations to resolve a local and infrequently arising question is an appropriate use of the Federal regulatory process.

C. How Did We Evaluate the Record in Deciding What Action To Take on the Proposed Rule?

We reviewed the record before us to determine what relevant information has been provided. We considered both the relevance and significance under SMCRA of any alleged supervisory function, right, or authority.⁷ For any asserted tribal supervisory function, right, or authority concerning allotted lands, we evaluated whether the record demonstrated that the Nation actually possesses the function, right, or authority (supervision in law),⁸ and if so, whether the record demonstrated that the Nation actually exercises the function, right, or authority over the Navajo allotted lands (supervision in fact).⁹ Further, we evaluated whether

⁷ The analysis of one author suggests some tribal functions or authorities that may constitute supervision of lands. That discussion notes that:

"[T]wo aspects of tribal sovereign authority crucial to mineral development [are] taxation and environmental regulation.

"Other police [regulatory] powers relevant to mineral development include the powers to regulate health and safety, building standards, water use, zoning, and labor."

Judith V. Royster, *Mineral Development in Indian Country: The Evolution of Tribal Control Over Mineral Resources*, 29 *Tulsa L.J.* 541, 607 and n. 607 (1994) (Citations omitted).

⁸ Supervision in law of allotted lands might be demonstrated by factors such as: specific authority or rights of the tribe to oversee, regulate, or superintend allotted lands that may amount to supervision of the lands (for example, whether the Navajo Nation has sovereignty over off-reservation allotments by virtue of the allotments' status as real property of the allottees); specific Navajo authority or rights on allotted lands because the lands are Indian country, in light of any Navajo sovereignty over its Indian country; tribal authority over individual allotments because of delegation from Congress, e.g., under 28 U.S.C. 1151. Relevant information could include, for example, pertinent treaties, Federal statutes and executive orders, Federal case law, and tribal law and history or tradition, as well as discussion of how and why a tribe's sovereignty over or authority on the lands is or is not supervision in law of the lands.

⁹ Supervision in fact might be demonstrated by information about specific ways in which the tribe

the record demonstrates, either individually or cumulatively, supervision of the allotted lands or activities affecting the allotted lands. Our review addressed the following factors, as well as any other relevant information in the record:

Established Tribal Authority Under Federal Law: Are the lands in question presumed or deemed as a matter of federal law or treaty to be subject to the tribe's sovereignty? For example, does the tribe have specific recognized authority over the allotted lands because of their status as Indian country? Or has the Federal Government delegated to the tribe or recognized in the tribe specific authority over the lands? Has the Federal Government delegated to the tribe authority over the lands by necessary implication? If so, does the record establish the nature or extent of the tribe's sovereignty or authority (as distinguished from Federal sovereignty) over these lands? And if so, have any significant and relevant aspects of tribal sovereignty or authority over these lands been ceded by treaty, removed by Federal statute, or otherwise divested or limited? Does the tribe exercise any such authority?

Land Use Regulation: Does the tribe have authority over land use on the allotted lands? Specifically, does the tribe have zoning or land use planning authority? Does the tribe have authority over building on the lands? Does the tribe have documented authority over grazing on allotted lands? Has the tribe adopted a building code, a land use plan, or zoning for the lands, or otherwise taken action to regulate use of the lands? Does the tribe supervise, or has the tribe historically supervised grazing on the allotted lands?

Taxation: What taxation authority or jurisdiction does the tribe have on the lands? For example, does the tribe have the authority to tax these lands or activities affecting these lands, or materials or profits from the lands?

Environmental Regulation: What environmental regulatory authority does the tribe have over or affecting the lands? For example, what authority if any, does the tribe have to regulate water use, water quality, or health and safety on the lands? What environmental regulatory requirements, if any, does the tribe actually apply on these lands?

actually functions to oversee, regulate, or superintend allotted lands (as contrasted, for example, with tribal programs that are primarily social services to the allottees). Relevant information could address actions a tribe has taken or is taking to adopt, administer, or enforce programs affecting use of allotted lands.

Public Works Authority: Does the tribe have relevant public works authority over the lands? Has the tribe done, authorized, or funded any relevant public works projects on the lands?

Other: Does the tribe have other functions, rights, or authorities on the allotted lands that establish “supervision” of the lands for purposes of SMCRA? For example, does the tribe have a sovereign interest in or congressionally delegated authority over the postmining uses of those lands? Or does the tribe have a sovereign interest in the potential effects of surface coal mining operations on the lands in question because of any potential effects on the health, safety, and welfare of tribal members, or on the economy of the tribe?

VI. What Does the Record Establish Concerning the Basis for the Proposed Rule?

In addition to our review of relevant materials, discussed above, the record includes numerous materials submitted by commenters, including both documentary submittals and other comments on the proposed rule. Our evaluation of these materials follows.

A. What Does the Record Establish Concerning Congress’ Intent Regarding the Indian Lands Status of Indian Country?

The Navajo Nation asserts that SMCRA and its legislative history indicate that “lands held in trust for or supervised by” a tribe were intended by Congress to include Indian country. The Nation asserts that legislative history shows Congress’ intent to prohibit state regulation of allotments.

New Mexico argues that Congress knew how to provide for Indian lands status over “Indian Country” if that is what Congress intended, but that they chose not to. The State asserts that it would be inappropriate to supply by rulemaking what Congress deliberately did not do itself. The State also asserts that nothing in the legislative history or the definition of “Indian lands” supports a conclusion that Congress intended allotments to be Indian lands.

NMA contends that Congress did not use the term “Indian country,” which had been defined in LUPA, because it did not intend the terms to be synonymous.

As noted earlier in this preamble, we have found no legislative history of SMCRA that clearly sets out Congress’ intent on this issue. However, we believe the relevant LUPA legislative history (discussed above), considered with the analysis in *Venetie* of Indian country law under 18 U.S.C. 1151

(discussed above), suggest that allotted lands’ status as Indian country may mean that a tribe has interests in those lands relevant to a case-by-case determination on tribal supervision of lands (for example, see the discussion of tribal authority to tax Indian country lands in *Pittsburg & Midway v. Watchman*, 52 F.3d 1531 (10th Cir. 1995) (“*Watchman*”), summarized *infra*).¹⁰ As discussed above, we have found widespread variability among legal commentators and court decisions as to what interests and authority tribes may have or typically have in Indian country or on allotments. Therefore, a determination of tribal interests and authority necessarily must be made on a case-by-case basis looking at all identified relevant factors.

We are not persuaded by the arguments of New Mexico and NMA concerning the relevance of the legislative history of LUPA in interpreting SMCRA’s Indian lands provisions. As discussed in *Valencia*, and in this preamble, SMCRA, the legislative history of SMCRA, and LUPA are consistent with a determination that allotted lands may be Indian lands, but do not compel a conclusion as to whether any specific allotted lands are in fact supervised by a tribe and therefore are Indian lands. Similarly, in light of our discussion of the LUPA legislative history, we do not find helpful the contention that Congress did not intend “Indian country” and “Indian lands” to be synonymous. Neither the proposed rule nor our decision not to adopt the proposed rule relies on a conclusion that the terms are synonymous.

¹⁰ OSM recognizes that some authors make broad and general assertions. For example:

“In Indian country, Natives enjoy inherent sovereignty, i.e., the right of self-government and self-determination. Specifically, in Indian country, a tribal government has the following powers: to enact and impose taxes; to adopt and enforce its own internal tribal laws; * * * to issue marriage licenses; to buy and sell real property; to regulate land use; [and] to provide essential and non-essential governmental services. * * * [Stephen C. Pevar, *The Rights of Indians and Tribes* 16 (1992); Felix Cohen, *Handbook of Federal Indian Law* 246–57 (Rennard Strickland & Charles F. Wilkinson eds., 1982)]. Also in Indian country, * * * tribal governments enjoy the same sovereign immunity possessed by Federal and state governments. [See Pevar, *supra*, at 309 (citing *Oklahoma Tax Comm’n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 508 (1991); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978))]. They can be sued only if they consent or if they engage in acts beyond the scope of their authority. [See *id.*.]”

Marilyn J. Ward Ford, *Indian Country and Inherent Tribal Authority: Will They Survive ANCSA?* 14 Alaska L. Rev. 443 (1997).

B. What Is the Legal Authority for the Proposed Rule?

1. What Is the Statutory Authority for the Proposed Rule?

P&M asserts that we do not have the statutory authority to adopt the proposed rule because the SMCRA definition of Indian lands does not include Indian allotment lands and urges that the proposed rule should be withdrawn on that ground.

We are not persuaded by this comment. We have the authority to interpret and apply by rule the applicable provisions of SMCRA concerning this issue. This authority is derived from a variety of SMCRA provisions, including sections 102(b) and (m), 201(c)(1), (2), and (13), 701(11), and 710(h).

2. What Are the Effects of the Judicial and Administrative Cases Cited by Commenters Concerning the Proposed Rule?

None of the judicial or administrative cases cited by commenters establishes whether or not the Navajo Nation supervises the allotted lands in question.

The Navajo Nation asserts that the courts and the IBLA have determined that allotted lands are Indian lands for purposes of SMCRA. Specifically, the Nation refers to the language in *Montana v. Clark* equating “Indian lands” with “all lands in which the Indians have an interest” (749 F.2d 740, 752 (DC Cir. 1984), *cert. denied*, 474 U.S. 919 (1985)), and the *Valencia* and *P&M* decisions, which referred to this *Montana* language. The Nation concludes that under the reasoning of these three decisions, all trust allotments are clearly “Indian lands” because they are lands in which Indians have an interest. The Nation also refers to the IBLA discussion in *Valencia* of the legislative history of LUPA, which the Nation asserts was a related bill. That legislative history defined the phrase “all lands held in trust [for] or supervised by any Indian Tribe” as, *inter alia*, “lands which are Indian country for all practical purposes but which do not enjoy reservation status,” and “lands outside a reservation which [the Indian tribes] own or for which they possessed administrative responsibility.” S. Rep. No. 197, 93d Cong., 1st Sess. 127 (1973), quoted in *Valencia Energy Co.*, 109 IBLA at 50. The Nation also argues that numerous cases concerning “Indian country” establish that allotments are Indian country, that Indian country defines the tribe’s territorial jurisdiction, and that Indian country, including allotments,

defines the area of exclusive tribal and Federal authority. The cited cases include: *Oklahoma Tax Comm'n. v. Sac & Fox Nation*, 508 U.S. 114 (1993); *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 n.5 (1987); *DeCoteau v. District County Court for Tenth Judicial Dist.*, 420 U.S. 425, 427 n.2 and 445–446 (1975); and *McClanahan v. Arizona State Tax Comm'n.*, 411 U.S. 164, 169 and n.4 (1973).

We do not agree that the courts have determined that allotted lands are Indian lands under SMCRA. Further, the record does not establish that LUPA was related to SMCRA. Rather, as the *Valencia* decision indicates, LUPA was considered at the same time, by the same congressional committee, and used the same terminology (see preceding discussions of LUPA legislative history). However, the definition used by Congress in 1973 for LUPA is consistent with our conclusion that allotted lands, as Indian country, may be supervised by a tribe for two related reasons. First, allotted lands are Indian country and under *Venetie* and *Watchman* the Nation has some degree of authority over Indian country, including allotments. Second, although it is not clear on the record before us what relevant authority the Nation does have on allotted lands, a tribe with authority over allotted lands may have some function, right, or authority to superintend, regulate, or oversee the lands. Some of the cases cited by the Nation do not concern the territorial jurisdiction of the Nation, but rather the jurisdiction of another tribe. Other cases cited by the Nation do not address the authority held by all tribes in Indian country, but rather the authority of the Federal Government in Indian country.

The Navajo Nation asserts that the Energy Policy Act of 1992 (EPACT) confirms Congress's understanding that allotments are "Indian lands" under SMCRA because Title XXVI of EPACT authorizes grants to tribes to develop, administer, and enforce "tribal laws and regulations governing the development of energy resources on Indian reservations" [citing 25 U.S.C. 3504(a)]. The Nation notes that, for purposes of this provision, the definition of "Indian reservation" on which tribes may regulate, specifically includes off-reservation, or "public domain," Indian allotments. 25 U.S.C. 3501(2). The Navajo Nation also asserts that EPACT and SMCRA should be read harmoniously.

We do not agree that the Energy Policy Act confirms Congress' understanding that allotments are "Indian lands" under SMCRA.

Although the authorizing provisions and definition cited by the Nation are found in legislation that also amends SMCRA, as noted above the provisions themselves do not concern SMCRA, but rather 25 U.S.C. 3504.¹¹ Therefore, we see no compelling argument why these provisions of EPACT and SMCRA should be read harmoniously, particularly since they were enacted 15 years apart, and to achieve different purposes. In fact, the very definition the Nation cites defeats the Nation's argument because "reservation" clearly does not mean the same thing under SMCRA that it is defined to mean under EPACT. As the Nation's comment recognizes, the definition of "Indian reservation" in EPACT includes off-reservation allotments. By contrast, the SMCRA definition of "Indian lands" includes lands within Federal Indian reservations and lands held in trust for or supervised by an Indian tribe. Thus, SMCRA recognizes that off-reservation Indian lands (including any allotments that qualify) are not deemed reservation lands for purposes of SMCRA.

The State notes that a 1987 decision in *The Pittsburg and Midway Coal Mining Co. v. OSM* specifically quoted a Senate Report that stated that "[t]he conference report limits the definition [of Indian lands] to lands within the external boundaries of a Federal Indian reservation and to all other lands, including mineral interests, held in trust by the Federal Government for any tribe." *The Pittsburg and Midway Coal Mining Co. v. OSM*, at 11, No. TU 6–2–PR, United States Dept. of the Interior, Office of Hearings and Appeals (1987) ("1987 Pittsburg ALJ decision") [citing Senate Report No. 94–101 at 85–86 (1975)]. The State further notes that the ALJ in that case concluded that OSM arguably exceeded its statutory authority when its 1984 Indian lands rules purported to regulate as "Indian lands" those off-reservation lands held in trust for or supervised by individual Indians. 1987 Pittsburg ALJ Decision at 11 [citing 49 F. R. 38463 (September 28, 1984)]. The State points out that the ALJ concluded that OSM's subsequent change of position on this issue had comported with the statutory definition of Indian lands and the legislative

¹¹ Section 3504 was added by the Energy Policy Act of 1992 to Title 25 U.S.C., Indians, in a new Chapter on Indian Energy Resources. Section 3504 authorized grants to tribes for development and implementation of tribal programs for development of energy resources, in general. Section 3504 authorized grants from 1994 to 1997, as well as technical assistance and training from the Department of the Interior and the Department of Energy. Pub. L. No. 102–486, § 2604, 106 Stat. 2776, 3114 (1992).

history of SMCRA. 1987 Pittsburg ALJ Decision at 12.

This comment by the State is inapposite for several reasons and, therefore, we do not find it persuasive. First, this ALJ decision on this issue was overturned by the Interior Board of Land Appeals (IBLA) on appeal and remanded for a hearing and decision on the merits. *The Pittsburg and Midway Coal Mining Co. v. OSM, and Navajo Tribe of Indians*, 115 IBLA 148, 160 (1990). Second, the cited ALJ decision language addressed OSM's earlier regulatory language that would have treated as Indian lands all lands held in trust for or supervised by individual Indians. The 1999 proposed Indian lands rule, and this decision not to adopt the proposed rule, would not have this effect. Rather, the proposed rule and this decision address whether, under SMCRA, we deem specific categories of allotted lands to be supervised by a tribe. The IBLA emphasized in its 1990 decision overturning the ALJ's opinion that allotted lands may be regarded as "Indian lands" if they are held in trust for or supervised by an Indian tribe.

The State asserts that the proposed rule does not accurately reflect the decision in *Valencia*. The State alleges that the proposed rule relies on *Valencia* for the proposition that "Indian lands" under SMCRA include "Indian country." The State asserts that *Valencia* actually found that the definition of "Indian country" was not relevant to its inquiry in that matter, and quotes a passage from *Valencia*:

Thus, the fact that the land may not be 'Indian country' for the purposes of state criminal jurisdiction is simply irrelevant to the question of whether these lands are properly deemed 'Indian lands' for the purposes of SMCRA.

Valencia, 109 IBLA at 67 (1989).

We do not agree. *Valencia* does not conclude that the definition of "Indian country" is irrelevant to whether lands that are Indian country are "Indian lands" under SMCRA. This comment by the State misreads the language of the proposed rulemaking, and, in quoting a brief portion of *Valencia* out of context, mischaracterizes that decision. Further, as discussed below, the proposed rulemaking did not rely on *Valencia* for the proposition that Indian lands under SMCRA include Indian country. Rather, the proposed rulemaking identified several possible bases for determining that allotted lands are "Indian lands," but did not say that we relied on any of those possible bases.

The 1999 proposed rule discussion suggested that one of the possible bases

would be a two-part determination: first, that Congress intended the reference to lands “supervised by” an Indian tribe in the SMCRA definition of “Indian lands” to include lands encompassed by the term “Indian country;” and second, a determination that allotted lands are Indian country. The proposed rule discussion noted that OSM had taken the position that Congress intended the phrase “lands * * * supervised by” an Indian tribe to include lands encompassed by “Indian country” [citing *Valencia*, 109 IBLA 59 (1989)]. The proposed rule referred to our *Valencia* brief discussing the LUPA legislative history of the phrase “supervised by an Indian tribe.” That legislative history says Congress intended the phrase to cover “lands which are Indian Country for all practical purposes but which do not enjoy reservation status.” S. Rep. 93–197, 127 (1973). In our *Valencia* brief we asserted that Congress must have intended the same terms (“supervised by”) and the almost identical definitions of “Indian lands” to have the same interpretation, as discussed in the LUPA legislative history. The proposed rule points out that the IBLA affirmed our analysis at 109 IBLA 60; and that the IBLA’s decision was upheld on appeal.

Valencia does not support the State’s comment that the “Indian country” definition is irrelevant to an Indian lands determination. Rather, the statement referred to by the State occurs in the IBLA’s analysis of an altogether different issue. The IBLA was discussing the argument by the State and the mine operator that assertion of OSM jurisdiction over tribal fee lands would conflict with Congress’ intent to avoid altering the jurisdictional status quo.¹² The IBLA determined that tribal fee land must be “Indian land” under SMCRA and that the fact that tribal fee land may not be “Indian country” for purposes of state criminal jurisdiction is irrelevant to whether the lands are “Indian lands” under SMCRA. *Id.* Thus, in effect the IBLA held that if lands meet the SMCRA definition they will be deemed “Indian lands” for purposes of SMCRA, even if they have been found

not to meet the definition of “Indian country” for other purposes.

The State also argues that the settlement agreement reached in *Mescal v. United States of America* underscored the State’s conclusion that allotments are not supervised by a tribe [citing *Mescal v. United States of America*, No. Civ. 83–1408 (D.N.M.)]. The State asserts that the settlement establishes that allottees own the beneficial title to minerals underlying their allotments. The State asserts that *Mescal* supports its position that allotments are owned by individual Indians and the United States Government, not by the Tribe, and are not tribal land.

We find these arguments inapposite and unpersuasive for several reasons. First, and most importantly, tribal title to lands is not required in all cases under the SMCRA definition of “Indian lands.” Rather, tribal supervision is the relevant prerequisite; and in some cases allottee ownership might be concomitant with tribal supervision of the lands. Second, the settlement agreement did not confer on allottees present title to the coal underlying the allotments. Rather, the Federal Government continued to hold title to the coal until the end of existing coal leases, but BLM records would give constructive notice of allottees’ beneficial title to the minerals. The agreement provides for transfer of mineral title to the allottees at a later date, upon the expiration of existing Federal coal leases. Thus, the agreement did not change vested record title in the leased Mescal lands. Third, settlement agreements and consent decrees, by their very nature, have no precedential effect. Rather, they are binding between the parties to the agreement concerning the matters addressed in the agreement.¹³

The State also refers to another line of cases that it contends established the State’s regulatory authority over allotments, and allowed the State’s regulatory authority over all of South McKinley mine to remain in place: *New Mexico v. United States*, Civ. No. 84–3572 (D.D.C. 1984) and the 1987 settlement agreement with the Navajo Nation in *New Mexico v. Navajo Tribe of Indians*, No. Civ. 87–1108. The State asserts that it and Pittsburg and Midway “have, for over a decade, relied on that state of affairs, have stabilized regulation of South mine, and have adapted to the regulatory scheme in place.” The State asserts that to require

changes in regulation and bond release standards would be unfair, unwise, and contrary to law. Similarly, the National Mining Association (NMA) asserts that the proposed rule is inconsistent with the settlement agreement reached between OSM and NMA’s predecessor organizations (the National Coal Association and the American Mining Congress) in companion litigation, *NCA v. United States Dep’t of the Interior*, Civ. No. 84–3586 (D.D.C.).

We do not agree. Neither our commitments in the settlement agreements nor our 1989 clarifying rulemaking excluded Navajo allotted lands from consideration as to whether the tribe supervised them, or from the definition of Indian lands. Thus, the settlements could not preserve the State’s regulatory authority over allotments, if those allotments are found to be Indian lands, because, as discussed above, SMCRA does not authorize state regulatory jurisdiction over Indian lands. The litigation was started by the State’s challenge to our assertion of exclusive regulatory authority over Indian lands under the 1984 Indian lands regulations. The preamble to those regulations included “inadvertent and unintentional” language that, in relevant part, asserted that we would “continue to regulate as Indian lands *allotted lands*, and all lands where either the surface or minerals are held in trust for or supervised by an Indian tribe *or individual Indians.*” 49 FR 38463 (1984) (emphasis added). The Navajo Nation intervened as of right in that litigation and filed a counterclaim requesting a declaratory judgment that certain lands in New Mexico are “Indian lands.” Subsequently the National Coal Association and the American Mining Congress also intervened. The parties other than the Nation reached settlement. The State agreed that it would not contest the position of the Secretary of the Interior “that he is the exclusive regulatory authority with respect to surface coal mining operations on Indian lands within the State.” We agreed to issue a statement concerning the preamble to the final Indian lands rule clarifying that the “Secretary does not consider individual Indian allotted lands outside the exterior boundaries of the Indian reservation to be included in the definition of ‘Indian lands.’” The trial court ordered the plaintiffs’ actions dismissed; but the counterclaim of the Tribe was unaffected. *New Mexico v. United States Dep’t of the Interior*, No. 84–3572 (D.D.C. August 6, 1985), *aff’d*. *New Mexico ex rel. Energy and Minerals*

¹² The IBLA rejected both this argument and the underlying assumption that a parcel subject to a state’s general regulatory or police powers before SMCRA’s enactment, must also be subject to the state’s regulatory authority under SMCRA. 109 IBLA 66. The IBLA rejected the argument because SMCRA itself is an assertion of Federal authority under the Commerce Clause to regulate all surface coal mining activities in states, and SMCRA allows state primacy only on non-Indian and non-Federal lands—thereby *establishing* the jurisdictional status quo for SMCRA purposes. *Id.* The IBLA noted that state inability to regulate Indian lands under SMCRA does not affect exercise of state jurisdiction under other authority. 109 IBLA 67.

¹³ See, e.g., 18 *Moore’s Federal Practice* § 131.13[2], 134.01 (3d ed. 2004); and Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction* § 4443 (2d ed. 2002).

Dep't v. United States Dep't of the Interior, 820 F.2d 441 (DC Cir. 1987). In 1988, the Department published a proposed rule correcting its statement in the 1984 Indian lands rule preamble. In 1989, the Department published a final rule stating that, "for purposes of surface coal mining regulatory jurisdiction, off-reservation allotted lands are include [sic] in the SMCRA definition of Indian lands only if an interest in the surface or mineral estate is held in trust for or supervised by an Indian tribe." 54 FR 22184 (May 22, 1989).

As the IBLA has pointed out, all that the settlement [and the Department's 1989 final rule clarifying its policy] on the Indian lands status of allotted lands decided was that lands cannot be considered Indian lands simply because they are allotted to individual Indians, as had been asserted in the 1984 Indian lands preamble. *Pittsburg & Midway Coal Mining Co. v. OSM*, 115 IBLA 148, 161 (1990), *aff'd Pittsburg & Midway Coal Mining Co. v. Babbitt*, Civ. 90-730 (D.N.M. 1994).

Likewise, the settlement agreement between the Navajo Nation and the State (which could not bind OSM in any case) did not purport to address the Indian lands status of off-reservation allotted lands. The State filed a motion to dismiss the Tribe's counterclaim on the 1984 rule for lack of jurisdiction, arguing that, under SMCRA section 520, the claim must be brought only in the judicial district in which "the surface coal mining operation complained of is located." In November, 1985, the district court dismissed the Tribe's counterclaim. On appeal, the DC circuit vacated the district court's order denying the Tribe's counterclaim and instructed the district court to transfer the counterclaim to the United States District Court for the District of New Mexico. *New Mexico ex rel. Energy and Minerals Dep't v. United States Dep't of the Interior*, 820 F.2d 441 (D.C. Cir. 1987). The transferred litigation was settled and approved by consent decree. *New Mexico ex rel. Energy, Minerals and Natural Resources Dep't v. Navajo Tribe*, No. Civ. 87-1108 (D.N.M. 1992). The settlement agreed that specified reservation and tribal trust lands are "Indian lands," and that other lands may constitute "Indian lands." The Tribe and the State did not waive their respective positions as to the "Indian lands" status under SMCRA of any lands not listed in the settlement. In summary, neither settlement agreement established State regulatory authority under SMCRA over allotments, and neither agreement could preserve State regulatory authority over allotments

found to be Indian lands; and neither the State nor Pittsburg & Midway could reasonably rely on the settlements to preclude our proper evaluation of the Indian lands status of allotted lands.

C. What Does the Record Establish as to Supervision by a Tribe of Individual Indian Trust Allotments in Approved Tribal Land Consolidation Areas?

Neither the comments, nor the other documentation in the record, separately or cumulatively, clearly confirms whether any Nation programs or authorities amount to supervision of specific allotted lands or of all allotted lands in the consolidation area. As discussed below, we decline to take administrative notice of materials not submitted. In any case-by-case determination, commenters may provide information as to whether any programs of the Navajo Nation constitute supervision of the allotted lands.

The Navajo Nation asserts that the Nation does in fact supervise allotted lands within the Navajo consolidation area. The Nation asserts that Navajo supervision over Navajo trust allotments is conclusively presumed, and clear. However, the Nation cites to no authority for this specific presumption. The Nation lists certain Navajo Nation ordinances and other provisions that it maintains the Nation applies and implements on allotted lands. For example, the Nation asserts that, pursuant to the Navajo Nation Code ("NNC"), the Nation applies to allotments its laws regarding the following: Agriculture and livestock, protection of the environment, regulation of commerce and trade, community development, courts and procedures, domestic relations, education, elections, fiscal matters, health and welfare, motor vehicle code, labor, land, law and order, mines and minerals, parks and monuments, professions and occupations, public utilities and communications, water, conservation, wildlife, and taxation. The Navajo Nation requests that we take administrative notice of the Navajo Nation Code and its laws.

The Nation asserts that, in *Pittsburg & Midway Coal Mining Co. v. Saunders*, No. Civ. 86-1442 M (D.N.M. 1988), *rev'd on other grounds*, 909 F.2d 1387 (11th Cir.), *cert. denied*, 498 U.S. 1012 (1990), *decision after remand*, 52 F.3d 1531 (10th Cir 1995), the district court examined a 1.9 million acre area that includes all of the P&M South McKinley Mine as well as several thousand Navajo trust allotments and found that the Nation provides to Navajos in that area a variety of services, including

community services, health, education, and water resources; and that the Nation provides law enforcement and hears the vast majority of civil and criminal disputes in the Tribal Court. The Nation references the Nation's criminal jurisdiction over allotted lands, through the Navajo Tribal Court of Indian Offences; and provides copies of affidavits submitted in *Saunders*, concerning Navajo governmental authority and activity on allotted lands in such matters as demographics, land consolidation, education services, social services, health services, police services, cultural resources protection and ethnography, and (for the McKinley Mine permit area) land status and social services. The Nation also submitted a copy of a 1984 memorandum from a Department of the Interior Administrative Law Judge (ALJ) in a probate proceeding involving certain Navajo allotments. The memorandum discusses the applicability of the escheat provision of the Indian Land Consolidation Act (the Act was subsequently held unconstitutional). That memorandum found that the Tribe "exercises civil governmental powers over the [allotted] lands" [in the Eastern Navajo Agency] involved in the proceeding.

We conclude that neither the Nation's comments, nor the affidavits, nor the 1984 ALJ memorandum, separately or cumulatively, clearly confirms any Nation programs or authorities as demonstrating supervision of specific allotted lands or of all allotted lands in the consolidation area. And, for the reasons outlined below, we decline to take administrative notice of the other materials referenced by the Navajo Nation.¹⁴ In the cited *Pittsburg & Midway* decision, the issue before the court was whether the P&M South McKinley mine is on the Navajo Reservation or in Indian country, so that the court was required to abstain from exercising jurisdiction over P&M's challenge to the Navajo Nation's tax on P&M's coal mining activities. Thus, only the status of the McKinley mine lands was at issue. The decision stated that the Tribe provided services in the area to allottees, including community development, child development, social services, health, education, youth

¹⁴ As discussed below, we anticipate that, in any case-by-case determination, the Nation may provide information about any programs that constitute supervision in fact or in law of the allotted lands; i.e., overseeing, regulating, or superintending the allotted lands or activities affecting the lands (as contrasted, for example, to programs that constitute general social services to allottees). In such a proceeding, the Nation may also request administrative notice of relevant materials, as appropriate.

development, and water resources, and law enforcement. The decision discusses the role of the Nation in Navajos' lives in the area. However, the decision does not discuss how or why any tribal authority, program, or service concerns allotted lands in particular, or amounts to supervision of those allotted lands. Further, the decision does not discuss any programs or services in such detail as to support a conclusion as to whether they amount to supervision of the allotted lands.

The affidavits submitted by the Nation concern primarily the provision of various types of social services, and tribal acquisition of title, as well as the importance of off-reservation cultural resources to the Nation. The 1986 Elwood affidavit asserts that, at the time of the affidavit, the Nation regulated grazing on lands in the 1908 extension of the Navajo Nation in New Mexico, including BLM and BIA lands, tribal trust lands, tribal fee lands, and allotted lands, pursuant to a cooperative agreement. We believe the affidavit refers to a February 8, 1965 memorandum of understanding (MOU) among the Navajo Nation, BIA, and BLM concerning grazing administration of the Eastern Navajo Agency Administration Area. That MOU subsequently has been extended by amendment, most recently in January, 2003. The affidavit does not specifically assert that the Nation has independent authority to regulate grazing on allotted lands, outside of any authority delegated by BIA or BLM under the cooperative agreement. The Elwood affidavit does assert that the predominant use of lands within Navajo Indian country is for grazing by Navajo livestock. We have reviewed the January, 2003 extension of the February 8, 1965 MOU. The MOU specifies that there are three groups of Indian grazing communities, designated by District, in the Eastern Navajo Agency. However, Section III.E. of the January, 2003 extension specifically provides that, "Individual Indian trust patent allotments and Navajo ranches shall not come under the administrative jurisdiction of the cooperative agreement as approved." Thus, the memorandum of understanding does not apply to Indian allotted lands. However, the holders of an allotment may voluntarily authorize regulation of grazing by BIA. Within the Eastern Navajo Agency, there are roughly 4,500 allotments. These allotments comprise the majority of the Navajo allotments within the approved tribal land consolidation area. Of those allotments, the necessary authorization for

regulation by BIA has been given for roughly 1000 allotments. For those allotments for which BIA is authorized to regulate grazing, BIA issues grazing permits. However, we have found no information in the administrative record confirming that the Navajo Nation regulates grazing on allotted lands.

The 1984 ALJ memorandum discusses whether, for purposes of the applicable statutory criterion, those trust or restricted lands at issue were subjected to the Navajo Nation's jurisdiction. It states that "the Tribe asserts general subject matter jurisdiction" in the Eastern Navajo Agency, but specifically confirms only that "the Tribe, BIA, and IHS [Indian Health Service] provide law enforcement, health, education, and social services" in the Eastern Navajo Agency. Thus, the categories of programs confirmed are apparently services to individual Navajo; and the memorandum does not differentiate between the roles of the Nation and those of BIA and IHS.

New Mexico's comments concerning the Nation's assertions about supervision of grazing, state status under SDWA, and power to tax, are discussed below. New Mexico asserts that the other functions and authorities which the Nation maintains it has on allotted lands concern very limited and general supervision. The State did not list those functions and authorities. The State asserts that those references are unpersuasive where Congress has not specifically applied SMCRA to mining on allotments.

As discussed above, we conclude that the record before us is not adequate to support a conclusion as to whether the Nation's functions and authorities constitute supervision of the relevant allotted lands. Further, we conclude that this issue may be properly addressed in case-by-case determinations. Any such determination can address whether the Nation supervises particular allotted lands in view of any specific relevant Tribal programs or authorities.

Both New Mexico and NMA comment in effect that the Nation does not supervise allotted lands if the Nation's alleged supervisory functions or roles do not pertain to SMCRA or surface coal mining operations. New Mexico asserts that references in the proposed rule to incidental supervision on topics that have nothing to do with mining do not establish supervision over mining. NMA maintains that the authority to tax bears little relationship to supervision of lands within the context of SMCRA.

We do not agree. We believe these comments mistake the issue. The definition of "Indian lands" does not

require that a tribe's supervision must directly pertain specifically to SMCRA program implementation or to surface coal mining operations. Rather, the definition simply requires that a tribe supervise the lands, as discussed above. And, as discussed above and in *Valencia*, supervision may exist as a matter of fact or as a matter of law; and jurisdiction or control over mining is not required. Thus *Valencia* found that, because the Nation owned the surface in fee, the Nation supervised the lands at issue in that case as a matter of law, even though the Nation had leased the coal rights. 109 IBLA 66. Further, *Valencia* emphasizes the Tribe's continuing interest in the postmining condition and use of lands as relevant to evaluation of tribal supervision under SMCRA. *Id.* We do not agree that authority to tax lands or what is done on or produced from lands necessarily bears little relationship to supervision of lands. Rather, taxation of land or activities on land, or of materials harvested from land, may be an aspect of supervision of the lands. For example, such taxation may be authorized because of a government's authority over the lands; and may be a means of regulating or controlling what is done on the lands, or a source of funding for such regulation.

Regarding specific categories of alleged Tribal supervision, we received the following comments:

The Navajo Nation asserts that it supervises grazing on allotted lands outside the reservation. New Mexico asserts that the reference to grazing is not compelling because the allotments are not being grazed, but rather are being mined. NMA asserts that the Nation is not supervising grazing on allotted lands outside the reservation.

The record does not demonstrate whether any allotted lands outside the reservation are grazing lands. Further, the record does not demonstrate whether or when those lands have been grazed. Likewise, the record is unclear as to whether the Navajo Nation has authority to supervise grazing on off-reservation allotted lands, or does supervise any grazing on such lands. And finally, the record does not conclusively demonstrate whether the Nation has an interest in or authority over the pre-mining and post-mining use of the allotted lands, and thus has authority to supervise such grazing as a matter of law, whether or not it supervises grazing as a matter of fact. A case-by-case determination may address all of these questions.

The Navajo Nation asserts that they have "state" status for purposes of implementing the Safe Drinking Water

Act (SDWA) on off-reservation allotted lands. However, they cite no authority for this proposition. New Mexico asserts that, for off-reservation lands, the Navajo Nation is not treated as a state under the SDWA, having withdrawn its request for treatment as a state outside its reservation. In support of this contention, the State cites a letter dated August 9, 1991 from H. Seraydarian, USEPA Region IX, to New Mexico Governor King. However, our records indicate the State did not attach a copy of that letter.

We find that the record contains no dispositive documentation or authority as to whether the Navajo Nation has "state" status for purposes of implementing the SDWA on allotted lands. In any case-by-case determination, interested persons may provide documentation to support any relevant assertions on this topic.

NMA asserts that the Navajo Nation's authority to regulate under the SDWA could not have been contemplated by Congress during its consideration of SMCRA because the Navajo Nation's treatment as a state did not occur until after 1986. We find this assertion unpersuasive. SMCRA does not require that only supervision of lands under statutes that existed as of the date of enactment of SMCRA may be considered; and nothing in SMCRA or its legislative history supports such a conclusion. If Congress had intended such a result, it could have inserted specific language to that effect in SMCRA.

Citing 56 FR 64876 (December 12, 1991), NMA asserts that the Navajo Nation does not have "state" status under the Clean Water Act on off-reservation allotted lands; only on reservation lands. NMA also asserts that, to make a fair determination of regulatory authority on off-reservation allotted lands, we must look at all types of regulatory authority over the lands, and consider the entities that exercise the authority, rather than the few unrepresentative examples of authority given in the proposed rule preamble. For the following reasons, we find these comments not helpful. The referenced 1991 USEPA rulemaking concerns interpretation of a particular Federal statute not at issue in this rulemaking. We have found no relevance of the 1991 USEPA rulemaking to this rulemaking, and no relevance to this rulemaking has been asserted by commenters. A reference to an unrelated statute under which a tribe does not supervise lands is not germane. Further, we do not agree that we must inventory all possible authorities under which any entity might possibly regulate or otherwise

supervise allotted lands, in order to make a determination as to whether a tribe supervises those lands. It is doubtful whether such an inventory is possible. But in any case, nothing in SMCRA compels or authorizes a comprehensive determination of the nature, extent, or focus of all such authority over allotted lands. And even if such an inventory were feasible, it would serve no purpose: as noted above, SMCRA does not require that a tribe exercise more authority or supervision of lands than does a state or the Federal Government; nor does SMCRA require exclusive tribal supervision. SMCRA requires only that a tribe supervise the lands.

Citing *Pittsburg & Midway Coal Mining Co. v. Watchman*, 52 F.3d 1531 (10th Cir. 1995) ("*Watchman*"),¹⁵ the Navajo Nation asserts that the Tenth Circuit has confirmed the Nation's authority to tax mining on trust allotments. The Nation characterizes this authority as the potentially most intrusive type of regulatory jurisdiction—"the power to tax involves the power to destroy." New Mexico asserts that the Navajo Nation does not tax allotted lands.

We conclude that *Watchman* does not unequivocally establish whether the Nation has the authority to impose a business tax on coal mining of all relevant allotted lands. However, because this decision provides potentially relevant or instructive discussion of a number of issues, we have evaluated it in some detail. In *Watchman*, Pittsburg & Midway Mining Co. ("P&M") sought an injunction and declaratory judgment that the Navajo Nation lacked jurisdiction to impose a tax on P&M's mining activities on the off-reservation portion of McKinley mine, the "South McKinley Mine." The Navajo Nation asserted that the Federal court should abstain based on the tribal abstention doctrine, and allow the Navajo tribal court to hear the issue first. Among other arguments, the Nation argued that the South McKinley mine area is Indian country within the meaning of 18 U.S.C. 1151. In relevant part, that provision reads as follows:

18 U.S.C. 1151. Indian country defined

Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country", as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding

¹⁵ *Watchman* was a supplemental opinion related to *Pittsburg & Midway Coal Mining Co. v. Yazzie*, 909 F.2d 1387 (10th Cir. 1990) (see note 3, *supra*), cert. denied, *Navajo Tax Com. v. Pittsburg & Midway Coal Mining Co.*, 498 U.S. 1012 (1990).

the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

The district court refused to dismiss P&M's complaint for failure to exhaust tribal remedies, holding that the area was not Indian country. The appellate court reversed that holding, and remanded for further findings by the district court, concerning whether the entire South McKinley Mine permit area is a dependent Indian community (and therefore, Indian country). The appellate court noted that P&M challenged the Navajo Nation's taxing authority, which was a basic attribute of its sovereignty. 52 F.3d 1531, 1538. The appellate court concluded that:

The power to tax is an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management. * * * It derives from the Tribe's general authority, as sovereign, to control economic activity within its jurisdiction, and to defray the cost of providing governmental services by requiring contributions from persons or enterprises engaged in economic activities within that jurisdiction. * * * [T]he power to tax is a sufficiently essential aspect of sovereignty to require P&M to initiate its jurisdictional challenge in Navajo tribal court.

* * * * *

P&M's lawsuit presents a direct challenge to the Navajo Nation's jurisdiction and involves the interpretation of *Navajo law*. * * * A myriad of legal and factual sources must be consulted to resolve the complicated and intertwined issues implicated in cases like this one.

The existence and extent of a tribal court's jurisdiction will require a careful examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions. Resolution of these issues also requires close examination of the historical and present-day status of the area in question.

Id. (Citations omitted; emphasis added).

The appellate decision notes P&M's arguments that the tribal abstention doctrine should not apply because the attempt to tax is patently violative of express jurisdictional prohibitions, and that the Tribe has no authority to regulate non-Indian activities on non-Indian lands. The court did not elaborate on these arguments, and disagreed:

P&M is correct that the Navajo Nation as a dependent sovereign lacks the inherent authority of a full-fledged sovereign. * * * Nonetheless, * * * [t]he question is not whether the Navajo Nation possesses inherent authority as a sovereign to tax P&M, but whether 18 U.S.C. 1151 is a Congressional delegation of this authority throughout Indian country.

52 F.3d 1531, 1540 (emphasis added). The Court continued:

We hold § 1151 represents an express Congressional delegation of civil authority over Indian country to the tribes. As a result, the Navajo Nation has authority to tax any mining activities taking place in Indian country without violating any express jurisdictional prohibitions.

52 F.3d 1531, 1541 (Citations omitted; emphasis added). The Court did not elaborate as to what civil authority over Indian country Congress had delegated to tribes. Nonetheless, the court concluded that it was not clear whether the area within the South McKinley Mine that was not allotted lands is Indian country. The court also concluded that, if the South McKinley non-allotted lands are not Indian country, then the allotted lands within the mine did not sufficiently implicate Indian sovereignty or other important interests of the Nation, and thus tribal abstention is not required. 52 F.3d 1531, 1542. In a footnote, the court specifically alluded to the authority of the Navajo Nation to tax on allotted lands. The court noted that

Of course, if the entire mine was located on Navajo trust allotments, there would be no question about the doctrine's applicability.* * * [W]e believe the Navajo Nation has the authority to apply its Business Activities Tax to the source gains from the 47% portion of the South McKinley Mine that lies within the individual Navajo trust allotments.

52 F.3d 1531, 1542 n.11. However, the court also recognized that the Nation's authority over allotted lands was not at issue in the case. Therefore, this footnote appears to be dictum. In fact, it may be doubly dictum, because the basic holding of the case was that the issue of jurisdiction or authority to impose the tax should be decided in the first instance by the tribal court.¹⁶ Thus, it does not appear that the decision holds what the Nation asserts it holds. We expect that, in any case-by-case determination, interested persons may provide information on whether the Nation has relevant authority to tax on

¹⁶ In effect, it appears that the court may be saying if tribal abstention did not apply and if the issue before us were taxing jurisdiction over allotted lands, and if we were the trial court, this would be our holding on the Nation's taxing jurisdiction over allotted lands.

off-reservation allotted lands. That information may address whether the circuit court's statement in *Watchman* that the Nation has the authority is binding precedent or is dictum; if it is dictum, whether it should be given weight as persuasive; and whether a tribal court has ruled on the issue. Interested persons might also address whether the *Watchman* jurisdictional challenge was pursued in Tribal court.

None of the other cases on tribal authority to tax allotted lands cited by the Nation concerning the authorities of other tribes establishes that all tribes have taxing authority on all members' allotted lands. Likewise, none of those cases establishes that the Navajo Nation has taxation authority over all Navajo allotted lands.

P&M maintains that whether the Navajo Nation supervises off-reservation Indian allotments under SMCRA is a mixed question of fact and law. P&M asserts that dictionaries "consistently define the word 'supervise' to mean; 'to have general oversight over, to superintend or to inspect'"; and "define superintend to mean; 'to have charge and direction of; to direct the course of and oversee the details; to regulate with authority; to manage; to oversee with the power of direction; to take care of with authority.'" P&M asserts that therefore it is clear that supervision requires the power of direction or authority to control or manage. P&M cites no specific authority for these assertions.

New Mexico asserts that supervision does not equate to jurisdiction. The comment offered an example of a definition for each of the two terms, noting that jurisdiction "is the authority by which courts and judicial officers take cognizance of and decide cases;" and that supervision connotes an element of management. New Mexico also effectively asserts that "Indian country" is a jurisdictional term and does not equate to supervision.

As we discuss above, we agree that supervision may be supervision in law or supervision in fact, or both. However, we are not persuaded by the comment asserting that supervision is not the same as jurisdiction. A review of reference works indicates that the distinction between "supervision" and "jurisdiction" is not always clear, and that they are sometimes used to mean the same thing. For example, *Black's Law Dictionary* defines the two terms as follows:

"[S]upervision": The act of managing, directing or overseeing persons or projects. ("direct": * * * 3. To guide (something or someone); to govern.)

Black's Law Dictionary (7th ed. 1999).

"Jurisdiction": 1. A government's general power to exercise authority over all persons and things within its territory * * * 3. A geographic area within which political or judicial authority may be exercised.

Id.

Burton's *Legal Thesaurus* gives as synonyms for "supervision":

Administration, care, charge, command, control, direction, government, gubernation, guidance, inspection, jurisdiction, management, oversight, procuratio, proctorage, regulation, steerage, stewardship, superintendence, surveillance.

William C. Burton, *Legal Thesaurus* (1980).

Burton gives as synonyms for "jurisdiction":

Authority, authority to hear and decide a case, capacity to decide the matter in issue, capacity to hear the controversy, command, control, decision-making power over the case, domain, domination, dominion, extent of authority, grasp, *jurisdictio*, legal authority, legal power, legal power to decide a case, legal right, power, province, purview, range, reach, realm, reign, sovereignty, sphere, superintendence, supervision, territorial range of authority, territory.

Id.

Another legal reference book, *Words and Phrases*, includes the following discussions of the meaning of "jurisdiction":

Jurisdiction is controlling authority; the right of making and enforcing laws or regulations; the capacity of determining rules of action or use, and exacting penalties; the function or capacity of judging or governing in general; the inherent power of decision or control. *People v. Pierce*, 41 N.Y.S. 858, 860, 18 Misc. 83.

* * * * *

The word "jurisdiction" in its technical sense is not synonymous with "authority" although it is sometimes employed in that sense. *In re Perez*, 1 So.2d 537, 540, 197 La. 334.

* * * * *

The term "jurisdiction" imports authority to expound or apply laws. *Max Ams, Inc. v. Barker*, 170 S.W.2d 45, 48, 293 Ky. 698.

* * * * *

The term "jurisdiction" originally included only right to hear and determine concerning subject matter in particular case, but is now frequently used as meaning authority to do particular thing or exercise a power in a particular manner. *Fortenbury v. Superior Court in and for Los Angeles County*, 106 P.2d 411, 412, 16 Cal.2d 405.

* * * * *

The word "jurisdiction" is frequently used as meaning authority to do the particular thing done * * * *Evans v. Superior Court in and for the City of San Francisco*, 96 P.2d 107, 116.

Words and Phrases, "Jurisdiction" (2001).

These references indicate that the two words are not necessarily synonymous, but that they may be used as synonyms and both words can mean command, control, or superintendence.

“Jurisdiction” may be said to typically refer to a government’s general power to exercise authority over persons and things within its territory. As discussed above, “supervision” may be said to typically refer to regulating, overseeing, or superintending persons or things.

As discussed above, in *Valencia Energy Co.*, the IBLA rejected an argument that jurisdiction was a prerequisite for supervision. The operator had argued the Nation lacked jurisdiction over lands outside the boundaries of the reservation, and thus that those lands could not constitute lands “supervised by an Indian tribe” for the purposes of SMCRA. Further, the operator argued that the Nation lacked supervisory authority over the land, arguing that the Nation had conveyed all of its rights to the surface in a lease for approximately 50 years. The IBLA concluded that OSM’s analysis was sufficient to support a finding of supervision in fact; and also that ownership of the surface estate was sufficient to compel a conclusion of “supervision” as a matter of law under SMCRA (despite the lease under which the Nation had granted full use of the surface for mining purposes).

However, there is nothing inherent in any of the definitions of “jurisdiction” and “supervision” that precludes jurisdiction from being either an aspect of supervision or a basis for supervision. Thus, for example, jurisdiction may be a prerequisite for regulation, and may be a concomitant of sovereignty, and if a tribe has regulatory authority over lands or has sovereignty over lands, then it is certainly possible that the tribe may supervise those lands. In summary, we conclude that the comment attempting to distinguish between the terms “supervision” and “jurisdiction” is not particularly helpful, and our review of references and definitions indicates that they do not compel the conclusion advocated by the comment.

P&M notes that the Navajo Nation is the only Indian tribe in the approved Navajo Land Consolidation Area, and asserts that, therefore, a valid rulemaking will require a specific finding by the Secretary that the allotment lands subject to the proposed rule are supervised by the Navajo Nation. However, P&M asserts that neither the Navajo Nation nor OSM has offered or is able to offer any facts to support this critical finding. P&M urges that it is clear that the Navajo Nation has no power of direction or authority,

P&M asserts that numerous Federal courts, including the United States Supreme Court, have held that

“[l]ands allotted to be held in trust for the sole use and benefit of the allottee or his heirs are during the trust period under the exclusive jurisdiction and control of Congress for all governmental purposes relating to the guardianship and protection of the Indians.” And; “[t]rust allotments to individual Indians remain under exclusive jurisdiction and control of Congress during the trust period for all purposes relating to guardianship and protection of Indians.”

P&M cites annotations to 18 U.S.C.A. Section 1151, n.14 as authority for these statements. P&M asserts that thus it is clear that “Congress, through its agent, The [sic] Bureau of Indian Affairs, supervises the allotment lands within the Tribal Consolidation Area.”

We agree that the intent of the proposed rule is to determine whether off-reservation Navajo allotted lands within the approved Navajo land consolidation area are supervised by the Navajo Nation and thus are Indian lands under the SMCRA definition of “Indian lands.” However, as discussed above, we conclude that the record does not support a determination as to supervision of those allotted lands, and that such a determination is appropriately made on a case-by-case basis. Further, the cases quoted in the annotations to 18 U.S.C.A. 1151, n. 14, concerning the Federal Government’s exclusive jurisdiction and control over allotted lands “for all governmental purposes relating to the guardianship and protection of the Indians” do not clearly preclude a tribe from regulating allotted lands and their use for other purposes. Indeed, the cases addressing the Indian country status of allotted lands specifically and consistently characterize allotted lands as a category of Indian country, and state that Indian country (not excluding allotted lands) is subject to the primary jurisdiction of the Federal Government and the Indians. See *Venetie*, 522 U.S. 531, and the cases cited therein. We are also mindful of the holding in *Watchman* that 18 U.S.C. 1151 was an express Congressional delegation of civil authority over Indian country to the tribes, and the statement in *Watchman* that the Navajo Nation has authority to tax any mining activities taking place in Indian country without violating any express jurisdictional prohibitions. 52 F.3d 1541. The court noted that the Navajo trust allotments are Indian country by definition under 18 U.S.C. 1151(c). 52 F.3d 1535. (The decision also specifically noted that this statute had been amended by Congress to conform to a Supreme Court decision that determined that trust allotments are

subject to Federal jurisdiction. 52 F.3d 1541.) And, as discussed above, the decision referred in a footnote to the court’s understanding that the Navajo Nation has the authority to apply its tax to the coal produced on the 47% of the South McKinley mine lying within the Navajo trust allotments. 52 F.3d 1531,1542 n.11. Thus, these decisions do not support the commenter’s assertion that the Nation has no authority on allotted lands.

P&M asserts that the Navajo Nation does not have title to the allotted lands or have any other legal interest in them; that there are no laws or regulations that grant to the Navajo Nation supervisory authority over allotted lands; and that the Nation cannot establish any significant or substantial or real control over the allotted lands within the tribal consolidation area. P&M also proposes that OSM should address the following issues when determining whether the Navajo Nation supervises off-reservation allotments: The existence of Nation contractual rights or other authority, or activities, that establish that the Nation has overseen or exercised authority over those lands; and the extent to which individual allottees consider their lands “supervised” by the Nation.

Because we have decided not to adopt the proposed rule and anticipate that the question of tribal supervision will be properly addressed in case-by-case determinations, those determinations may address relevant information addressing P&M’s concerns. Thus, in any such determinations concerning Navajo Nation supervision of allotted lands interested persons may submit for consideration all relevant information concerning matters such as title to the lands; applicable statutes, regulations, treaties, and executive orders; and all other information concerning Navajo supervision. We anticipate that relevant information would include evidence related to whether the Nation has the right or authority of overseeing, or acts to oversee the lands; and to whether the Nation has the right or authority to regulate or superintend what is done affecting those lands, or does in fact regulate or superintend what is done affecting the lands. To the extent the types of information referenced by P&M are submitted and are relevant to these matters, they may be addressed in any further case-by-case proceedings.

D. What Procedural Questions Does the Record Raise About the Proposed Rulemaking?

1. Is a Formal Adjudication Required on the Issue Presented in the Proposed Rule?

P&M asserts that the question of tribal supervision of allotted lands should not be decided by an informal rulemaking process, but rather by formal adjudication, in order to allow interested parties the opportunity to fully develop evidence and fully address the facts and circumstances related to the Nation's contention that it supervises allotted lands.

As noted above, we believe the parties to the settlement and MOU contemplated that the rulemaking was to address the Indian lands status of the off-reservation allotted lands in the Navajo land consolidation area. However, as discussed *infra*, the record is not clear as to a number of the relevant facts. As to the relevant factors addressed by the commenters, some comments allege that the Nation does have the relevant right or authority, or functional role, and some allege that they do not; but generally there is little or no evidence or other support in the record for either set of allegations. A more complete record is needed to establish whether or not the Nation supervises the allotted lands in question.

Whether the Nation supervises allotted lands in the Navajo land consolidation area, so that those lands would be deemed Indian lands under SMCRA, may be properly addressed in a proceeding in which all interested persons may provide relevant information and address the significance and weight to be attached to that evidence. However, we do not believe that a formal quasi-judicial administrative hearing would be required for such a determination in all cases. Less formal procedures may develop an appropriate record. For example, the procedures for SMCRA permitting decisions may assure an adequate record, since those procedures ensure all interested persons ample opportunity to participate in the permitting process. For example, the Indian lands status of certain off-reservation allotted lands, which are within the permit area of the south McKinley mine, had been the subject of the P&M case. *Pittsburg & Midway Coal Mining Co. v. OSM*, Docket No. TU 6-2-R, *Dismissed without prejudice*, February 2, 2007 (OHA Departmental Hearings Div.). We believe that the record in such a case could be

developed to fully address the Indian lands status issues.

2. Are We Taking Administrative Notice of Materials as Requested by Commenters?

As discussed in more detail below, the Navajo Nation refers to documents that it believes are relevant to this rulemaking, and requests that we take administrative notice of the materials. Some of those documents were submitted in evidence in proceedings that occurred more than a decade ago. Because of the age of the materials, and because the Nation has indicated the materials are voluminous, we believe it is not in the interest of fairness to take administrative notice of those materials without full notice and opportunity for all interested persons to review, evaluate, and comment on them. We believe that all interested persons and the decision maker should have ample opportunity to address the weight and relevance to be attributed to these materials, particularly to the extent that they would be submitted to establish supervision in law or in fact.

The Navajo Nation requests that we take administrative notice of the Navajo Nation Code ("NNC") and its laws which the Nation maintains demonstrate the Nation's supervision of allotted lands. Further, the Navajo Nation asserts that it submitted extensive proof of its active supervision of the trust allotments, including an un rebutted factual showing of tribal jurisdiction over the allotments, in two cases: *New Mexico, ex. rel. Energy and Minerals Dep't, Mining & Minerals Div. v. United States Dep't of the Interior*, No. Civ. 84-3572 (D.D.C. 1985), *aff'd in part and rev'd in part*, 820 F.2d 441 (D.C. Cir. 1987), *settlement approved after remand and transfer*, No. Civ. 87-1108 JB, 19 Indian L. Rep. 3119 (D.N.M. 1992) ("*New Mexico v. DOI*"); and *Pittsburg & Midway Coal Mining Co. v. OSMRE and Navajo Tribe*, IBLA No. 87-577. The Nation asks that we take notice of and include in the administrative record the exhibits filed by the Navajo Nation in *New Mexico v. DOI*, and the administrative record filed and discovery completed in *Navajo Nation v. Babbitt*, No. Civ. 89-2066 (D.D.C.) [citing *United States v. American Tel. & Tel. Co.*, 83 F.R.D. 323, 333-34 (D.D.C. 1979)].

In the interest of administrative fairness we will not take administrative notice of the Navajo Nation's exhibits in the referenced Federal court litigation, and will not take administrative notice of the NNC. The Navajo Nation is requesting administrative notice of these materials as probative of supervision—

the central issue in this rulemaking. In any case-by-case determination the Navajo Nation may offer these materials in evidence and their merits may be addressed as appropriate by interested persons. These materials are not otherwise readily available to interested persons. The exhibits of which the Nation requests that we take administrative notice were apparently filed with the respective Federal district courts between 10 and 20 years ago. The files of such old closed Federal cases are typically routinely archived by the courts and may even have been routinely destroyed by the archives because of the age of the records. Further, given the age of these materials, it is unclear whether they would accurately reflect current law and current conditions. (And, because of the age of these records, even if they still exist and could be retrieved by the courts, it does not appear reasonable to expect interested persons to timely request and review them.) We located and reviewed a copy of the NNC, dated 1995, in the Department of the Interior Natural Resources Library. That copy was obtained by the Library in 1999. We have no information as to what, if any, changes may have been made to the NNC since either 1995 or 1999. Further, the copies of affidavits or declarations actually submitted by the Nation primarily concern social services to allottees, rather than supervision of allotted lands, and thus appear to be of limited relevance.

Administrative notice (or "official notice") is an administrative law device that is used to enter information into the record that has not been proved through hearing methods.¹⁷ Effectively, the decision maker may consider some commonly understood information as if it had been documented, submitted in evidence, and proved (although it has not actually been).¹⁸

¹⁷ See Charles Koch, *Administrative Law & Practice* § 5.55(1) at 204 (2d ed. 1997). Administrative notice is generally used to allow a decision maker to take notice of commonly acknowledged facts. In addition to commonly known facts, an administrative agency can take notice of technical or scientific facts that are within the agency's area of expertise. See *McLeod v. Immigration & Naturalization Serv.*, 802 F.2d 89, 93 n.4 (3rd Cir. 1986) [citing *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344 (1953)].

¹⁸ In hearings before the Department of the Interior Office of Hearings and Appeals (OHA), 43 CFR 4.24 allows administrative notice "of the public records of the Department of the Interior and of any matter of which the courts may take judicial notice." In hearings subject to the Administrative Procedure Act, 5 U.S.C. 556(e) (the "APA"), "[w]hen an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary." This

With regard to the Navajo Nation's previous exhibits, in determining whether administrative notice should be taken, agencies have distinguished between "adjudicatory" facts and "legislative" facts. Adjudicatory facts pertain to the immediate parties, whereas legislative facts are general and do not concern the immediate parties. See 3 Kenneth Davis, *Administrative Law Treatise* § 10.6 at 150 (1984). In practice, the admission of adjudicatory facts depends upon whether the facts are central to the controversy. If they are, they usually have to be proved, but if they are not, they may be officially noticed. See Koch, *supra*, at 207. Agencies more typically notice legislative facts if the parties are given notice of their use and are given an opportunity for rebuttal. See Koch, *supra*, at 206. The use of adjudicatory facts is more restricted. Under the Federal Rules of Evidence (which govern *judicial* notice but also provide useful guidance in this case, in light of 43 CFR 4.24, *supra*), adjudicatory facts that are "not subject to reasonable dispute" may be noticed, but all other adjudicatory facts must be proved. We believe that the Nation's exhibits from previous proceedings would be intended to establish whether the Navajo supervise the allotted lands (and as discussed below, in this case might be considered both adjudicatory facts and legislative facts). The nature of the proposed rule amply demonstrates that the issues of whether the Navajo Nation supervises these off-reservation allotted lands, and, more generally, what interests and roles the Navajo Nation has on these lands, are subject to reasonable dispute. These are issues central to the proposed rule, and are disputed by commenters. Therefore, we conclude that it would not be fair or appropriate to take administrative notice as requested by the Nation.

With regard to the NNC, arguably "any information useful in deciding the adjudication may be noticed as long as no unfairness is created." Koch, *supra*, at 205. However, it is not clear whether the version of the code available to us at the location of the administrative record is current and complete. Further, the record before us does not clearly establish whether and in what way the

rulemaking is not directly subject to these procedural requirements, because it is not based on a hearing before an OHA board, nor does it involve a hearing subject to the cited provision of the APA. Nonetheless, the OHA procedures and the APA provisions were adopted because they ensure basic procedural fairness in agency decision making. Thus, these provisions provide useful guidance as to what may be generally regarded as procedures to ensure fundamental fairness in agency decision making.

code is implemented on allotted lands, or what the Nation's authority is to implement the code on off-reservation allotted lands, in light of any other law that may be applicable. Thus, there is an argument that, concerning the issues in this rulemaking, the terms and applicability of the NNC are both "adjudicatory" and "legislative" facts. In any case, we conclude that to take notice of these materials without further opportunity for examination and comment by all interested persons would be of questionable fairness and value.

In summary, the Nation and all other interested persons may submit all relevant and probative materials in any case-by-case determination. All such materials may then be examined and addressed by all interested persons as to their relevance and the weight to be given them concerning the "Indian lands" status of specific Navajo off-reservation allotted lands.

E. What Administrative, Operational, and Environmental Issues Did Commenters Raise Concerning the Proposed Rule?

The proposed change in the definition of Indian lands, if adopted, would have shifted SMCRA regulation from the State to OSM for all allotted lands located within the Navajo land consolidation area in New Mexico. Under the proposed rule change we would have assumed SMCRA jurisdiction on the 48 allotments included within the mine's so-called south area.

As we noted earlier, the McKinley Mine permit area straddles the boundary of the Navajo Reservation near the Arizona-New Mexico border. The portion of the permit that lies within the reservation boundaries and on an adjacent parcel of off-reservation Navajo fee lands is collectively referred to as the north area and is regulated by us. The remainder of the mine, the so-called south area, is composed of Federal, private, State, and allotted lands occurring in a complex checkerboard pattern and is regulated by the State of New Mexico.

State and industry commenters were very concerned that the proposed change in the definition of Indian lands would greatly increase the area subject to dual regulation at the McKinley Mine and thus further complicate regulation at the mine. One commenter maintained that the rule change would create a potential disincentive to continued mining at McKinley Mine and to future mining in other checkerboard areas of New Mexico. The same commenter asserted that the increase in dual

regulation would be complex, burdensome, expensive, impractical and time-consuming and would undermine SMCRA's intent of ensuring efficient regulation and reclamation of coal mining operations. The commenter also cited specific issues of concern stemming from differences in State and OSM regulations and differing interpretations of rules.

Another commenter noted that certain difficulties associated with our assumption of jurisdiction in 1986 on the tribal fee lands at the McKinley south mine were illustrative of the types of problems that would arise from our adoption of the proposed rule change. The commenter cited numerous issues anticipated for any transfer of jurisdiction.

State and industry commenters also commented extensively on the bureaucratic inefficiencies and the additional administrative expenses for regulators and mine operators that they believe would result from the proposed rule change due to differences in State and OSM regulations and differing interpretations of regulatory requirements. They also expressed concern about the frequency of consultation that would be required, and about the confusion and delays they expected as the operator moves from section to section. In addition, they asserted that the proposed change in the definition of Indian lands would have serious adverse economic and financial consequences at the local, State, and Federal levels, including increased regulatory workloads and costs, potential loss of future mining and mining jobs, and lost royalty and tax revenue from State lands.

Although commenters' concerns about the effects of a complex regulatory scheme may reflect business and fiscal concerns, the complex land ownership patterns at the McKinley south mine, or elsewhere in the consolidation area in New Mexico, are not relevant to a determination of whether any or all of the allotted lands in the consolidation area are Indian lands. Further, we believe that determinations of the Indian lands status of consolidation area allotments are properly based solely upon application of the SMCRA standard. That standard requires consideration of relevant information concerning the nature and extent of the tribe's supervisory authority over the allotted lands. Any operational or administrative concerns about a determination could be addressed through coordination between OSM and the State on a site-specific basis.

F. What Other Questions Does the Record Raise About the Proposed Rulemaking?

1. Must Any Ambiguities Be Construed in Favor of Tribal Interests?

The Navajo Nation asserts that the Indian lands provisions of SMCRA are intended to benefit Indian tribes under the Federal trust responsibilities. The Nation asserts, in effect, that, if there is any ambiguity as to whether the Navajo interest in and authority over allotted lands amounts to supervision, applicable rules of statutory construction require that any ambiguities in the SMCRA Indian lands provisions should be construed in favor of tribal interests. The Nation cites *Bryan v. Itasca County*, 426 U.S. 373, 392–93 (1976); *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985); *Jicarilla Apache Tribe v. Andrus*, 687 F.2d 1324, 1332 (10th Cir. 1982); and *Star L. R. Co. v. Lujan*, 737 F. Supp. 103, 109 (D.D.C. 1990), *aff'd*, 925 F.2d 490, 18 Indian L. Rep. 2027 (DC Cir. 1991). The Nation asserts that these rules of statutory construction have a special corollary with respect to whether trust allotments are ‘Indian lands’ under exclusive tribal and Federal authority; and that any ambiguities in Federal legislation “should be resolved in favor of limiting state jurisdiction.” The Nation quotes *State v. Ortiz*, 105 N.M. 308, 311, 731 P.2d 1352, 1355 (Ct. App. 1986):

The Supreme Court has implicitly recognized that stricter standards apply to federal agencies when administering Indian programs. * * * When the Secretary is acting in his fiduciary role rather than solely as a regulator and is faced with a decision of which there is more than one “reasonable” choice as that term is used in administrative law, he must choose the alternative that is in the best interest of the Indian Tribe.

The Nation cites: *Jicarilla Apache Tribe v. Supron Energy Corp.*, 728 F.2d 1555, 1567 (10th Cir. 1984), *dissenting opinion adopted as modified on reh’g*, 782 F.2d 855 (10th Cir. 1986) (en banc), *modified on other grounds*, 793 F.2d 1171 (10th Cir. 1986), *cert. denied* 479 U.S. 970 (1986).

Thus, the Nation argues that ambiguities in the definition of “Indian lands” must be resolved in favor of the Navajo Nation because if the allotments are not Indian lands they may be regulated by the states, “contrary to the cornerstone of the special tribal/federal relationship.” The Nation cites *New Mexico ex rel Energy and Minerals Dep’t, Mining & Minerals Div. v. United States Dep’t of Interior*, 820 F.2d 441, 445 (DC Cir. 1987), *settlement approved after remand and transfer*, No. Civ. 87–

1108 JB, 19 Indian L. Rep. 3119 (D.N.M. 1992); and *Washington Dep’t of Ecology v. United States EPA*, 752 F.2d 1465, 1470 (9th Cir. 1985). The Navajo Nation notes that the latter case stated that the trust responsibility “arose largely from the federal role as a guarantor of Indian rights against state encroachment.”

We believe that, under SMCRA, we act solely as a regulator, and that the canon of construction referenced by the Nation does not apply to our interpretation of SMCRA’s Indian lands provisions and implementing rules for purposes of implementing our regulatory responsibilities. Section 102(a) of the Act states that “it is the purpose of this Act to establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations.” The Federal program for Indian lands is a component of this nationwide regulatory program, intended to ensure “that all mining operations on Indian lands are conducted in accordance with permanent program standards until tribes are given the authority to seek and obtain primacy.” 49 FR 38464 (September 28, 1984). The preamble to the final rulemaking adopting the Indian lands permanent program requirements discusses in some detail how responsibilities for Indian trust asset management and for tribal consultation remain with MMS, BLM, and BIA under their separate statutory authorities; and emphasizes that OSM is responsible for establishing a nationwide regulatory program for surface coal mining operations, of which the Indian lands program is one part, until tribes are authorized to assume primacy. 49 FR 38467–38469. The preamble makes clear that, when implementing the SMCRA Indian lands program, we are solely implementing the nationwide regulatory program. The authority and fiduciary responsibility to administer Indian trust assets were not affected by SMCRA or the Indian lands rule; they remain with MMS, BLM, and BIA, under their respective authorities. As a result, we do not understand the canon of construction articulated in *Ortiz* to apply by its terms to our implementation of SMCRA’s Indian lands regulatory provisions.

However, we would reach the same conclusion on the proposed rule even if the canon set out in *Ortiz* did apply to our action on this matter. We are mindful that the nature and extent of the trust responsibilities of Federal agencies have been described in many different ways in court decisions. Some cases arguably take a very expansive view of Federal agency trust

responsibilities. *See, e.g., HRI v. United States EPA and Navajo Nation*, 198 F.3d 1224, 1245–1247. Nonetheless, regardless of the applicability of any special canons of statutory construction, the record before us in this rulemaking is inadequate to support a determination as to whether the Navajo Nation supervises the off-reservation allotted lands within the approved Navajo land consolidation area.

2. Can a Tribe Supervise Lands Over Which a State Has Authority?

The comments of the Navajo Nation include extensive arguments concerning their position that states do not have general regulatory authority or governmental authority over Indian country, including allotted lands.

We conclude that these comments are not germane to the proposed rule because they do not address whether the Nation supervises allotted lands, in law or in fact. Rather, these comments relate to states’ authority in Indian country and to Congress’ views on states’ ability or authority to regulate in Indian country. The proposed rule did not purport to analyze or define the nature or extent of the State’s general authority or jurisdiction over off-reservation allotted lands. We have no authority to make such a determination. The SMCRA definition of “Indian lands” does not require that off-reservation lands will be considered Indian lands only if they are subject to no state regulation or authority of any kind. The proposed rule concerns only whether tribes supervise certain allotted lands, as a matter of law or as a matter of fact, and thus whether such lands are Indian lands for purposes of SMCRA. Thus, if a state has some authority on or interest in the lands this does not preclude properly considering the lands to be “Indian lands” for purposes of SMCRA. Because these comments about State authority or jurisdiction do not address the Nation’s supervision of allotted lands the comments do not address the merits of the proposed rule and are not helpful.

The comments assume that state regulation of allotted lands under SMCRA is a dilution of the Federal trust responsibility because allowing state regulation delegates a trust responsibility to the state. We do not agree. If the Nation does not supervise the off-reservation allotted lands, then those lands are not Indian lands under SMCRA. Thus, if the allotted lands were found not to be supervised by the Nation, allowing state regulation would not delegate a fiduciary trust management responsibility to the state. However, if the Nation is found to

supervise the lands in question, those lands are Indian lands and are subject to the Federal Indian lands regulatory program.

The Navajo Nation maintains that 30 U.S.C. 1300(h) confirms that all Indian trust allotments must be considered "Indian lands" because it states "nothing in this Act shall change the existing jurisdictional status of Indian lands." The Nation refers to the final conference committee report on SMCRA, which stated that this proviso was intended to preserve the existing jurisdictional status of off-reservation trust lands. H.R. Rep. No. 493, 95th Cong., 1st Sess. 114 (1977). The Navajo Nation asserts that, with respect to the off-reservation trust allotments at issue, it is clear that states could exercise no legitimate regulatory function in 1977 when SMCRA was enacted. The Nation asserts that in 1977 reclamation of surface coal mines on all Indian lands was covered by a comprehensive and exclusive (of states) Federal regulatory regime. The Nation references 25 CFR Part 177, Subpart B (1977), and General Accounting Office *Administration of Regulations for Surface Exploration, Mining, and Reclamation of Public and Indian Lands* 5-6 (1972). The Nation asserts that in 1977 state laws regulating or controlling the use or development of any trust land, including all off-reservation trust allotments, could not apply on allotments:

Without specific authorization of the Secretary of the Interior, none of the laws, * * * or other regulations of any State or political subdivision thereof limiting, zoning, or otherwise governing, regulating, or controlling the use or development of any real * * * property * * * shall be applicable to any such property leased from or held or used under agreement with and belonging to any Indian * * * that is held in trust by the United States. * * *

25 CFR 1.4(a) (1977).

For several reasons we do not find these comments helpful. First, whether or not a state regulates allotted lands under other law the SMCRA definition of "Indian lands" still applies. See *Valencia*, which, as discussed above, concluded that SMCRA establishes the jurisdictional status quo for SMCRA purposes, although it does not affect the jurisdictional status quo for other purposes. 109 IBLA 66. Second, this comment is not germane to the proposed rule because it does not address the question of whether the Nation supervises off-reservation allotted lands, in law or in fact. Like the preceding comments, this comment asserts that the states had no legitimate jurisdiction or authority on allotted lands in 1977 and thus can have none

now under SMCRA. Such assertions do not address whether a tribe supervises allotted lands for SMCRA purposes.

The Navajo Nation also asserts that the Department of the Interior had recognized by 1977 that Indian tribes had retained general regulatory authority over the trust allotments of their members. The Nation cites a memorandum opinion of the Solicitor, Department of the Interior: *Application of Local Building Codes to Indian Trust Property*, II Op. Sol. 2052 (1972) [*available at* 4 Indian L. Rep. 0-7 (1977)].

As discussed above, case law indicates that determinations of tribal authority or rights must be made on a case-by-case basis. The cited Solicitor's Opinion addresses, *inter alia*, the authority of a particular tribe in Washington State to regulate the use of tribal trust and individual allotted lands in that State. The opinion concludes that in that instance the tribe has the inherent authority to regulate the use of both tribal and individually held trust land. The opinion is not germane to this rulemaking because it does not concern supervision by the Nation of off-reservation allotted lands and the authority of each tribe must be examined based on the facts and law concerning that tribe.

3. Is the Proposed Rule Consistent With Past OSM Actions?

The Navajo Nation maintains that in the 1989 rule OSM justified its clarification of the status of these allotments in "wholly contradictory ways." Specifically, the Nation noted that we stated on the one hand that:

It is more appropriate that this jurisdictional issue [of off-reservation allotments] be addressed by rulemaking * * * rather than by quasi-judicial proceedings in which only parties and intervenors have standing.

1989 AR 3-4. On the other, the Nation asserts that we "confessed" that:

A dispositive policy concerning the concept of tribal supervision of individual trust allotments * * * would have to encompass a highly complex set of potential issues and fact patterns, and is beyond the scope and purpose of this rulemaking. As stated earlier in this preamble, OSMRE will make such determinations on a case-by-case basis if and when the need arises.

1989 AR 5.

We agree that the quoted language could have been more precisely phrased; however, these materials are quoted out of context. We believe that careful examination of the 1989 rule preamble language indicates that we intended to say that whether off-reservation allotted lands in general

may be "Indian lands" (because they may be "supervised by a tribe" for purposes of SMCRA) is properly addressed in a rulemaking; but whether specific off-reservation allotted lands are actually supervised by a particular tribe is best addressed on a case-by-case basis because of the potentially complex issues, law, and facts. We believe that this position is reasonable and continues to be valid.

NMA argues or implies that the proposed rule would conflict with a 1985 settlement that we entered with NMA, and would conflict with the intent of Congress.

Our interpretation of the 1985 settlement has not changed. See discussion *supra* of 54 FR 22182 (May 22, 1984). Neither the proposed rule nor this decision not to adopt the proposed rule is intended to change our interpretation of the 1985 settlement. As discussed above, we do not agree that the proposed rule or our decision not to adopt the proposed rule conflicts with the intent of Congress.

VII. What Is the Effect of This Notice?

We reach no conclusions on the Indian lands status under SMCRA of Navajo allotments in New Mexico. We intend this notice to provide guidance for any pending or subsequent action concerning the Indian lands status of allotted lands, but in any such action we will consider arguments or information concerning the merits or applicability of this approach. We intend this notice to aid interested persons in determining what information may be relevant in such action. Further, we intend to advise interested persons of the interpretation of existing law that we anticipate implementing in any such action. See, e.g., *Christensen v. Harris County*, 529 U.S. 576 (2000); *Stinson v. United States*, 508 U.S. 36 (1993); *Williams v. United States*, 503 U.S. 193 (1992); *Pacific Gas & Electric Co. v. FPC*, 506 F.2d 33 (D.C. Cir. 1974).

VIII. How Will This Issue Be Addressed After This Notice?

A. Will This Issue Be Addressed by Case-by-Case Determinations?

Existing procedures allow for case-by-case determinations of the Indian lands status of specific allotted lands in any actions in which that status might arise. We anticipate that any such determinations would most likely arise in permitting decisions that involve allotted lands.

As discussed above, a case that had been pending before the Office of Hearings and Appeals concerning the Indian lands status of allotted lands

within the permit area of the South McKinley mine was the only permitting action where SMCRA jurisdiction over allotments has been raised. That case had been stayed pending final action on this rulemaking and had been continued since 1992. *Pittsburg & Midway Coal Mining Co. v. OSM* (OHA Docket No. TU-6-2-PR). The parties contemplated that final action on this rulemaking might obviate the need for further action in that case. However, as discussed above, that case has been dismissed without prejudice. If a similar case is filed or that case is re-instated, all parties would have ample opportunity

to submit and evaluate relevant evidence, cross-examine witnesses, and submit arguments. Judicial review would be available.

B. Will We Propose Amendments of Our Rules To Set Out Specific Procedures for Case-by-Case Determinations on This Issue?

We considered the option of developing a process for making case-by-case determinations of whether particular allotted lands are supervised by a tribe in lieu of developing a national rule that would govern all instances. However, there are many different possible procedural contexts in

which this issue might be raised. Devising amendments to all the procedural rules under which this issue might be raised, in order to specify how such a determination would be addressed, would not be appropriate in light of the low probability that any particular procedure might be used for such a determination in the foreseeable future.

Dated: April 5, 2007.

C. Stephen Allred,

Assistant Secretary, Land and Minerals Management.

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