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The Surface Mining Control and Reclamation Act of 1977 is the culmination of a prolonged effort to enact a federal program for the control of coal surface mining operations. In this article, Ms. Kite first briefly describes the pre-existing regulatory scheme and the general outline of the Act. She then analyzes the performance standards and the timing of compliance with the Act. Finally, the author examines where the responsibility for the enforcement and administration of this significant piece of legislation lies.

## THE SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977: AN OVERVIEW OF RECLAMATION REQUIREMENTS AND IMPLEMENTATION

*Marilyn S. Kite\**

On August 3, 1977, President Carter signed H.R. 2, entitled "Surface Mining Control and Reclamation Act of 1977." This marked the end of a long and arduous process of congressional consideration of "the strip mine bill." The Conference Committee reported the bill out on July 12, 1977.<sup>1</sup> The bill was passed by the House on July 21, 1977, and the Senate on July 20, 1977.<sup>2</sup> This legislation is very similar to two prior bills passed by the Congress that met with the presidential veto. S. 425, passed by the Ninety-third Congress in its final days, received a pocket veto by President Gerald Ford.<sup>3</sup> The next session of Congress passed H.R. 25 which was again vetoed by President Ford. The effort to override that veto

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The author wishes to express her gratitude to Mr. Tom Elezery, Amax, Inc. and Mr. Tom France, Powder River Basin Resources Council who read the manuscript and made many helpful suggestions.

1. H. CONF. REP. NO. 493, 95th Cong., 1st Sess. (1977).
2. *Id.*
3. BUSINESS WEEK, Jan. 13, 1975, at 40.

failed by three votes.<sup>4</sup> Although all of these bills were essentially similar in framework, the final product has benefited from a six-year evolution, updated as it moved through the process. The House Report optimistically refers to this process as "fine tuning."<sup>5</sup> More importantly, the thirty-seven-year legislative effort to adopt a federal program for the control of coal surface mining operations is finally complete.<sup>6</sup> The Surface Mining Control and Reclamation Act of 1977 represents a supreme, if some times conflicting, effort by Congress, industrial representatives and environmental concerns. As most major pieces of federal legislation, the Surface Mining Control and Reclamation Act is the result of numerous compromises. It is that final product this article will discuss.

It is clear Congress felt federal regulation of the development of coal was mandatory by the fact that eighty percent of the western coal is owned by the federal government.<sup>7</sup> The importance of coal production to the nation's energy picture is certain. Numerous federal programs have begun a widespread commitment to the development and utilization of coal for purposes of achieving energy independence.<sup>8</sup> In 1976, coal served seventeen percent of the nation's total energy consumption and provided fifty-five percent of its electrical power generation.<sup>9</sup> Coal production has increased from 457 million tons in 1953 to 671 million tons in 1976.<sup>10</sup> Even more striking, the percentage of coal produced by surface mining methods has increased from 23.4 percent in 1953 to 55.9 percent in 1976.<sup>11</sup> The substantial increase in surface mining of coal represents, in part, lower costs of production than those necessary for underground coal mining.<sup>12</sup>

All of these factors have resulted in a substantial increase in the amount of active coal surface mines, especially in the western states.<sup>13</sup> This increased surface mining activity, the sur-

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4. 121 CONG. REC. H5205 (daily ed. June 10, 1975).
  5. H.R. REP. NO. 218, 95th Cong., 1st Sess. 71 (1977).
  6. Comment, *The Strip Mine Law: Conflicting Goals Underlie Balanced Regulatory Requirements*, 7 ENV'TL L. REP. 10160 (1977).
  7. H.R. REP. NO. 218, 95th Cong., 1st Sess. 73 (1977).
  8. *Id.* at 80.
  9. FEDERAL ENERGY ADMINISTRATION, PROJECT INDEPENDENCE REPORT 98 (1974).
  10. H.R. REP. NO. 218, 95th Cong., 1st Sess. 72 (1977).
  11. *Id.*
  12. Mintz, *Strip Mining: A Policy Evaluation*, 5 ECOLOGY L.Q. 461 (1976).
  13. *Id.* at 467.

face damage occasioned by surface mining, and the fact that a substantial amount of coal produced in the United States belongs to the federal government, are some of the reasons Congress created this federal regulatory scheme. In the absence of federal legislation governing the control of surface mining, state regulatory procedures constituted the entire reclamation effort. Historically, state reclamation programs have been viewed as inconsistent, inadequate and weak.<sup>14</sup> In some situations this reputation was probably well earned. However, weaknesses have been slowly eliminated in many state regulatory programs.<sup>15</sup> In view of the varied and sometimes non-existent state regulatory programs, the federal statute is aimed at providing uniformity, minimum standards and relief from economic disadvantages feared by those states with stringent reclamation laws.<sup>16</sup> The creation of economic disadvantage by stringent enforcement of reclamation laws was addressed in the Congressional findings, Section 101 of the Act.<sup>17</sup> It was also clear that one purpose of the bill is to provide for "a nationwide program to protect society and the environment from the adverse effects of surface coal mining."<sup>18</sup>

The strident arguments against the Act, and the reason for the two presidential vetoes, were based generally on claims that production of coal would be substantially diminished under the reclamation requirements, employment would be decreased and unreasonable costs would be added to the production of the coal resulting in increased consumer costs.<sup>19</sup> Great disparity existed between the estimates of production and employment losses by the coal industry and supporters of the Act. Although the actual effect remains to be experienced, the coal industry's predictions appear to be somewhat inflated.<sup>20</sup> The Federal Energy Administration, who strongly opposed the passage of H.R. 25, estimated a reduction in coal

14. Comment, *The Strip Mine Law: Conflicting Goals Underlie the Balanced Regulatory Requirements*, 7 ENVTL L. REP. 10160, 10163 (1977).

15. Bender, *Strip Mining, The West and the Nation*, 12 LAND & WATER L. REV. 1 (1977) [hereinafter cited as Bender].

16. Note, *Energy versus Environment: Who Wins the Race for Coal in Kentucky*, 64 KY. L.J. 641 (1976).

17. Pub. L. No. 95-87, § 101(g), 97 Stat. 447 (1977) (to be codified in 30 U.S.C. § 1201).

18. Pub. L. No. 95-87, § 102(a), 91 Stat. 449 (to be codified in 30 U.S.C. § 1202).

19. Comment, *The Strip Mine Law: Conflicting Goals Underlie Balanced Regulatory Requirements*, *supra* note 6.

20. Randall & Pagoulatos, *Surface Mining and Environmental Quality: An Economic Perspective*, 64 KY. L.J. 549 (1976).

production by a maximum of 162 million tons.<sup>21</sup> However, comments by presidential assistant James R. Schlesinger, now Secretary of the Department of Energy, were to the contrary. Mr. Schlesinger estimated coal resources lost as a result of the requirements of this legislation would be less than five percent of the total reserves or one percent of the resource base. "Fortunately, the great abundance of coal in this country allows us to declare certain areas off limits to strip mining because of their greater value for competing purposes."<sup>22</sup> Although it is impossible to accurately estimate the amount of coal that may not be mined as a result of this Act, it appears the earlier predictions were based on inflated estimates of cost and production losses. In addition, production limitations created by the Act, if excessive, may be eased by later legislation. Many of the limitations such as designations of areas unsuitable and alluvial valley restrictions are viewed as serving to protect fragile areas until more is known about their reclamation or until energy emergencies demand legislative action.

The reactions to the final passage of the Surface Mining Control and Reclamation Act were varied and demonstrated dissatisfaction on all sides. The disenchantment of both industry and the environmentalists is probably a result of the numerous, and somewhat confusing, compromises reached in the legislation. Flexibility in the areas of alluvial valley floors and mountaintop mining was the result of efforts by the conference committee to meet the requests of industry. However, following the passage of the bill, industry representatives complained that these more vaguely worded requirements would result in extended litigation.<sup>23</sup> Expressing such concern, the vice president of law of the National Coal Association, alleged the legislation's various requirements would result in "no production until late 1980s."<sup>24</sup>

Reactions from the various environmental groups that lobbied heavily in favor of the passage of the Act were mixed. Most of the groups were in favor of the mandatory, minimum

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21. Bender, *supra* note 15, at 51.

22. H.R. REP. NO. 218, 95th Cong., 1st Sess., 166 (1977).

23. Comment, *The Strip Mining Law: Conflicting Goals Underlie Balanced Regulatory Requirements*, *supra*, note 6, at 53.

24. Address by William E. Hynan Before the American Bar Association Conference on Proposals for Federal Energy Reorganization, Washington, D.C. (June 9, 1977).

reclamation requirements. However, the compromises in the area of alluvial valleys and approximate original contour were criticized. The reaction of the Powder River Basin Resource Council, a Wyoming agricultural-environmental group, was representative. "Powder River Basin Resource Council has worked long and hard for the passage of the bill over the past four years. It has often been disappointing work. Today the bill has become law and we think it is a step forward for Wyoming and the country."<sup>25</sup>

A third interest group reacting to the passage of the bill, was the various state governments affected. In those states with relatively strong reclamation programs, such as Wyoming and Montana,<sup>26</sup> the reaction was one of controlled frustration. It was generally felt in these states that the state regulatory program was sufficient and compliance with the federal requirements would be time consuming and expensive for state governments.<sup>27</sup> Most of the state governments, either through organizations such as the National Governors' Conference or individually, participated in the drafting and consideration of the bill.

It is not the purpose of this article to re-examine the advantages and disadvantages of strip mining, the advisability of federal regulation of reclamation, or the relative merits of the positions of the interested parties. The Surface Mining Control and Reclamation Act of 1977 is now law. The challenge to all interested parties is to make it work in the most efficient and beneficial manner. The article will first briefly describe the pre-existing regulatory scheme and the outline of the statute. Secondly, it will analyze, in a cursory manner, the performance standards and the timing of compliance, emphasizing the more controversial requirements. Third, it will attempt to sift out where the responsibilities for enforcement and administration lie, for the benefit of the operators, the governments involved and interested citizens. At the time of publication of this article, developments in the implementation of this Act were proceeding at a rapid pace. Efforts to keep the information current were made, but interested per-

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25. Press Release, Ed Schwartz, Chairman, Powder River Basin Resource Council (Aug. 1977).

26. Bender, *supra* note 15.

27. The relationship between the federal and state governments in the area of reclamation will be discussed later in the paper.

sons must continue to monitor the litigation cited, amendments to the regulations, amendments to state laws in response to the Act, and agency policy to have an accurate understanding of the impact of this legislation.

### I. SETTING THE SCENE

In order to gain an understanding of how and where the requirements of the Surface Mining Control and Reclamation Act fit into the existing ongoing regulation of surface mining, it is necessary to briefly review the status of the present regulatory programs.

As mentioned above, prior to recent efforts by the federal government to regulate surface mining reclamation, state regulatory programs were the major source of such regulation. The strength and efficiency of these programs varied from state to state. However, most states which did have reclamation programs involved similar regulatory frameworks: requiring mining permits, reclamation to a use equal to the highest previous use, bonds, and some enforcement mechanism.<sup>28</sup> Generally, and in Wyoming specifically, no distinction was made between federal, private or state owned coal and surface.<sup>29</sup> Specifically, the Wyoming Environmental Quality Act provides that "no mining operation" shall be conducted without compliance with the statute and all "surface or underground mining operations" shall comply with requirements of the Act.<sup>30</sup> As a result of the checkerboard pattern of ownership in the West, had states refrained from regulating federal lands or federal coal, the result would have been unequal reclamation requirements on different pieces of land within the same mining operation. In addition, the federal government made virtually no effort to control surface mine reclamation. "The vacuum left by federal inaction was filled by state officials who simply assumed control of reclamation on federal land under the terms of state law or under the express terms of federal coal leases."<sup>31</sup>

28. Walli & Imes, *An Ecological Legal Assessment of Mined Land Reclamation Laws*, 53 N.D.L. REV. 359, 372 (1977).

29. WYO. STAT. § 35-11-101 *et seq.* (1977).

30. WYO. STAT. § 35-11-401(a) and (b) (1977).

31. Barry, *Reclamation of Strip Mined Federal Land: Preemptive Capability of Federal Standards Over State Controls*, 18 ARIZ. L. REV. 386 (1976).

Attempts by the federal government to regulate reclamation of strip mined lands were historically limited to stipulations on leases and coal mine operating regulations under the Mineral Leasing Act of 1920. Immediately following the presidential veto of the H.R. 25, the Department of the Interior published more extensive reclamation requirements by amending the previous operating regulations.<sup>32</sup> As a result of the Ford Administration's opposition to the congressionally drafted strip mine regulation programs, it was generally believed the attempt to control reclamation through these amended regulations was aimed at reducing support for further attempts to pass a statutorily imposed reclamation program.<sup>33</sup> These regulations were drafted pursuant to the authority of the Mineral Leasing Act of 1920 and the then recently passed S. 391, the Federal Coal Leasing Amendment of 1975. These regulations initially attempted to preempt the application of state law to federal coal. Section 211.75 of these regulations provided for the application of state law on federal coal, *if* the Secretary determined that such law was as stringent as the federal regulatory requirements. The Secretary also had to determine that the application of state law would not unreasonably and substantially prevent the mining of federal coal which was determined to be in the overriding national interest.<sup>34</sup> These regulations further provided that agreements could be entered into between the federal and state governments with respect to the implementation and enforcement of reclamation operations on federal coal lands.<sup>35</sup> As a result of the position of the Department of the Interior in the adoption of these operating regulations, the State of Wyoming filed suit alleging the regulations were an unconstitutional attempt to preempt the application of state law.<sup>36</sup> That lawsuit was settled by a stipulation between the Department of the Interior and the State of Wyoming recognizing that federal and state governments had concurrent jurisdiction over the control of reclamation of federal coal lands.<sup>37</sup> Following the conclusion of

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32. 30 C.F.R. §§ 211 *et seq.* (1975).

33. Barry, *supra* note 31, at 391.

34. 30 C.F.R. § 211.75 (1975).

35. 30 C.F.R. § 211.75 (1975).

36. *Herschler v. Kleppe*, C-76-108-13 (D. Wyo.).

37. The stipulation and consent decree in *Herschler v. Kleppe*, *supra*, specifically provided that federal and state governments had concurrent jurisdiction and that mining operations on federal coal had to comply with both federal and state requirements.



that lawsuit, the State of Wyoming entered into a Cooperative Agreement with the Department of the Interior providing for state administration and enforcement of reclamation laws on federal coal lands within the State.<sup>38</sup> Later Cooperative Agreements were finalized with the States of New Mexico, North Dakota, Utah, Montana and Colorado.<sup>39</sup>

The Cooperative Agreements reached between the states and the Department of the Interior varied in their specific provisions. The purpose of these agreements was clearly stated in the Wyoming agreement, *i.e.*, to "prevent duality of administration and enforcement of surface reclamation requirements by designating the State of Wyoming as the principle entity to enforce reclamation laws and regulations in Wyoming."<sup>40</sup>

Thus, the status of the control of reclamation requirements, at least in the western states, immediately prior to the passage of the Surface Mining Control and Reclamation Act, was based upon an uneasy truce. Actual implementation of a Cooperative Agreement resulted in a continuation of state regulation and enforcement. However, there continued to be substantial confusion as to precisely what authority each of the federal and state agencies possessed and unnecessary duplication continued.<sup>41</sup> On private and state-owned coal, reclamation was regulated only by state governments.

A major accomplishment of the state governments' participation in the legislative process, which was supported by both industrial and environmental groups, was the adoption of Section 523(c).<sup>42</sup> That provision recognizes existing Cooperative Agreements and allows the federal government to enter into continuing Cooperative Agreements to govern reclamation on federal lands.

38. 42 Fed. Reg. 3642 (1977) (to be codified in 30 C.F.R. § 211.77).

39. Walli & Imes, *supra* note 28, at 388.

40. 42 Fed. Reg. 3644 (1977) (to be codified in 30 C.F.R. § 211.77). (Art. 1, Cooperative Agreement).

41. Difficulty was encountered when the Bureau of Land Management requested the U.S. Geological Survey to apply stipulations to individual mine plans without previously submitting such stipulations to the State of Wyoming for their acceptance or rejection and without reviewing the state permit which answered many of the stipulations. However, a satisfactory resolution of the problems did result. The procedure is simply an example of a difficulty in coordinating two major federal agencies and a state regulatory program.

42. Pub. L. No. 95-87, § 523(c), 91 Stat. 510 (1977) (to be codified in 30 U.S.C. § 201).

The existence of state statutory reclamation programs, the promulgation of federal reclamation regulations, and the execution of Cooperative Agreements formed the basis of control of reclamation of surface mined lands prior to the passage of the Surface Mining Control and Reclamation Act. Depending on the manner in which this new Act is administered, the actual regulation of reclamation should not be significantly different. There will be federally mandated, statutory minimum standards in addition to the state statutory standards. There will be mandatory enforcement activities. On federal lands, there exists the opportunity for Cooperative Agreements which allow the state to have primary administration and enforcement capability. However, as will be later discussed, there is substantial room for federal interpretation of this Act to have more significant preemptive impacts upon state law. Only a thorough understanding of the administrative aspects of the Act, and a sincere desire on the part of the federal government to encourage and allow effective state participation in the control of reclamation will result in a continued federal-state cooperation in regulation of surface mine reclamation.

## II. GENERAL OUTLINE OF THE ACT

The Surface Mining Control and Reclamation Act of 1977 (the Act) creates a new agency entitled the Office of Surface Mining Reclamation and Enforcement<sup>43</sup> within the Department of the Interior. Specific direction was given to separate this regulatory agency from the factions of the Department of the Interior whose role is the promotion of the development and use of coal.<sup>44</sup>

Specific responsibility is given to this Office to administer the surface coal mining operations required by the Act, to approve or disapprove state programs, to make inspections, conduct hearings, issue administrative orders, and order the suspension or revocation of permits. Further, the Office is directed to administer the grant programs, maintain information and data services, and assist states in developing programs.<sup>45</sup>

43. Pub. L. No. 95-87, *Statutes at Large* 201(a), 90 Stat. 449 (1977) (to be codified in 5 U.S.C. § 1211).

44. Pub. L. No. 95-87, *Statutes at Large* 201(b), 91 Stat. 449 (1977) (to be codified in 30 U.S.C. § 801).

45. Pub. L. No. 95-87, *Statutes at Large* 201(c), 91 Stat. 450 (1977) (to be codified in 30 U.S.C. § 801).

The Office is specifically mandated to "cooperate with other Federal agencies and State regulatory authorities to minimize duplication of inspections, enforcement, and administration of this Act."<sup>46</sup>

The Act specifically regulates employees' conflicts of interest and includes punishment by fines and imprisonment for violations. Regulations have been promulgated pursuant to this section governing conflict of interest of both federal and state employees involved in the administration of the Act.<sup>47</sup> State regulatory authorities must comply with these regulations in order to receive reimbursements under Section 502 of the Act, grants under Section 705, or primary authority under Section 503.<sup>48</sup>

The basic framework of the Act provides for an initial regulatory procedure which allows the performance standards and other requirements to be phased in gradually.<sup>49</sup> This initial regulatory procedure applies only to surface coal mining operations on lands which are already regulated by a state.<sup>50</sup> This was apparently an effort to relieve the burden of requiring immediate compliance with performance standards by operations previously unregulated. The recent publication of proposed rules by the United States Geological Survey, however, appears to expand the application of these regulations to all coal mining operations on federal lands. All existing mines, regulated by a state, must be in compliance with the performance standards of the Act within nine months from the date of enactment, or by May 3, 1978.<sup>51</sup> All new surface mining operations commencing operations on or after six months from the date of enactment, or February 3, 1978, must comply with, and obtain permits containing, the requirements of the performance standards specifically cited.<sup>52</sup> This same provision of the statute clearly provides that the state shall be the authority to issue such permits and that no person shall open or develop a mine or surface coal mining op-

46. Pub. L. No. 95-87, § 201(c), 91 Stat. 450 (1977) (to be codified in 30 U.S.C. § 801).

47. 42 Fed. Reg. 56060 *et seq.* (1977).

48. 42 Fed. Reg. 56062 (1977). The State of West Virginia has filed suit challenging the constitutionality of applying these requirements to state governments. *West Virginia v. Andrus*, No. —, D.C. Cir.

49. Pub. L. No. 95-87, § 502, 91 Stat. 468 (1977) (to be codified in 30 U.S.C. § 1252).

50. Pub. L. No. 95-87, § 502, 91 Stat. 468 (1977) (to be codified in 30 U.S.C. § 1252).

51. Pub. L. No. 95-87, § 502(c), 91 Stat. 468 (1977) (to be codified in 30 U.S.C. § 1252).

52. Pub. L. No. 95-87, § 502(b), 91 Stat. 468 (1977) (to be codified in 30 U.S.C. § 1252).

eration unless it has obtained a permit from the state regulatory authority.

In an obvious attempt to have immediate control over surface mining operations, Congress required the Secretary to publish regulations governing this interim regulatory procedure within ninety days immediately following the date of enactment.<sup>53</sup> Regulations pursuant to this Section were published by the Secretary on December 13, 1977.<sup>54</sup> The Act envisions total implementation of the requirements upon approval of a state program or the implementation of a federal program within eighteen months of the passage of the Act.<sup>55</sup> Actual reclamation performance standards are required to be implemented through state and/or federal programs.<sup>56</sup>

The general regulatory requirements of the Act include permits with specific application requirements, reclamation and mining plans, bonds insuring reclamation, specific permit approval and denial provisions, and authority for revision of permits.<sup>57</sup> The Act also provides very specific and elaborate enforcement authority which will be discussed at a later point.<sup>58</sup>

Several provisions allow funds to be granted for purposes of furthering the implementation of the Act. Funds may be granted to small operators who meet the specific requirements for conducting detailed hydrologic and soil studies required in the performance standards.<sup>59</sup> Funds are also available to state regulatory authorities for the implementation of both the interim regulatory procedures and the final state programs.<sup>60</sup> Various provisions of the Act make funds available for coal related research programs.<sup>61</sup>

53. Pub. L. No. 95-87, § 501(a), 91 Stat. 467 (1977) (to be codified in 30 U.S.C. § 1251); H.R. REP. NO. 218, 95th Cong., 1st Sess. 62 (1977).

54. 42 Fed. Reg. 62639 *et seq.* (1977).

55. Pub. L. No. 95-87, § 502(d), 91 Stat. 468 (1977) (to be codified in 30 U.S.C. § 1252).

56. Pub. L. No. 95-87, §§ 503, 504, 515, 527, 528, 529, 91 Stat. 469 (1977) (to be codified in 30 U.S.C. §§ 1253-1255).

57. Pub. L. No. 95-87, §§ 506-514.

58. Pub. L. No. 95-87, §§ 517, 521, 91 Stat. 498 (1977) (to be codified in 30 U.S.C. § 1267).

59. Pub. L. No. 95-87, § 507(c), 91 Stat. 477 (1977) (to be codified at 30 U.S.C. § 1260).

60. Pub. L. No. 95-87, § 705, 91 Stat. 520 (1977) (to be codified in 30 U.S.C. § 1295).

61. Pub. L. No. 95-87, Titles III, VIII, IX.

An interesting and important provision of the bill is Title IV, the abandoned mine reclamation provision. This portion of the statute creates an Abandoned Mine Reclamation Fund to be administered by the Secretary of the Interior.<sup>62</sup> All operators of coal mining operations subject to the Act shall pay a fee of thirty-five cents per ton of coal produced by surface mining and fifteen cents per ton of coal produced by underground mining or ten percent of the value of the coal at the mine, whichever is less, for at least fifteen years. However, the reclamation fee for lignite coal shall be at the rate of two percent for the value of the coal at the mine or ten cents per ton, whichever is less.<sup>63</sup> Section 404 provides that the only lands eligible for reclamation under the abandoned lands program are those lands which were mined for coal or were affected by coal mining.

Section 402 requires that fifty percent of reclamation fee collected must be allocated to the state from which it was collected if there is an approved reclamation program within that state. Of interest, especially to the western states experiencing impact caused by coal development, is the requirement that once all eligible lands within a state have been reclaimed and all voids and tunnels sealed, the Secretary has the discretion to allow all or part of the fifty percent allocated to the state for the construction of public facilities in communities impacted by coal development.<sup>64</sup> This can be done only if certain specified federal payments are inadequate to meet the needs of impact. This condition was added by the Conference Committee and recognizes the increase in the state's share of federal coal and other mineral leasing revenues and of the impact loan fund enacted as part of the Federal

62. Pub. L. No. 95-87, §§ 401-413, 91 Stat. 456 (1977) (to be codified in 30 U.S.C. § 1231).

63. Pub. L. No. 95-87, § 402(a), 91 Stat. 457 (1977) (to be codified in 30 U.S.C. § 1232).

64. Pub. L. No. 94-87, § 402(g)(2), 91 Stat. 458 (1977) (to be codified in 31 U.S.C. § 1601). Of major concern to western states was the fact that after reclamation of all abandoned lands in the state, fifty percent of the funds generated from production in that state and previously allocated to it, would be returned to the Secretary and expended elsewhere. Because surface mining of coal is relatively new in the West and the vast majority of abandoned mines are located in the East, the individual Western states were faced with losing significant funds which were generated from production in those states. However, the new production of coal in the West caused significant economic and social impact on small rural communities. Thus the argument was successfully made that once all abandoned mines were reclaimed, a state should be allotted those funds for impact assistance.

### Coal Leasing Act and the Federal Land Policy Management Act.<sup>65</sup>

The abandoned lands program is one of the major accomplishments of the Act. Without the funds generated by this reclamation fee, many acres of existing lands affected by coal mining would remain in their presently unreclaimed condition. As of January 1, 1974, there were 621,887 acres of lands disturbed by surface coal mining in the United States which were not subject to reclamation.<sup>66</sup> This fund will hopefully work toward returning these lands to a productive state.<sup>67</sup>

### III. CONTROL OF THE ENVIRONMENTAL IMPACTS OF SURFACE COAL MINING—TITLE V SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977.

The provisions of Title V contain the operative features of the statute that hopefully will result in efficiently administered reclamation practices on disturbed lands. The Title contains essentially three major features: A) the initial regulatory procedure, B) the environmental performance standards and their enforcement, C) landowner consent requirements, and D) state and federal programs.

#### A. *Interim Regulatory Program*

Of interest to operators, state governments, and interested citizens is the mechanism by which the performance standards are immediately applied. The initial regulatory procedure is awkwardly worded at best. It is necessary to carefully analyze this section to determine, in practice, how the interim program will work. It is also the first point at which the Office of Surface Mining Reclamation and Enforcement (O. S. M.) can demonstrate its intentions concerning the role of the state regulatory agencies in the administration of the Act.

65. H. CONF. REP. NO. 493, 95th Cong., 1st Sess. 99 (1977).

66. H.R. REP. NO. 218, 95th Cong., 1st Sess. 76 (1977).

67. WYO. STAT. § 35-11-424 (1977) of the Wyoming Environmental Quality Act provides for a similar fund within the State of Wyoming. All moneys collected pursuant to that Act are deposited with the Wyoming State Treasurer in an account within the trust and agency fund for reclamation purposes. As this fund has slowly increased, the Environmental Quality Department has begun reclamation studies in conjunction with the state forester and other entities. However, to date no specific areas have been reclaimed as a result of moneys collected by the fund.

As stated above, Section 502 requires existing mines to come into compliance with the Act by May 3, 1978, and all new permits issued by the states after February 3, 1978, to be issued in compliance with specifically stated performance standards. The important aspect of this phase is that new operators (commencing after February 3, 1978), previously regulated by a state, are required to obtain state permits. Section 502(b) specifically provides the state shall issue those permits. The regulations promulgated by the Secretary governing the interim regulatory procedure confirms that states are responsible "for issuing permits."<sup>68</sup>

In addition, Section 523 of the Act provides that states with existing Cooperative Agreements may renegotiate these Cooperative Agreements to govern federal lands during the initial regulatory procedure, provided the agreements comply with Section 502 of the Act.<sup>69</sup> Thus, a state with an existing Cooperative Agreement may continue with relatively little disruption during the initial regulatory procedure and until a state program or federal program is imposed.

Another element of the initial regulatory procedure is the federal enforcement program required by Section 502(e).<sup>70</sup> Regulations promulgated pursuant to this Section specify in detail what enforcement actions are available.<sup>71</sup> The regulations include inspections without notice or a warrant and automatic inspections upon citizen complaints. If inspections reveal conditions which are of imminent danger to public health or safety or are causing significant environmental harm, the authorized representative of the Secretary shall order cessation and corrective action. If less serious violations are noted, a notice of violation is issued, followed by a cessation order if compliance is not obtained. These orders may be reviewed at the minesite. If a pattern of violations develops, the Director of O.S.M. shall issue an order to show cause why the permit should not be revoked.

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68. 42 Fed. Reg. 62678 (1977) (to be codified in 30 C.F.R. § 710.4(b)).

69. Pub. L. No. 95-87, § 523(c), 91 Stat. 510 (1977) (to be codified in 30 U.S.C. § 201).

70. Pub. L. No. 95-87, § 502(e), 91 Stat. 469 (1977) (to be codified in 30 U.S.C. § 1252).

71. 30 C.F.R. § 722.1-17 (1977).

The regulations further provide for a complex process for the imposition of civil penalties to a maximum of \$5,000 per day of violation.<sup>72</sup> The process includes a point system which considers history of past violations, seriousness of the violation, actual or potential damage, negligence, and good faith. The operator may request a hearing to review the assessment of a penalty.

Existing Cooperative Agreements clearly provide for enforcement procedures to be implemented initially by the states.<sup>73</sup> Regulations promulgated by the Secretary for the interim regulatory procedure also appear to reinforce the enforcement responsibility of the state.<sup>74</sup> In addition, the statute specifically authorizes the renegotiation of Cooperative Agreements to govern operations during the initial regulatory procedures.<sup>75</sup> Section 502(e) requires federal enforcement *as necessary*. Therefore, it appears Congress recognized that Cooperative Agreements may provide for state enforcement and thus make federal enforcement unnecessary. Hopefully during the interim regulatory procedure the Office of Surface Mining Reclamation and Enforcement will continue to administer its enforcement responsibilities in concert with existing Cooperative Agreements.

### *B. Environmental Performance Standards*

As is often the case, the substantive environmental requirements are sometimes lost in the morass of regulatory procedures, administrative requirements, and implementation hurdles. Section 515 of the Act, providing the environmental protection performance standards, is the reason for the Act's existence. Hopefully in the implementation of the Act, the responsible regulatory authorities will not lose sight of this fact.

The purpose of any reclamation effort is, of course, to restore the land to a specific productive use. Section 515(b)(2) requires the restoration of lands affected by mining to its prior use or a higher or better use. The regulations adopted

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72. 30 C.F.R. § 723.1-19 (1977).

73. 42 Fed. Reg. 3644 (1977) (to be codified in 30 C.F.R. § 211.77). Cooperative Agreement, Art. VI.

74. 42 Fed. Reg. 62678 (1977) (to be codified in 30 C.F.R. § 710.4(b)).

75. Pub. L. No. 95-87, § 523(c), 91 Stat. 510 (1977) (to be codified in 30 U.S.C. § 201).



pursuant to this Section spell out the manner in which these future uses shall be delineated and approved.<sup>76</sup> The regulations clarify the fact that if the land was mined prior to the implementation of these reclamation requirements, the premining use will be judged by the land surrounding it. In other words, mining is not an acceptable prior use.

Operators are required to restore the land to its approximate original contour by backfilling, compacting, and grading the area, and removing high walls and spoil piles.<sup>77</sup> The regulations implementing this section appear to provide flexibility for situations where fill material may be inadequate or excessive.<sup>78</sup> Preservation and restoration of topsoil and revegetation sufficient to support the future use are essential elements of reclamation and are required by both the statute and the regulations.<sup>79</sup>

The performance standards require extensive regulation of the use of explosives in coal mining. The applicant must provide advanced written notice of blasting schedules, and any change thereto, to local governments and residents, maintain accurate logs and records detailing the blasts, limit the type and amounts of explosives used, conduct blasting operations only with trained and competent personnel, and most notably, provide pre-blasting surveys, when requested, of existing structures which may be damaged by the activity.<sup>80</sup> A significant problem with blasting damage caused by mining operations is the lack of information concerning the damaged structure's original condition. This is especially true of groundwater wells. The pre-blasting survey is required only at the request of a resident or owner of a dwelling or structure located within one-half mile of any part of the permit area.<sup>81</sup> Special attention must be given to the pre-blasting condition of wells and other water systems used for human, animal or agricultural purposes and to the quantity and quality of the water.<sup>82</sup>

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76. 42 Fed. Reg. 62681 (1977) (to be codified in 30 C.F.R. § 715.13).

77. Pub. L. No. 95-87, § 515(b)(3), 91 Stat. 486 (1977) (30 U.S.C. § 1265).

78. 42 Fed. Reg. 62681 (1977) (to be codified in 30 C.F.R. § 715.14).

79. Pub. L. No. 95-87, § 515(b)(5), (6), (19), (20); 42 Fed. Reg. 62684, 62689 (1977) (to be codified in 30 C.F.R. §§ 715.16 and 715.20).

80. Pub. L. No. 95-87, § 515(b)(15), 91 Stat. 490 (1977) (to be codified in 30 U.S.C. § 1265).

81. 42 Fed. Reg. 62689, 30 C.F.R. § 715.19 (1977).

82. 42 Fed. Reg. 62689, 30 C.F.R. § 715.19 (1977). This requirement, though seemingly burdensome upon the operator, will serve to avoid the problems encountered by the Wyoming Department of Environmental Quality in reviewing and processing

Operators and the public should be aware of the extensive public notice requirements in the blasting regulations. The regulations also contain detailed requirements regarding warning signs, warning signals, access to the blasting area, minimum peak particle velocity, seismograph measurements, and records of blasting operations.<sup>83</sup>

Special emphasis is placed, by both the statute and the regulations, for the interim regulatory program, on the protection of the hydrologic balance at the minesite and in associated offsite areas.<sup>84</sup> Hydrologic balance is defined by the regulations to mean "the relationship between the quality and quantity of inflow to, and outflow from, and storage in a hydrologic unit such as a drainage basin, aquifer, soil zone, or reservoir."<sup>85</sup> Specific aspects of the hydrologic balance that must be controlled include toxic mine drainage, contribution of suspended solids to streamflows from runoff, construction of siltation structures, restoring the recharge capacity of the mined area to the approximate pre-mining conditions, avoiding channel deepening, and preserving the hydrologic functions of alluvial valleys.<sup>86</sup> The regulations adopted involve extremely detailed requirements concerning effluent limitations, surface water monitoring, construction of stream channel diversions and sediment control measures, construction of roads to alleviate hydrologic impact, and construction of permanent impoundments.<sup>87</sup> The most notable requirements of those listed above are restoration of the recharge capacity of the mined area and preservation of the hydrologic functions of alluvial valleys.

Extensive comment was received on the regulations concerning the requirements of restoring the recharge capacity of the mined area. The extremely complex nature of groundwater systems requires a close look at the criteria which will be used to determine if restoration has occurred. As proposed,

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permits. In some cases protesters have alleged that damage had been done to their wells and structures within the vicinity of a mine. However, it is impossible to document at what point such damage occurred and what was the precise cause. Such a pre-blasting survey could answer the problem for all parties concerned.

83. 42 Fed. Reg. 62689, 30 C.F.R. § 715.19 (1977).

84. Pub. L. No. 95-87, § 515(b)(10), 91 Stat. 488 (1977) (to be codified in 30 U.S.C. § 1265).

85. 42 Fed. Reg. 62678 (1977) (to be codified in 30 C.F.R. § 710.5).

86. Pub. L. No. 95-87, § 515(b)(10), 91 Stat. 488 (1977) (to be codified in 30 U.S.C. § 1265).

87. 42 Fed. Reg. 62685 (1977) (to be codified in 30 C.F.R. §§ 715.17(a) *et seq.*).

the regulations would have required restoration of infiltration rates as a measure of recharge capacity.<sup>88</sup> Commentators pointed out that infiltration rates were not the only method by which to measure recharge capacity and the requirement to restore infiltration rates was not pursuant to legislative intent.<sup>89</sup> The drafters of the regulation gave reasonable consideration to these comments and basically agreed. "Because recharge capacity is a function of many variables,"<sup>90</sup> the regulation was changed to expand the definition of recharge capacity. The regulation now requires the operator to restore the reclaimed lands to the approximate pre-mining recharge capacity through restoration of the capability of the reclaimed areas to, as a whole, transmit water to the groundwater system.<sup>91</sup> This requires the operator to restore the aquifer to serve the same purpose that it did prior to mining, but not to restore it to precisely the same characteristics.

The second notable aspect of the hydrologic balance requirements is the preservation "throughout the mining and reclamation process the essential hydrologic functions of alluvial valley floors in arid and semi-arid areas of the country."<sup>92</sup> This controversial and well-publicized alluvial valley floors provision appears both in the performance standards, requiring preservation of the function, and in the permit approval or denial section, requiring denial of the permit on alluvial valley floors under certain conditions.<sup>93</sup> Consideration of alluvial valley floors has existed throughout the history of the Act. Congress recognized the importance of these areas to the arid and semi-arid western coal mining areas. As a result of the widely held belief that valley floors are the productive lands that form the backbone of the agricultural and cattle ranching economy in the West, Congress set out to protect them.<sup>94</sup> Concern with alluvial valley floors was first articulated by the National Academy of Science study entitled *Rehabilitation Potential of Western Coal Lands*. That study stated,

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88. 42 Fed. Reg. 62655 (1977).

89. Statement of T. S. Melancon, Atlantic Richfield Company, Hearings on Department of Interior Proposed Regulations on Surface Mining Reclamation and Enforcement, Denver, Colo. (Sept. 20, 1977).

90. 42 Fed. Reg. 62655 (1977).

91. 42 Fed. Reg. 62687 (1977) (to be codified in 30 C.F.R. § 717.17 (h)).

92. Pub. L. No. 95-87, § 515(b)(10)(F), 91 Stat. 481 (1977) (to be codified at 30 U.S.C. § 1260).

93. Pub. L. No. 95-87, § 510(b)(5), 91 Stat. 481 (1977) (to be codified in 30 U.S.C. § 1260).

94. H.R. REP. NO. 218, 95th Cong., 1st Sess., 116 (1977).

“[i]n the planning of any proposed mining and rehabilitation it is essential to stipulate that alluvial valley floors and stream channels be preserved.”<sup>95</sup> The Act does not specifically require “preservation” of the alluvial valley floor. However, it does impose severe restrictions on the circumstances in which those areas can be mined.

The vociferous criticism against this provision of the Act was based on the allegation that large amounts of coal would no longer be available for production. Numerous efforts were made to estimate the tonnage of coal that would be affected by the alluvial valley limitation. As an example, it was generally agreed that alluvial valley floors overlay approximately 2.67 percent of the coal in the western states.<sup>96</sup> However, the difficulty is that alluvial valley floors have not been specifically mapped or identified. The Act’s definition of alluvial valley floors is “the unconsolidated stream/lake deposits holding streams where water availability is sufficient for subirrigation or flood irrigation agricultural activities but does not include upland areas which are generally overlain by a thin veneer of colluvial deposits composed chiefly of debris from sheet erosion, deposits by unconcentrated runoff or slope wash, together with talus, other mass movement accumulation and windblown deposits.”<sup>97</sup> As is obvious from reading the definition, actual identification of alluvial valley floors will be difficult.<sup>98</sup> Numerous geologic, hydrologic and vegetative factors enter into the identification of a specific alluvial valley floor.<sup>99</sup> More importantly, it may not be a simple matter to determine how much coal underlies these identified valleys. The techniques required in protecting and restoring the valleys may require taking additional amounts of coal out of production. These techniques may involve leaving a buffer zone between the mine and the valley floor, protect-

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95. NATIONAL ACADEMY OF SCIENCE, REHABILITATION POTENTIAL OF WESTERN COAL LANDS 44-45 (1974).

96. H.R. REP. NO. 218, 95th Cong., 1st Sess. 119 (1977).

97. Pub. L. No. 95-87, § 701, 91 Stat. 516 (1977) (to be codified in 30 U.S.C. § 1291).

98. As an example, the first mine plan to be submitted to Department of the Interior for approval after passage of the Act included an intermittent stream that was argued to constitute an alluvial valley. Amax Coal Co. has alleged that Little Rawhide Creek, running through its Eagle Butte Mine in Campbell County, Wyoming, does not constitute an alluvial valley. The Department of Interior approved the mine plan on February 2, 1978, conditional upon Amax’s demonstrating either that it is not an alluvial valley or that, if it is, it can be restored.

99. Erickson, Hardaway, Kimball & Lindsay, *Subirrigated Alluvial Valley Floors*, U.S. E.P.A., Region VIII (1977) (unpublished).

ing upstream drainages, and avoiding drainage from the valley floor into an adjacent pit. The rough estimate of this augmented amount of potentially lost coal, made at a very preliminary stage, indicates that it may run as high as ten percent.<sup>100</sup> It is clear that the effects of removing these areas from coal production were studiously considered by the Congress.<sup>101</sup> However, the Congress clearly opted for serious restrictions on these valuable areas at the risk of possible production losses. In order to protect the alluvial valley areas, substantial pre-mining base line information will be necessary. The regulations specifically require detailed monitoring requirements, base line information covering a full water year, and specific plans showing how the operation will avoid injuring the area. Although suggestions were made to require complete mapping of all alluvial valley floors prior to issuance of mining approval in any area, the regulation drafters did not impose that requirement.<sup>102</sup> Thus, the existence of alluvial valley floors will be determined on a case by case basis.

The original House language provided for a total ban on mining in alluvial valley floors.<sup>103</sup> However, the final provisions are much less restrictive. As indicated above, Section 515(b)(10)(F) requires all mining subject to this Act must preserve the hydrologic functions of alluvial valley floors. Section 510(b)(5) requires that a mining permit shall not be approved unless the applicant demonstrates the operation will not interrupt, discontinue or preclude farming on alluvial valley floors or materially damage the quantity or quality of water in the surface or underground systems.<sup>104</sup> This is an extremely important section of the Act and requires a very close reading. First of all, the burden is clearly on the applicant to demonstrate that its operations will not have the result of interrupting, discontinuing or precluding farming or damaging the quantity or quality of the water. Secondly, it must be an operation located west of the 100 meridian west longitude. This apparently is because of the importance of these productive areas to the arid West. The limitation on interrupting,

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100. *Id.*

101. H.R. REP. NO. 218, 95th Cong., 1st Sess., 118, 119 (1977).

102. 42 Fed. Reg. 62656 (1977).

103. Comment, *The Strip Mine Law: Conflicting Goals Underlie Balanced Regulatory Requirements*, *supra* note 6.

104. Pub. L. No. 95-87, § 510(b)(5), 91 Stat. 481 (1977) (to be codified in 30 U.S.C. § 1260).

discontinuing or precluding farming excludes undeveloped rangelands and areas that are of such small acreage as to have negligible impact on the farm's agricultural production.<sup>105</sup> By using the words "preclude farming", Congress clearly intended to protect agricultural lands from being taken out of production in order to qualify the alluvial valley for mining.<sup>106</sup>

The difficulty with administering this particular provision is determining what, in fact, constitutes the agricultural production unit. The Conference Report language concerning this particular aspect does provide some insight. After closely reading the Conference Report, those who lobbied so long and hard for this provision may wonder whether they accomplished anything.<sup>107</sup> The Conference Committee clearly indicates the language "not interrupt, discontinue or preclude farming" and the limitation of "such small acreage to be of negligible impact on the farm's agricultural production" were not intended to apply to the specific alluvial valley site. It was recognized that farming on the actual alluvial valley mine-site *must* be interrupted during the mining and reclamation process. Therefore, this restriction will only prevent mining on alluvial valley floors where the disruption would in fact interrupt, discontinue or preclude farming on the remainder of the agricultural unit. Thus, it is arguable that the only time this provision will prevent mining in an alluvial valley floor is when removal of the valley floor would have more than a negligible impact on the entire agricultural operation involved.

Certain operations were specifically grandfathered from the application of this portion of the alluvial valley requirements. All coal mining operations, which in the year preceding enactment produced coal in commercial quantities or had obtained "specific permit approval by the state regulatory authority to conduct surface coal mining operations within said alluvial valley floors" are not affected by the permit denial section.<sup>108</sup> In the supplementary information of the final interim regulatory procedure regulations, the Secretary makes it exceedingly clear that this grandfather section exempts

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105. Pub. L. No. 95-87, § 510(b)(5)(A), 91 Stat. 481 (1977) (to be codified in 30 U.S.C. § 1260).

106. H. CONF. REP. NO. 493, 95th Cong., 1st Sess. 104 (1977).

107. *Id.*

108. Pub. L. No. 95-87, § 510(b)(5), 91 Stat. 481 (1977) (to be codified in 30 U.S.C. § 1260).

grandfathered operations from only a portion of the alluvial valley requirements.<sup>109</sup> It is the intent of the regulations and that Section 515(b)(10)(F) will apply to grandfathered operations. Thus, even if an operation was producing coal or had obtained a state permit prior to the passage of the Act, it will still be required to preserve "throughout the mining and reclamation process the essential hydrologic functions of alluvial valley floors."<sup>110</sup> Existing operations whose permit areas include alluvial valleys will be required to modify their existing permits to comply with the monitoring, base line data, and restoration requirements of that section. The supplemental information further specifies that it is the intent of the regulations to allow operations to continue on alluvial valley floors "in those areas that have been adequately investigated, on which impacts have been assessed, and which are included in areas to be mined or reclaimed in plans approved by the regulatory authority."<sup>111</sup> Depending on the particular characteristics of the alluvial valley floor involved, this requirement may have the same impact of completely protecting, and prohibiting mining on, those areas.<sup>112</sup> It is the opinion of some experts that certain alluvial valley floors, because of their physical characteristics, will not be susceptible to restoration and thus could not be mined pursuant to the Act.<sup>113</sup>

An interesting question arises when the regulations are compared with the statute regarding the effective date of the prohibitions of Section 510(b)(5) against preventing farming and materially damaging the water systems. The issue is whether an operator must comply with that section on February 3, 1978 or not until a federal or state program is approved—which could be as long as two years later. This could be extremely significant for proposed mines which would be planning to commence mining in alluvial valleys during that time. Essentially, the prohibitory language of Section 510(b)(5) applies when a permit is being issued or denied. Permits are not required until a state or federal program is approved.<sup>114</sup> However, the interim regulations adopted the prohibitory

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109. 42 Fed. Reg. 62656 (1977).

110. Pub. L. No. 95-87, § 515(b)(10)(F), 91 Stat. 489 (1977) (to be codified in 30 U.S.C. § 1265).

111. 42 Fed. Reg. 62656 (1977).

112. Erickson, Nordaway, Kimball & Lindsay, *supra* note 99.

113. *Id.*

114. Pub. L. No. 95-87, § 502(d), 91 Stat. 468 (1977) (to be codified in 30 U.S.C. § 252).

language of Section 510(b)(5) and make it effective immediately.<sup>115</sup> The attempt by the regulations to fill the hiatus period between the passage of the Act and the approval of a state or federal program is certainly logical. Congress gave specific direction that only those operations which had produced coal or obtained state permits prior to the enactment of the Act were exempted from the prohibitory language of Section 510(b)(5). It should be noted that all operations, existing and new, will be required to obtain a permit after approval of a state or federal program.<sup>116</sup> If the regulations are not valid, all statutorily "grandfathered" mines would continue to be exempt from the prohibitory language, but all new mines could interrupt, discontinue or preclude farming on alluvial valley floors until they were required to obtain a permit under a state or federal program. It is not logical and is in derogation of the goal to protect alluvial valleys, to statutorily exempt only a limited number of facilities with ongoing operations and then allow new operations additional time to mine these valuable agricultural lands without demonstrating a negligible impact on farming. However, Congress does not always proceed logically and the question is significant enough that litigation will be necessary for a resolution of it.<sup>117</sup>

A Senate amendment, adopted by the Conference Committee, provides some assistance to operators who are prohibited from mining as a result of the alluvial valley provision.<sup>118</sup> This provision would allow such operators, who had made substantial financial and legal commitments prior to January 1, 1977, to enter into agreements with the Secretary obtaining other federal coal deposits in exchange for the coal lease which lies within an alluvial valley.<sup>119</sup> That provision further states "It is the policy of the Congress that the Secretary shall develop and carry out a coal exchange program to ac-

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115. 30 C.F.R. § 715.17(j)(2) (1977).

116. Pub. L. No. 95-87, § 502d, 91 Stat. 468 (1977) (to be codified in 30 C.F.R. § 1252).

117. At the time of the writing of this article, significant litigation has already been commenced including the issue of the legality of including requirements in the immediately effective regulations which were not allegedly intended by the Act to apply until a future date. Outcome of this litigation should be watched closely. *Nat'l Coal Ass'n v. Andrus*, No. 78-0183 D.C. Cir.; *Amherst Coal Co. v. Andrus*, No. 80762, S.D. W. Va.

118. "The Wallop Amendment"—this amendment was introduced by Senator Malcolm Wallop of Wyoming.

119. Pub. L. No. 95-87, § 510(b)(5), 91 Stat. 482 (1977) (to be codified in 43 U.S.C. § 1716).



quire private fee coal precluded from being mined by the restrictions of this paragraph (5) in exchange for Federal coal which is not so precluded."<sup>120</sup> The Conference Report indicates the intention that this coal exchange program shall apply to private coal deposits even though legal or financial commitments had not been made.<sup>121</sup>

It should be noted that the trade provision is available only to those parties who are prohibited from mining alluvial valley floors pursuant to Section 510(b)(5). It would not apply to operators who are denied a permit as a result of not being able to make a demonstration required by Section 515(b)(10)(F). The actual effect of the hydrologic aspects of these two provisions is very similar. In Section 510 the operator must not materially damage the quantity or quality of water in the surface and groundwater systems that supply the valley floors. In Section 515(b)(10)(F) the applicant must preserve the hydrologic functions of an alluvial valley floor. Thus, if an existing operation, which is grandfathered from Section 510(b)(5), is prohibited from mining on alluvial valley floors as a result of Section 515(b)(10)(F), it does not appear the operator is entitled to a trade-off provision. The Conference Report gives no guidance as to the intent of Congress with regard to this inconsistency.

A further interesting hydrologic requirement is Section 715.17(i) which provides for the permittee to replace the water supply of an owner of an interest in real property who obtains all or part of a water supply from that property which has been affected by the "contamination, diminution, or interruption proximately resulting from the surface coal mine operation by the permittee."<sup>122</sup> Apparently, the regulations intend that this requirement apply during the interim regulatory procedure. However, statutory authority for the provision is Section 717 of the Act which is not included in those specific items required by the interim regulatory procedures.<sup>123</sup> Historically, this problem has been handled through private litigation based upon the common law. This provision

120. Pub. L. No. 95-87, § 510(b)(5), 91 Stat. 482 (1977) (to be codified in 43 U.S.C. § 1716).

121. H. CONF. REP. NO. 493, 95th Cong., 1st Sess. 105 (1977).

122. 42 Fed. Reg. 62687 (1977), 30 C.F.R. § 715.17(i).

123. Pub. L. No. 95-87, § 502(c), 91 Stat. 468 (1977), compared with, Pub. L. No. 95-87, § 717, 91 Stat. 526 (1977).

will interject the common law obligations of the operator into the mining permit process and conceivably make it easier for the well owner to recover.

Reclamation performance standards are applied to underground mining operations pursuant to Section 516 of the Act. Regulations have also been developed for the interim regulatory procedure for underground mines.<sup>124</sup> The Act specifically directs the Secretary to consider the distinct differences between surface coal mining and underground mining in adopting its rules and regulations.<sup>125</sup>

Special slope considerations are provided for mountain-top mining, steep slope mining, and special bituminous coal mines.<sup>126</sup> Flexibility in the restoration to approximate original contour and the allowable slopes was the result of the industry position that stringent contour requirements would render these operations uneconomical.<sup>127</sup>

Special bituminous coal mines are treated separately in Section 527 of the statute. This special provision was designed to address the unique problems of the Kemmerer Coal Company operation near Kemmerer, Wyoming.<sup>128</sup> The regulations further limit this provision by defining a special bituminous coal mine as one located in the State of Wyoming.<sup>129</sup> The unique problem that results from mining the steep, downward sloping coal seams, at least fifteen degrees from the horizontal, is a limited pit area of great depth. Congress recognized that the nature of this operation, the depth of the pit, and the lack of adequate fill material would make it extremely difficult to return the area to the approximate original contour.<sup>130</sup> Therefore, such mines were allowed to remain in operation without meeting the performance standards relating to highwalls, recontouring, onsite spoil piles and water impoundments.<sup>131</sup> The Senate bill, S. 7, specifically limited the Special Bituminous Coal Mines exemption only to mines

124. 42 Fed. Reg. 62695 (1977) (to be codified in 30 C.F.R. § 717).

125. Pub. L. No. 95-87, 516(a), 91 Stat. 495 (1977) (to be codified in 30 U.S.C. § 1266).

126. Pub. L. No. 95-87, § 515(c) and (d), and § 527, 91 Stat. 493 (to be codified in 30 U.S.C. § 1265).

127. Comment, *The Strip Mine Law: Conflicting Goals Underlie Balanced Regulatory Requirements*, *supra* note 6.

128. 42 Fed. Reg. 62660 (1977).

129. 42 Fed. Reg. 62692 (1977) (to be codified in 30 C.F.R. § 716.4(a)).

130. H.R. REP. NO. 218, 95th Cong., 1st Sess. 127 (1977).

131. 30 C.F.R. § 716.4 (1977).

which were in operation prior to January 1, 1972. The House bill, H.R. 2, was amended to include new mines meeting the same criteria and immediately adjacent to existing special bituminous mines, but specifically required these new mines to comply with state laws.<sup>132</sup> The Senate Committee clearly intended new mines to comply with all requirements of the Act irrespective of whether the new mine qualified as a special bituminous coal mine.<sup>133</sup> However, the Senate acceded to the House in the Conference Committee, and the Act allows new adjacent mines to be eligible for the exemption.<sup>134</sup>

Regulations adopted pursuant to this Section for existing mines approved prior to July 1, 1973,<sup>135</sup> codify the slope requirements presently established for the Kemmerer Coal Company operation in the state mining permit. For new special bituminous coal mines, the slope requirements are an exact duplication of the present Wyoming regulations.<sup>136</sup> The effect of these regulations is that the one existing mine, Kemmerer Coal Company, will be allowed to continue operation and orderly expansion pursuant to its state permit which provides the flexibility regarding slope requirements that the Act intended. All new mines will be required to meet slope regulations which require recontouring to the average natural slope unless that would cause an unwarranted increase in affected land by removing the highwalls.<sup>137</sup>

In the Appalachia area and other eastern coal fields, coal seams may be located in hilly, mountainous terrain, and mining in these areas requires special treatment of steep slopes and mountaintops. The special provision for mountaintop mining recognizes that while it is generally preferable to return a mined area to the approximate original contour, in specific cases the usefulness of the land can be increased by allowing reclamation to return a mined mountaintop to a level condition.<sup>138</sup> The Act and the regulations exempt moun-

132. Amendment added by Representative Teno Roncalio to provide for proposed operation of Rocky Mountain Energy Co. adjacent to the Kemmerer Coal Co. pit. Casper Star Tribune, May 8, 1977.

133. S. REP. NO. 128, 95th Cong., 1st Sess. 97 (1977).

134. H. CONF. REP. NO. 493, 95th Cong., 1st Sess. 112 (1977); Pub. L. No. 95-87, § 527(b), 91 Stat. 514 (1977) (to be codified in 30 U.S.C. § 1277).

135. Effective date of Wyo. Environmental Quality Act, WYO. STAT. § 35-11-1104 (1977).

136. 30 C.F.R. § 716.4(c)(1) (1977); Wyoming Land Quality Rules & Regulations, Ch. II, § 2 (1975).

137. 30 C.F.R. § 716.4(c)(1) (1977); Wyoming Land Quality Rules & Regulations, Ch. II, § 2 (1975).

138. H.R. REP. NO. 218, 95th Cong., 1st Sess. 124 (1977).

mountaintop mining from the requirement of returning the land to the approximate original contour if a specific future land use is identified, compatible with land use plans, practicable with respect to financial capability for completion, and supported by commitments from public agencies.<sup>139</sup> Operations qualifying for this exemption must create a level plateau with inward drainage except in specific channels, and spoil must be placed on the mountaintop bench or disposed of in compliance with the other requirements of the Act.

Mining in steep slope areas (greater than twenty degrees) presents unique environmental and reclamation problems which result in special treatment of this type of mining by the Act. Mining and disposing of spoil material in these areas have resulted in increased landslides and massive erosion.<sup>140</sup> Therefore, specific requirements are applied prohibiting the disposal of spoil material downslope of the mine, requiring complete covering of highwalls, and limiting disturbance of areas above the highwalls.<sup>141</sup> Despite strong industry arguments to the contrary, Congress found existing state regulation of steep slope problems was inadequate and that proper mining methods to solve the problems did exist and were economically practical.<sup>142</sup> The Conference Committee provided for flexibility in the requirement for steep slope operations to return the side to approximate original contour by allowing variance if the surface owner requests it for purposes of accommodating a post-mine land use and if the watershed of the affected land is improved.<sup>143</sup>

A final important provision of the environmental performance standards is the prime farmlands provision.<sup>144</sup> In areas that have been identified by the Secretary of Agriculture as prime farmlands, the operator must comply with more stringent soil segregation and replacement requirements. In addition, the operator will be unable to obtain a permit unless the regulatory agency can find that the operator has a technologi-

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139. Pub. L. No. 95-87, § 515(c)(2) and (3), 91 Stat. 493 (1977) (to be codified in 30 U.S.C. § 1235); 30 C.F.R. § 716.3 (1977).

140. H.R. REP. NO. 218, 95th Cong., 1st Sess. 120 (1977).

141. Pub. L. No. 95-87, § 515(d), 91 Stat. 494 (1977) (to be codified in 30 U.S.C. § 1265).

142. H.R. REP. NO. 218, 95th Cong., 1st Sess. 121 (1977).

143. H. CONF. REP. NO. 493, 95th Cong., 1st Sess. 108 (1977).

144. Pub. L. No. 95-87, § 515(b)(7), 91 Stat. 487 (1977) (to be codified in 30 U.S.C. § 1265).

cal capability to restore such prime farmland to an equal or higher level of yield.<sup>145</sup> This finding can be based upon data submitted by the operator, expertise of the regulatory authority, and other scientific data. These specific prime farmland requirements apply to all permits issued after the date of enactment.<sup>146</sup> Operations existing prior to that time, however, are not required to comply. Congress was concerned with the value of these farmlands being diminished and their availability reduced.<sup>147</sup> "Recognizing that mining is only a temporary use of the land, it appeared especially important to require restoration of their productivity levels as part of the mining and reclamation process."<sup>148</sup>

Regulations promulgated pursuant to the prime farmlands provisions specifically state the technical criteria used by Secretary of Agriculture to identify prime farmlands. In addition, the regulations provide for a "negative determination" of prime farmland which allows the operator to avoid the extensive soil survey requirements.<sup>149</sup> As a result of the severity of the reclamation requirements on prime farmlands, litigation challenging their validity commenced immediately.<sup>150</sup>

In summary, the environmental performance standards of Section 515 require the operator to restore the area to a productive use following mining and to provide detailed and extensive pre-mining information, planning, and specific techniques used throughout the mining operation. Environmentally, the most significant portion of these performance standards, at least to those operations in the West, are those that require the restoration of the hydrologic balance. The significance of the impact of these performance standards is already being demonstrated by the amount of litigation they have generated.<sup>151</sup> Certainly the operators view the imposition of these mandatory, uniform standards as more of a threat than

145. Pub. L. No. 95-87, § 510(d), 91 Stat. 483 (1977) (to be codified in 30 U.S.C. § 1260).

146. Pub. L. No. 95-87, § 510(d), 91 Stat. 483 (1977) (to be codified in 30 U.S.C. § 1260).

147. H.R. REP. NO. 218, 95th Cong., 1st Sess. 105 (1977).

148. *Id.* at 106.

149. 30 C.F.R. § 716.7(b)(c) and (d) (1977).

150. The State of Texas filed suit challenging the prime farmland regulation because of the fear that it would prevent mining of significant amounts of lignite in that state. *Texas v. Andrus*, No. 78-1071, D.D.C.

151. *Nat'l Coal Ass'n v. Andrus*, No. 78-1083, D.D.C.; *Amherst Coal Co. v. Andrus*, No. 80762, S.D. W.Va.; *Peabody Coal Co. v. Andrus*, No. 78-10163, D.D.C.; *Consol. Coal Co. v. Andrus*, No. 78-1064, D.D.C.

preexisting state regulation. The result of these federally-imposed requirements, even recognizing that some strong state programs existed, will likely be more consistent reclamation activities and increased enforcement.

### *C. Surface Owner Consent*

One of the most emotional and controversial sections of the Act deals with the requirement of obtaining surface owner consent prior to allowing surface coal mining operations. This provision has had a tortuous history throughout the equally tortuous history of the Act. The question is finally answered, and the surface owner requirement is federal law. This certainly is a relief to many.<sup>152</sup>

During the Senate consideration of the Conference Report, the Surface Mining Reclamation and Control Act of 1977 faced a Motion to Recommit because of the surface owner consent provisions.<sup>153</sup> Senator Bumpers moved to recommit the bill because of his belief the surface owner consent provision would result in windfall profits to the surface owner and the unwarranted loss of federal coal. The motion sparked a lengthy and lively debate on the merits of surface owner consent. The motion failed by a vote of fifty-three to forty-three.<sup>154</sup> In the debate, Senator Melcher stated the cost paid by coal companies for surface owner consent has been approximately \$1,000 per acre which would result in a negligible increase in the price of coal of approximately 1.8 cents per ton.

Although the inclusion of the surface owner consent provision will certainly have some economic effect, many coal companies have already purchased the surface in coal mining areas in anticipation of the passage of the Act.<sup>155</sup> During the four years of the existence of the Wyoming surface owner consent provision, there was no permit denied for lack of surface owner consent and only one permit protest involving a

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152. Haughey & Gallinger, *Legislative Protection of the Surface Owner in the Surface Mining of Coal Reserved by the United States*, 22 ROCKY MTN. MIN. L. INST. 145 (1976).

153. CONG. REC. S12425 (daily ed. July 20, 1977).

154. CONG. REC. S12441 (daily ed. July 20, 1977).

155. Haughey & Gallinger, *supra* note 152.

coal company which owned the surface and refused consent to another coal company which had leased the coal.<sup>156</sup>

Various surface owner consent requirements were discussed throughout the development of the Act. These varied from complete prohibition of mining without surface owner consent, to schemes to limit compensation paid to the surface owner for his consent, to a federal policy to refrain from leasing federal coal where the surface ownership was different from the mineral ownership.<sup>157</sup> Several western states have previously adopted surface owner consent provisions providing some protection for the surface owner whose land is to be surface mined.<sup>158</sup> These sections are not precisely the same as the federal provisions. However, surface owner consent is not one of the provisions specifically required to be included within a state program under Section 503. Thus, it is not clear whether or not each state will have to adopt similar surface owner consent provisions.

The Act provides that a permit shall not be issued unless the applicant can demonstrate, in cases where the private mineral estate has been severed from the private surface estate, he has the written consent of the surface owner or a conveyance which expressly grants the right to conduct surface mining.<sup>159</sup> If the conveyance does not expressly grant that right, the conveyance will be interpreted under state law clarifying the relationship of the surface and subsurface owners. This section also provides that the regulatory agency itself is not to adjudicate property rights. Thus, if an applicant applies for a permit without a specific document of consent, the regulatory agency is in a very difficult position. If it denies the permit, it has determined that the conveyance does not expressly grant the right to surface mine, and if it grants the permit, it is making the opposite determination. Perhaps the agency must postpone any action until the state courts rule.

The Wyoming Environmental Quality Council was placed in precisely this position under the Wyoming surface owner

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156. *Franklin Real Estate Co. v. Kerr McGee Coal Co.*, Wyoming Supreme Court Case No. 4678. Franklin Real Estate is a wholly owned subsidiary of American Electric Power Co.

157. Haughey & Gallinger, *supra* note 152.

158. *Id.*

159. Pub. L. No. 95-87, § 510(b)(6), 91 Stat. 482 (1977) (to be codified in 30 U.S.C. § 1260).

consent requirements in *Franklin Real Estate Company v. Kerr-McGee Coal Corporation*. In that situation, the surface owner contended he had not given consent and the subsurface lessee of the federal coal argued that surface mining had in fact been contemplated by the original conveyance. Thus, if a similar law had applied at that time, the decision to grant or deny the permit, in fact, adjudicates the property rights between the parties. The Conference Committee provision (subsection (c)) does not resolve the question and once again will leave the procedural problems of determining surface consent to mine in dispute.<sup>160</sup>

Additional portions of the Act provide for surface owner protection. Section 714(a) provides that the Secretary shall not enter into a lease of any federal coal deposits until the surface owner consent has been given to enter and surface mine.<sup>161</sup> Surface owner consent given prior to the enactment of the Act is deemed sufficient. However, apparently recognizing that consent may have been given prior to the passage of the Act without the knowledge that such a right existed or would exist, the statute further allows a second chance and requires the Secretary to consult with surface owners in leasing property and to allow the owner to state his preference for or against the lease. The Secretary can then consider this input in his determination as to whether or not to lease the property or place proper conditions upon that lease. For purposes of this Section, surface owner is defined narrowly to include only persons who live on the property or conducting farming or ranching on it. The definition comports with the Wyoming Environmental Quality Act definition of surface owner consent.<sup>162</sup>

The statute clearly requires surface owner consent prior to the leasing of federal coal and prior to issuance of a permit if there is private surface and private coal. A large portion of coal operations, those with previously issued federal leases and private surface owners, appear to be omitted from *any* surface owner requirements. The practical effect of prohibiting the lease of any federal coal until achieving surface owner

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160. H. CONF. REP. NO. 493, 95th Cong., 1st Sess. 105 (1977).

161. Pub. L. No. 95-87, § 714(a)-(g), 91 Stat. 525 (1977) (to be codified in 30 U.S.C. § 201).

162. WYO. STAT. § 35-11-406(b) (1977).



consent will be relatively small. Substantial amounts of federal coal have already been leased possibly sufficient to supply production demands for some time.<sup>163</sup> In addition, the federal government is currently enjoined from further leasing pursuant to *Natural Resources Defense Council v. Hughes*.<sup>164</sup>

Earlier surface owner consent provisions would have prohibited leasing of federal coal which was overlain by private surface irrespective of consent of the surface owner.<sup>165</sup> However, that approach appears to have been dismissed by Section 714(b) of the Act which requires all such federal coal to be offered for lease.<sup>166</sup> In an interesting development, Secretary of the Interior, Cecil Andrus, is apparently contemplating a policy "not to lease Federal coal in the foreseeable future where the Federal Government does not own the surface above the coal."<sup>167</sup> He has further indicated that sufficient amounts of federal coal exist where the government owns the surface, and the policy would not apply where the mining company owns the surface. Responses to this policy have expressed the concern that it is contrary to the intent of the law and would create great economic pressure on the rancher or farmer to sell out.<sup>168</sup>

The approach taken in the Act of requiring the original conveyance which severed the surface and mineral estate to have allowed surface mining is responsive to existing case law interpreting surface owner rights in private deeds.<sup>169</sup> The major question in such cases is whether the conveyance severing the mineral from the surface estate intended to include the right to obtain the mineral by a method which destroys, at least temporarily, the surface. The statute requires the specific intent of the deed or conveyance to be either unequivocally stated or found pursuant to state law. Thus the allegation of unconstitutional taking of the property of the mineral owner without compensation is not applicable to the final form of

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163. *Natural Resources Defense Council v. Hughes*, 437 F. Supp. 981, 991 (D.D.C. 1977). The case is now on appeal.

164. *Id.* at 993.

165. Haughey & Gallinger, *supra* note 152.

166. Pub. L. No. 95-87, § 714(b), 91 Stat. 525 (1977) (to be codified in 30 U.S.C. § 1304).

167. Remarks of the Honorable Cecil D. Andrus, Secretary of Interior, 4th Annual Coal Conf. and Exposition, Louisville, Ky. (Oct. 18, 1977).

168. Letter from Senator Clifford Hansen to Honorable Cecil D. Andrus, Secretary of the Interior (Nov. 11, 1977).

169. See *Smith v. Moore*, 474 P.2d 794 (Colo. 1970).

surface owner consent. The Act simply requires the conveyance to be interpreted. If the court finds the conveyance did not convey the right to surface mine, then the mineral owner is not being denied any property by being prevented from surface mining. He simply never had that right.

In the case of federal coal, the Act simply expresses the Congressional intent that, in the future, it will not dispose of its property, the mineral, without consent of the surface owner. Certainly no taking question arises in that case. The interesting question is what effect this Act will have on interpreting the original intent of Congress and the rights of surface owners over already-leased federal coal. It has been argued that the Stock-Raising Homestead Act of 1916, which granted the surface and reserved the minerals, did not intend to reserve the right to strip mine to obtain the mineral.<sup>170</sup> The Act's limitation on leasing without surface owner consent could arguably answer that question.

The Act provides additional protection to surface lessees of the federal land. Written consent from the surface lessee to enter and commence surface mining, or a bond to secure payment of damages to the surface estate, must be provided.<sup>171</sup>

In summary, the Act clearly protects the surface owner in situations where private coal has been severed from private surface. Although the manner in which the determination is made as to whether or not consent has been given is still substantially confused. Where there are severed mineral and surface estates involving federal coal and private surface, surface owner consent is required prior to leasing of the coal. The statute does not require specific consent if the federal coal has previously been leased.

#### *D. Cooperative Implementation*

As can easily be seen from reviewing the various regulatory requirements of the Act, effective implementation will require significant commitments of manpower, funds, and effort on the part of both federal and state governments. The

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170. *Franklin Real Estate Co. v. Kerr McGee Coal Co.*, *supra* note 156.

171. Pub. L. No. 95-87, § 715, 91 Stat. 525 (1977) (to be codified in 30 U.S.C. § 1305).

federal-state relationships created by the Act is unique. In most other major pieces of environmental legislation, such as the Clean Air Act and the Federal Water Pollution Control Act Amendments of 1972,<sup>172</sup> minimum standards are set by the United States Environmental Protection Agency, and a specific process is established for the total designation of the administration and enforcement of such programs to qualified state authorities. The Surface Mining Control and Reclamation Act also sets minimum environmental performance standards. However, the designation process is considerably more complex and constitutes the major weakness of the legislation. It is perhaps understandable that this weakness exists. For unlike the air and water acts, this legislation regulates federally owned surface and federally owned coal. It is for this apparent reason Congress was incapable of, or unwilling to, clearly and cleanly delegate the administration and enforcement of reclamation on federal lands.

This attitude could be based either upon the fear the states would inadequately enforce and implement the reclamation requirements on federal land or that the states would too stringently regulate reclamation, resulting in removal of a federal mineral resource from production. As discussed earlier, the attitude of the federal government in its original attempts to regulate reclamation of federal coal by regulation<sup>173</sup> was to allow the states to regulate federal coal only if such regulation did not threaten the national interest.<sup>174</sup> The states would be allowed to regulate as long as they did not unreasonably attempt to block or lock up federal coal reserves.<sup>175</sup> Apparently, this is not the intent of the present Surface Mining Reclamation and Control Act of 1977. Section 505 of that Act clearly and precisely protects existing state laws which are more stringent than federal reclamation requirements. Thus, it does not appear to be the intent of Congress to supersede or prevent the application of state law on federal coal unless it is "inconsistent" with provisions of this Act. The Section goes on further to spell out that requirements that are more stringent environmental regulations of surface coal mining operations shall not be construed to be inconsis-

172. 42 U.S.C. §§ 1857 *et seq.* (1970); 43 U.S.C. §§ 1151 *et seq.* (1970).

173. 30 C.F.R. § 211 (1976).

174. 30 C.F.R. § 211.75 (1976).

175. Bender, *supra* note 15.

tent with the Act.<sup>176</sup> The Act clearly protects the federal property by setting definable and mandatory minimum standards.<sup>177</sup> However, it does not take the additional step the prior regulations did and attempt to prohibit state laws from applying if they are more stringent.<sup>178</sup> The Act does indicate that one of its purposes is to strike a balance between the protection of the environment and the nation's need for coal.<sup>179</sup>

The statutorily imposed implementation plan is a complex, overlapping system of state programs, federal programs, and federal lands programs.

1. *State and Federal Programs.* Section 503(a) of the Act provides that each state in which there may be conducted surface coal mining operations on *non-federal* lands, over which the state wishes to assume exclusive jurisdiction, shall submit a state program to the Secretary meeting certain minimum requirements.<sup>180</sup> Thus a state program is intended to govern non-federal lands within a state boundaries on which surface coal mining operations are conducted. The term "federal lands" is defined in Section 701(4) to include mineral and surface owned by the United States.<sup>181</sup> In the western states where a combination of federal ownership of surface and coal constitutes a substantial amount of the coal lands, a state program will apply to a small percentage of actual coal mining operations.

The state program is to be submitted and approved or disapproved by the Secretary.<sup>182</sup> If the state program is denied or if a state fails to submit a state program, the Secretary shall prepare a *federal program* which will vest the Secretary with exclusive jurisdiction for the regulation and control of surface mining taking place within the state.<sup>183</sup> Whenever a federal

176. Pub. L. No. 95-87, § 505(b), 91 Stat. 473 (1977) (to be codified in 30 U.S.C. § 1255).

177. Pub. L. No. 95-87, § 515, 91 Stat. 486 (1977) (to be codified in 30 U.S.C. § 1265).

178. Pub. L. No. 95-87, § 505, 91 Stat. 473 (1977) (to be codified in 30 U.S.C. § 1255).

179. Pub. L. No. 95-87, § 102(f), 91 Stat. 448 (1977) (to be codified in 30 U.S.C. § 1202).

180. Pub. L. No. 95-87, § 503(a), 91 Stat. 470 (1977) (to be codified in 30 U.S.C. § 1253).

181. Pub. L. No. 95-87, § 701(4), 91 Stat. 516 (1977) (to be codified in 30 U.S.C. § 1291).

182. Pub. L. No. 95-87, § 503(b)(c), 91 Stat. 471 (1977) (to be codified in 30 U.S.C. § 1253).

183. Pub. L. No. 95-87, § 504(a)(3), 91 Stat. 471 (1977) (to be codified in 30 U.S.C. § 1254).

program is promulgated for a state, any statutes and regulations of that state which "interfere with the achievement of the purposes and requirements of this Act" will be preempted and superseded.<sup>184</sup> This process closely resembles the delegation under the Air and Water Acts.

2. *Federal Lands Program.* All of this seems relatively clear to this point. If a state wishes to regulate land within a state, it submits a state program. If such program is not submitted or not approved, the federal government implements a federal program governing the reclamation regulation within the state. However, on top of this relatively simple delegation process is superimposed the *federal lands program*. The federal lands program is to be established by the Secretary, pursuant to Section 523, to regulate surface coal mining operations on federal surface and coal lands.<sup>185</sup> Section 523 deserves a very close reading. This portion of the statute requires the federal lands program to be promulgated irrespective of the existence of an approved state program. If there is an approved state program, a federal lands program shall include the requirements of that program. Requirements of the federal lands program and approved state programs will be incorporated into federal leases or contracts issued by the Secretary. However, Section 523(c) provides that if a state has an approved program, it may enter into a Cooperative Agreement with the Secretary to allow state regulation of surface coal mining operations on federal lands within that state, provided it meets certain minimum requirements.<sup>186</sup> The statute clearly contemplates renegotiated Cooperative Agreements, negotiated pursuant to 30 C.F.R. 211.75 (1976), to govern during the period prior to approval of the state program. A Cooperative Agreement after approval of a state program will allow states to regulate federal lands permanently. The delegation process, after a seemingly unnecessary step, is completed. However, throughout Section 523, the Secretary's authority pursuant to the Mineral Leasing Act and his obligation to approve mining plans on federal lands are preserved.<sup>187</sup>

184. Pub. L. No. 95-87, § 504(g), 91 Stat. 472 (1977) (to be codified in 30 U.S.C. § 1254).

185. Pub. L. No. 95-87, § 701(5), 91 Stat. 516 (1977) (to be codified in 30 U.S.C. § 1291).

186. Pub. L. No. 95-87, § 523(c), 91 Stat. 510 (1977) (to be codified in 30 U.S.C. § 1273).

187. Pub. L. No. 95-87, §§ 523(a) and (c), 91 Stat. 510 (1977) (to be codified in 30 U.S.C. § 1273).

This preservation is easily understood and certainly warranted. The Secretary has extensive and important commitments to carry out pursuant to those requirements specifically relating to maximizing production of the federal mineral. However, as a result of the previously promulgated coal operating regulations, the Secretary has chosen to extend his authority pursuant to the Mineral Leasing Act, to cover reclamation requirements on federal coal.<sup>188</sup> Thus, even though the Secretary appears to be delegating the regulation of reclamation under the Act on federal lands to qualified states, both by approval of state programs and by the negotiation of Cooperative Agreements on federal lands, authority is still retained by the Secretary to actually implement reclamation requirements pursuant to the Mineral Leasing Act. It is easy to imagine an unworkable situation developing with this administrative nightmare.

Under this procedure, a state can have an approved state program for non-federal lands, a Cooperative Agreement for federal lands and thus, fully regulate reclamation within the state. At the same time the Secretary, pursuant to his authority under the Mineral Leasing Act, is imposing the same, or perhaps slightly different, requirements in federally required mine plans and leases. The ability of the state, the federal government, the operator, or any interested citizen to identify a responsible authority for enforcement and administration will be significantly hindered.

Although much of this concern may be written off to the paranoia of state governments, their fears are certainly justified after reviewing the very recently published proposed amendments to the coal operating regulations by the United States Geological Survey.<sup>189</sup> By these regulations, the Department of the Interior appears to be superimposing the United States Geological Survey, together with the Office of Surface Mining and the states, on the initial regulatory program. If regulations similar to these exist in the final program, a full delegation of authority to the states is impossible. These regulations attempt to define the term "permit" to include a mine plan required by the United States Geological Survey

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188. 30 C.F.R. § 211 (1977).

189. 42 Fed. Reg. 60890 (1977).

and to define the term "regulatory authority" to include the United States Geological Survey. Such definitions are in direct contravention of the statute.<sup>190</sup> The regulations apply the interim performance standards to all federal lands and require operators to submit mine plans containing these requirements to the Geological Survey. Thus, in addition to the already confused regulatory framework, the Department of the Interior now adds a third administrative body to the fray.

Apparently, the reason for the adoption by the Department of the Interior of these regulations was to insure uniform requirements be applied to all federal lands. The statute requires all operators "previously regulated by a state" to comply immediately with the interim standards. Therefore, if an operator on federal lands was previously not subject to state regulation, that operator could avoid compliance until sometime in the future when all requirements of the law applied.

These regulations, at the time of publication of this article, are proposed only. Extensive adverse comment has been given objecting to the promulgation.<sup>191</sup> Hopefully, the Department of the Interior will be successful in getting its administrative house in order without the creation, by these regulations, of an unnecessary confusion.

In addition to the difficulty caused by the substantive requirements of these regulations, Interior has further complicated the picture by introducing the Geological Survey into the role specifically reserved for the new Office of Surface Mining. It is essential not only to delineate the role of the federal agency in the implementation of the Act, but to delineate *which* agency is responsible to carry out that role.

Despite the administrative problems in implementing the Act on federal lands, it should be recognized that the Act itself contains the necessary tools to achieve a solution. Section 523(c) specifically authorizes Cooperative Agreements with the states for the regulation of reclamation on federal

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190. Pub. L. No. 95-87, §§ 701(15) and (22), 91 Stat. 518 (1977) (to be codified in 30 U.S.C. § 1291).

191. Testimony of Governor Ed Herschler, Governor of State of Wyoming, before Energy and Environmental Subcommittee, Interior and Insular Affairs Committee, House of Representatives, Oversight Hearing on Surface Mining Control and Reclamation Act of 1977, Jan. 19, 1977.

lands. Present Cooperative Agreements, and presumably future agreements, govern both permit approval and enforcement, the major elements of regulation.<sup>192</sup>

During the initial regulatory procedure, the Act gives the permit approval authority to the states requiring certain minimum standards to be met.<sup>193</sup> After approval of a state program, the state regulatory authority shall process the applications and approve or deny the permit.<sup>194</sup>

These specific provisions of the statute, and many others, clearly indicate congressional intent to encourage states to assume the leadership role in implementation of the permit and reclamation requirements of the statute. If that is to be effectively done, and if states are to have any incentive to assume such a program, the Cooperative Agreements must provide limitations on the Secretary's role of the approval and disapproval of federal mine plans pursuant to the Mineral Leasing Act. Numerous production-related requirements are necessary in those plans and are not related to reclamation of the disturbed areas. Any reference to reclamation requirements which were created by regulation and not statutorily mandated should be handled by the qualified states with approved programs through the permit process provided under the Surface Mining Control and Reclamation Act of 1977. Any review of the reclamation requirements by the Secretary or his designee should be limited to a determination that the minimum standards are being met.

The federal government and its lands are sufficiently protected from any failure on the part of the state to implement and enforce provisions of the Act. Section 504(b) specifically addresses inadequate state enforcement and allows for federal intervention. A Cooperative Agreement must also include all requirements of the Act. Present agreements allow for termination if the requirements are not met. Thus, if a state was failing to comply with the Act, the Agreement could be terminated and federal enforcement ensue.

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192. 42 Fed. Reg. 3645 (1977); Article I, III, IV, V and VI, Cooperative Agreement.

193. Pub. L. No. 95-87, § 502(b), 91 Stat. 468 (1977) (to be codified in 30 U.S.C. § 1252).

194. Pub. L. No. 95-87, § 502(d), 91 Stat. 469 (1977) (to be codified in 30 U.S.C. § 1252).



Secondly, the Act provides numerous avenues for avoiding administrative duality in enforcement. Section 502(e) provides for federal enforcement as *necessary*. In situations where the states are adequately and efficiently enforcing the requirements of both the initial regulatory program and the final performance standards, federal enforcement is not necessary. Federal inspectors are required only if the state has reported consecutive violations or the standards are being violated. In addition, Section 101(f) specifically sets out as a Congressional finding that "because of the diversity in terrain, climate, biologic, chemical, and other physical conditions in areas subject to mining operations, the primary governmental responsibility for developing, authorizing, issuing, and *enforcing* regulations for surface mining and reclamation operations subject to this Act should rest with the States."<sup>195</sup> The Congress also clearly provided for substantial funding support for state programs in the administration and enforcement of the requirements of this Act.<sup>196</sup> The purpose of those grants are clearly "developing, administering, and enforcing State programs." Further, "[i]f a State elects to regulate surface coal mining and reclamation operations on *Federal lands* the Secretary may increase the amount of the annual grants."<sup>197</sup>

The regulations adopted for the interim regulatory program continue the present situation in which the states are responsible for issuing permits, inspecting and enforcing on federal lands within the individual states.<sup>198</sup> The previously negotiated Cooperative Agreements specifically provide for state enforcement of reclamation laws.<sup>199</sup>

Thus, it is strongly recommended that the Department of the Interior make a sincere effort to negotiate meaningful Cooperative Agreements that will, in fact, allow the delegation of reclamation on federal lands, and on all lands, to qualified state regulatory authorities. Any attempt at partial delegation and dual enforcement will serve to benefit neither the

195. Pub. L. No. 95-87, § 101(f), 91 Stat. 447 (to be codified in 30 U.S.C. § 1201) (emphasis added).

196. Pub. L. No. 95-87, § 705, 91 Stat. 520 (1977) (to be codified in 30 U.S.C. § 1295).

197. Pub. L. No. 95-87, § 705(c), 91 Stat. 521 (1977) (to be codified in 30 U.S.C. § 1295) (emphasis added).

198. 42 Fed. Reg. 62678 (1977) (to be codified in 30 C.F.R. § 710.4 (b)).

199. 42 Fed. Reg. 3644 (1977) (to be codified in 30 C.F.R. § 211.77), Articles 1, 5, 6 and 7 of the Cooperative Agreement.

operator, the governments involved, nor interested citizens attempting to deal with the system. Ample authority exists for such a delegation.

The existence of vast amounts of federal coal and federal surface in the western states, and the checkerboard arrangement by which federal land is interspersed with private and state land, demand that state and federal governments make every effort to develop a reasonable and cohesive implementation program under this Act without duality and interagency jealousies. It should be emphasized that efficient implementation of this program will serve to benefit both the operators and the interested citizens involved in the process. It is much easier for the governmental entities involved to avoid strict compliance with the statute when the enforcement authorities are not identifiable.

#### IV. DESIGNATION OF LANDS UNSUITABLE FOR SURFACE COAL MINING

A significant and potentially far-reaching provision of the Act is Section 522 which requires both the state and federal governments to establish a process by which they may designate specific areas unsuitable for surface coal mining operations. The section specifically sets out separate procedures for both federal and state government.<sup>200</sup> The intent of this Section is to require some type of a data gathering, planning process to enable objective decisions to be made prior to a proposed mine operation.<sup>201</sup> The statute provides that a state *shall* designate areas if it determines that reclamation in such areas is not technologically or economically feasible. It is arguable whether the permit process itself accomplishes the same end because a permit is denied if reclamation is not possible. However, Congress clearly found the permit process was not sufficient and an area by area study was necessary.<sup>202</sup>

It further provides that permissive designation in areas where operations may be incompatible with land use plans, affect fragile or historic lands, affect renewable resource lands, affect national hazard lands. It should be noted that this lan-

200. Pub. L. No. 95-87, §§ 522(a)(1) and (b), 91 Stat. 508 (1977) (to be codified in 30 U.S.C. § 1272).

201. H.R. REP. NO. 218, 95th Cong., 1st Sess. 95 (1977).

202. *Id.*

guage is very similar to that used in many designations for critical areas in the area of land use planning.<sup>203</sup> The inventory or data-gathering process is arguably necessary for a site specific designation.<sup>204</sup>

A mining operation being conducted prior to the passage of the Act or under a permit issued pursuant to the Act cannot be precluded as a result of a designation.<sup>205</sup> In addition, if an operator made "substantial legal and financial commitments" on a project prior to January 4, 1977, a designation will not prevent such operation.<sup>206</sup> On federal lands, the Secretary of the Interior is required to conduct a review and withdraw "unsuitable" designated lands from leasing. However, he may allow coal mining on lands under review.<sup>207</sup> It is not clear what the result will be if a pre-existing coal lease lies within an area designated unsuitable for coal mining. Section 510, however, appears to require the denial of a mining permit to any operation in a designated area if the "substantial legal and financial commitment" exemption does not apply.<sup>208</sup>

Although the Act regulates only coal mining, Section 601 establishes a procedure for designating federal lands unsuitable for "noncoal mining".<sup>209</sup> Federal land can be so designated if it is predominantly urban or suburban and used for residential purposes or if mining on the federal land would adversely impact residential lands.<sup>210</sup> The Act further provides that "valid existing rights shall be preserved and not affected by the designation."<sup>211</sup>

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203. Wyoming Land Use Planning Study Commission Report and Model National Land Use Planning Legislation.

204. *AMAX v. Environmental Quality Council*, Docket No. 10751, 5th Judicial District of Wyo., raises the issue of whether or not such an inventory and data base is necessary as a matter of law prior to any specific designation. In that case, the parties proposing the designation were doing so in response to plans for a major copper mine in the area. However, the designation was not based upon any statewide inventory.

205. Pub. L. No. 95-87, § 522(a)(6), 91 Stat. 508 (1977) (to be codified in 30 U.S.C. § 1272).

206. Pub. L. No. 95-87, § 522(a)(6), 91 Stat. 508 (1977) (to be codified in 30 U.S.C. § 1272).

207. Pub. L. No. 95-87, § 522(b), 91 Stat. 508 (1977) (to be codified in 30 U.S.C. § 1272).

208. Pub. L. No. 95-87, § 510(b)(4), 91 Stat. 481 (1977) (to be codified in 30 U.S.C. § 1260).

209. Pub. L. No. 95-87, § 601(a), 91 Stat. 515 (1977) (to be codified in 30 U.S.C. § 1281).

210. Pub. L. No. 95-87, § 601(b), 91 Stat. 515 (1977) (to be codified in 30 U.S.C. § 1281).

211. Pub. L. No. 95-87, § 601(d), 91 Stat. 515 (1977) (to be codified in 30 U.S.C. § 1281). It should be noted that designations, as well as many other provisions of the

## V. CONCLUSION

The passage of the Surface Mining Control and Reclamation Act of 1977 brought strong reactions from both the mining industry and environmental concerns. The Act itself, perhaps, does not accomplish as much as the former feared and the latter hoped. It does establish as a federal policy that all coal mined lands must be returned to a productive use. Significantly, it also provides additional protection to the precious groundwater systems of the West. The Act was unsuccessful, at least on the surface, in creating an efficient administrative procedure by which it should be implemented. Thus, the implementation and the success of the Act depend upon those administrative entities who have the awesome responsibility of implementation. The first year of the Act's history, during which state programs are submitted and approved or disapproved, federal programs are developed, federal land programs are developed, and Cooperative Agreements are negotiated, will foretell the future manner in which the Act will be implemented. Successful implementation is necessary to attain the laudable goals of uniform mandatory reclamation.

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Act will not apply to Indian lands. Congress instead directed the Secretary of the Interior to study regulation of surface mining on Indian lands and develop legislation designed to allow the Indian tribes full authority over reclamation. However, federal leases issued on Indian lands must comply with all requirements of the Act and other operations must comply within a specified time frame. Pub. L. No. 95-87, § 710, 91 Stat. 523 (1977) (to be codified in 30 U.S.C. § 1300).