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## The Abandoned Mine Reclamation Fund— A View from the West

*John Davison Collins\**

*Congress created the Abandoned Mine Reclamation Fund (AML) in 1977 as part of the Surface Mining Control and Reclamation Act. The AML is funded by a special tax on coal mining. About one-third of AML fees will be paid by coal operators in the western states.*

*In this article, the author examines the disbursement of AML funds under the Reagan Administration. He describes how the western state governments expected a generous portion of the AML funds for coal and non-coal reclamation, as well as community impact assistance projects in their states. Finally, the author shows how the Office of Surface Mining has largely frustrated the western expectations through its interpretation of the AML disbursement priorities.*

One of the larger federal public works programs in the 1980's is the Office of Surface Mining's Abandoned Mine Land (AML) program.<sup>1</sup> From the late 1970's through the early 1990's, when the program is scheduled to end, over three billion dollars could be spent repairing the damage of past mining.<sup>2</sup> The Office of Surface Mining (OSM) has indicated that the

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1. AML has become the most commonly used acronym for the program. The actual enabling legislation refers only to the Abandoned Mine Reclamation Fund. Pub.L. 95-87, §§ 401-413, 30 U.S.C. §§ 1231-1234 (1982).

2. OFFICE OF SURFACE MINING, DEP'T OF THE INTERIOR, DRAFT OSM-EIS-11, FUNDING FOR STATE AND INDIAN RECLAMATION PROGRAM GRANTS UNDER TITLE IV OF THE SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977, at III-3, III-4 (1983) [hereinafter cited as DRAFT OSM-EIS-11]. In contrast, Congress first set aside \$1.6 billion for the Superfund for the clean-up of toxic wastes. 42 U.S.C.A. §§ 9601-9657 (West 1980 Laws Special Pamphlet).

six western coal-mining states can expect about \$560 million of this money.<sup>3</sup> These states, however, would like a share more nearly equal to the fees that will be collected in their states.<sup>4</sup>

The question of how this Abandoned Mine Reclamation money should be divided is just one of several AML issues which have continued to bedevil relations between the Office of Surface Mining and the western states. The western ire directed towards OSM has come as a surprise to some. During House appropriation hearings for fiscal year 1984, the long list of western complaints about OSM and the AML program brought the following bemused inquiry: "I thought Watt was going to take care of the West. That was the idea we in the East got. Is he not taking care of you out there?"<sup>5</sup> Complaints from the west have continued since Interior Secretary Watt left office.

#### THE ABANDONED MINE RECLAMATION FUND

The "Abandoned Mine Reclamation Fund" was established in title IV of the 1977 Surface Mining Control and Reclamation Act (SMCRA)—the federal strip-mining law. The Governor of Wyoming, the state which is the nation's largest producer of strip-mined coal, has stated that "the abandoned mine lands program is not a regulatory program imposed by the Department [of the Interior] upon the States. It is really the carrot which supposedly makes the title V regulatory program attractive."<sup>6</sup> Support for this characterization is found in the Act itself. Congress clearly forbade any direct funding of a state's AML program until a state had brought its laws regulating strip mining into conformity with the new federal regulations contained in title V of the Act.<sup>7</sup>

During the Carter Administration the AML program attracted relatively little attention or controversy. It was only in the final months of the Carter Administration that a significant number of coal-mining

3. OFFICE OF SURFACE MINING, DEP'T OF THE INTERIOR, APPORTIONMENT OF ABANDONED MINE LAND RECLAMATION FUNDS, (1983) [hereinafter cited as OSM, APPORTIONMENT OF AML FUNDS]. See also *infra* note 103.

Conforming to general usage, the western coal-mining states in this article are Colorado, Montana, New Mexico, North Dakota, Utah, and Wyoming. Alaska has been excluded. The State of Washington and the Crow, Hopi, and Navajo Tribes also have coal mining but do not yet have state or tribal AML programs. Other western states and Indian reservations may have coal reserves but do not have active coal mines. See also *infra* note 17.

4. See *infra* text accompanying notes 98-128.

5. *Appropriations for 1984, Part 13: Hearings Before the Subcomm. on Interior of the House Comm. on Appropriations*, 98th Cong., 1st Sess. 440 (1983) (comment by Rep. Murtha of Pa.) [hereinafter cited as *Appropriations Hearings*].

6. *Fiscal Year 1984 Budget Request for the Abandoned Mine Reclamation Fund: Hearings Before the Subcomm. on Energy and the Environment of the House Comm. on Interior and Insular Affairs*, 98th Cong. 1st Sess. 7 (1983) (statement of Governor Herschler of Wyo.) [hereinafter cited as *AML Budget Hearings*].

7. 30 U.S.C. § 1235(c) (1982). Prior to approval of a state's new regulatory program, however, it could receive AML funds through a cooperative agreement with OSM for a specific project. Also, OSM could and did contract directly for work on emergency and high priority AML projects. 30 U.S.C. §§ 1232(g)(3), 1240, 1242 (1982).

states received federal approval for their regulatory programs.<sup>8</sup> Only then were they eligible to submit a state AML program for approval and funding. In any case, most states had been too busy battling OSM over the regulations for ongoing mining to give much thought to abandoned mine lands.<sup>9</sup> In their frustration with the Carter Administration, many of the coal producing states in the East and Midwest seemed even to reject the lure of AML funds. Instead of resubmitting their regulatory programs to the Carter Administration after disapproval, they sought injunctions against the enforcement of OSM permanent regulations in sympathetic state courts.<sup>10</sup>

Under the Reagan Presidency, dramatic changes in OSM's relations with the states appeared in the offing.<sup>11</sup> The conservative Heritage Foundation accused the Office of Surface Mining of "zealotry," and advised President Reagan "to make an example of OSM and its regulatory excesses."<sup>12</sup> Interior Secretary James Watt soon initiated a controversial reorganization of OSM,<sup>13</sup> as well as a review and rewriting of the regulations promulgated by the Office of Surface Mining.<sup>14</sup> According to James

8. No state had its regulatory program approved until 1980. A total of sixteen states, including all six of the western coal-mining states, had received program approval by the time President Carter left office in January, 1981. Most approvals were conditional, and the conditions had to be satisfied by a specified date. Time extensions have proved relatively easy to obtain. Barry, *The Surface Mining Control and Reclamation Act of 1977 and the Office of Surface Mining: Moving Targets or Immovable Objects?* 27 ROCKY MTN. MIN. L. INST. 169, 230-72 (1982).

9. G. A. O., ISSUES SURROUNDING THE SURFACE MINING CONTROL AND RECLAMATION ACT, No. CED 79-83 (1979) [hereinafter cited as G.A.O., SMCRA ISSUES]; Edgmon and Menzel, *The Regulation of Coal Surface Mining in a Federal System*, 21 NAT. RESOURCES J. 245, 246-47, 254-65 (1981); Barry, *supra* note 8, at 191-209, 234-72, 325-33; Menzel, *Implementation of the Federal Surface Mining Control and Reclamation Act of 1977*, PUB. AD. REV., Mar.-April 1981, 212, 214-18; Abrams, *The Rockefeller Amendment: Its Origins, Its Effect and Its Future*, 82 W. VA. L. REV., 1241, 1243-50, 1253, 1254 (1980). See also J.D. Collins, *Strip Poker: Negotiations Between Wyoming and the Federal Office of Surface Mining, in Politics and Public Policy in Wyoming—Some Recent Research* (April, 1984) (Gov't Research Bureau, Dep't of Political Science, Univ. of Wyo.).

10. The Surface Mining Act allowed federal funding, as well as state interim enforcement, to continue for up to a year if "any court of competent jurisdiction" issued an injunction against the permanent OSM regulations. 30 U.S.C. § 1253 (d) (1982). See also Barry, *supra* note 8, at 303-06; *Implementation of the Surface Mining Control and Reclamation Act of 1977: Oversight Hearings Before the Subcomm. on Energy and the Environment of the House Comm. on Interior and Insular Affairs*, 97th Cong., 1st Sess. 40, 48 (1981) [hereinafter cited as *Implementation Hearings*].

11. Many of these promised changes are discussed in an article co-authored by President Reagan's first Director of OSM, James R. Harris, who served from 1981 until March, 1984. Harris & Close, *Redefining the State Regulatory Role*, 12 ENVTL. L. 921 (1982).

12. Terrell, *The Department of the Interior*, in MANDATE FOR LEADERSHIP 345, 346 (C. Heatherly ed. 1981).

13. *Reorganization of the Office of Surface Mining: Oversight Hearing Before the Subcomm. on Energy and the Environment of the House Comm. on Interior and Insular Affairs*, 97th Cong., 1st Sess. *passim* (1981) [hereinafter cited as *Reorganization Hearing*]; R. ARNOLD, AT THE EYE OF THE STORM: JAMES WATT AND THE ENVIRONMENTALISTS 168-71 (1982).

14. OFFICE OF SURFACE MINING, DEP'T OF THE INTERIOR, FINAL OSM-EIS-1 SUPPLEMENT, PROPOSED REVISIONS TO THE PERMANENT PROGRAM REGULATIONS (1983). See also Hoch, *Regulatory Revisions to the Surface Mining Control and Reclamation Act: An Exercise in Administrative Legislation?*, 31 U. KAN. L. REV. 279 (1983); Rasnic, *Federally Required Restoration of Surface-Mined Property: Impasse Between the Coal Industry and the En-*

Harris, the new Director of OSM, the reorganization of OSM "was designed to allow States to control their own mining and reclamation programs as the law intended."<sup>15</sup> States were also encouraged to resubmit regulatory programs to OSM that had been rejected by the Carter Administration.<sup>16</sup> By the summer of 1982 all coal-mining states, with the exception of Alaska, had received federal approval for their state coal mining regulations.<sup>17</sup> If the Abandoned Mine Reclamation Fund was the carrot, the payoff for an acceptable state regulatory program, then it appeared that the coal-mining states were ready for their reward.

### *A Master Plan To Achieve Reclamation*

Congress, of course, intended the Abandoned Mine Reclamation Fund to be much more than a three billion dollar lure with which to persuade the states to change their strip-mining regulations. Those who supported the Reclamation Fund during the congressional debates of the 1970's, felt it was a necessary part of a two-part program to save the nation from the ravages of coal mining.<sup>18</sup>

One part of this plan dealt with lands mined for coal *after* mid-1977. All such lands would be protected by the federal Surface Mining Act,<sup>19</sup> to be administered by the states in cooperation with the Office of Surface Mining.<sup>20</sup> Title V of the Act set minimum federal standards to govern surface coal mining and reclamation, as well as the surface effects of underground coal mining.<sup>21</sup> Lengthy OSM regulations translated these

*Environmentally Concerned*, 23 NAT. RESOURCES J. 335, 345-48 (1983); Menzel, *Redirecting the Implementation of a Law: The Reagan Administration and Coal Surface Mining Regulation*, PUB. AD. REV., Sept.-Oct. 1983, at 411, 414, 415.

15. 1982 OSM ANN. REP. 1 (1983). *see also* *Reorganization Hearing*, *supra* note 13, at 12-14, 18 (statement of James Watt); *see also* *Implementation Hearings*, *supra* note 10, at 7, 8 (statement by James Harris, Director OSM).

16. *Implementation Hearings*, *supra* note 10, at 6, 7, 28, 172, 178 (testimony by James Harris, Director OSM); *Reorganization Hearing*, *supra* note 13, at 14 (statement by James Watt); 1982 OSM ANN. REP. 1, 13, 27 (1983).

17. Alaska's program received federal approval in 1983. This brought the total of approved regulatory programs to twenty-five. Georgia and the State of Washington so far have chosen not to apply for state regulatory primacy. In 1984, after OSM took over part of its program, the state of Tennessee decided to return state primacy to OSM. OSM therefore will create a federal regulatory program for these states and for the states with coal reserves but with no active coal mines. The Navajo, Hopi, and Crow Tribes have indicated a desire for regulatory primacy, but must await federal legislation, authorized under SMCRA section 710, 30 U.S.C. § 1300 (1982), to allow Indian tribes this option.

18. H.R. REP. NO. 218, 95th Cong., 1st Sess. 135 (1977), *reprinted in* 1977 U.S. CODE CONG. & AD. NEWS 593, 595; S. REP. NO. 128, 95th Cong., 1st Sess. 65 (1977). *See also* *AML Budget Hearing*, *supra* note 6, at 1 (comment by Rep. Morris K. Udall of Ariz.). *But cf. infra* note 30 (where another reason for the Reclamation Fund is discussed).

19. 30 U.S.C. §§ 1201-1328 (1982). General introductory articles on the Act include: Harvey, *Paradise Regained? Surface Mining Control and Reclamation Act of 1977*, 15 HOUS. L. REV. 1147 (1978); McDaniel, *The Surface Mining Control and Reclamation Act of 1977: An Analysis*, 2 HARV. ENVTL. L. REV. 288 (1978); Statutory Comment, *The Surface Mining Control and Reclamation Act of 1977: Its Background and Its Effects*, 25 N.Y.L. SCH. L. REV. 953 (1980); Edgmon and Menzel, *supra* note 9; Barry, *supra* note 8; Hoch, *supra* note 14; Rasnic, *supra* note 14; Comment, *Recent Developments Under the Surface Mining Control and Reclamation Act of 1977*, 85 W. VA. L. REV. 829 (1982-83).

20. *See* 30 U.S.C. §§ 1201(f), 1211(c)(9), 1211(c)(12) (1982).

21. 30 U.S.C. §§ 1251-1272 (1982).

standards into an enforceable code.<sup>22</sup> A state could continue to regulate coal mining and reclamation on its lands—even on federally owned land—if it changed its laws and regulations to conform to the Act as interpreted in OSM regulations.<sup>23</sup>

The second part of this master plan involved lands and waters damaged by coal mining which had been abandoned or inadequately reclaimed prior to the passage of SMCRA, and for which there was no continuing legal responsibility for reclamation.<sup>24</sup> These land and water resources would be reclaimed using fees collected from current coal-mining operations. For the period from 1977 through 1992, coal companies would pay fees of thirty-five cents per ton for surface mined coal; fifteen cents per ton for coal mined underground; or ten percent of the value of the coal at the mine, whichever was less.<sup>25</sup> Lignite (soft coal) operations would be charged a fee of ten cents per ton, or two percent of the value.<sup>26</sup> These fees would provide the major revenue for a "trust fund" to be "created on the books of the Treasury of the United States" and "to be known as the Abandoned Mine Reclamation Fund."<sup>27</sup> The Office of Surface Mining has estimated that total collections over this fifteen-year period will surpass \$3.3 billion.<sup>28</sup> As of the end of fiscal year 1983, \$1.1 billion in fees had already been collected by OSM.<sup>29</sup>

### *Western Fears*

As westerners were quick to point out, there was an obvious fairness problem if fees paid by current mining operations, especially strip mining operations, funded abandoned mine reclamation.<sup>30</sup> The most serious abandoned coal-mine problems were in the East and Midwest, while much of the new growth predicted for the coal industry—the source of AML

22. 30 C.F.R. §§ 700.1-890.23 (1984).

23. See 30 U.S.C. §§ 1201(f), 1253, 1273 (1982).

24. 30 U.S.C. § 1234 (1982).

In *Yates v. Island Creek Coal Co.*, the United States District Court held that SMCRA did not create an affirmative duty for operators to reclaim land strip-mined before the effective date of the Act where such responsibility did not already exist under state or other federal laws. 485 F. Supp. 995 (W.D. Va. 1980).

25. 30 U.S.C. § 1232(a) (1982). See also Reese, *The Reclamation Fee on Coal Production: An Example of Federal Regulatory Taxation*, 32 OIL & GAS TAX Q. 69 (1983).

26. 30 U.S.C. § 1232(a) (1982).

27. 30 U.S.C. § 1231(a) (1982).

28. DRAFT OSM-EIS-11, *supra* note 2, at III-3, III-4.

29. Estimates of fee collections for fiscal years 1984 and 1985 are \$207.2 million and \$218.6 million respectively. This would bring total collections at the end of fiscal year 1985 to \$1.5 billion. OFFICE OF SURFACE MINING, DEP'T OF THE INTERIOR, BUDGET JUSTIFICATIONS, F.Y. 1985, at OSM-90 (1984) [hereinafter cited as OSM 1985 BUDGET JUSTIFICATIONS].

30. Comment, *supra* note 19, at 982. Indeed, Viator argues that the idea for the Abandoned Mine Fund came out of an attempt to levy an unequal tax on the surface coal-mining industry for the express purpose of slowing the shift to western strip-mined coal. R. VIATOR, ENVIRONMENTAL POLITICS AND THE COAL COALITION 101, 102, 109, 115 (1980). It should be noted that not all western coal is subject to the higher AML fee from surface mine production. Currently all of Utah's coal is produced from underground mines, as is about one-third of Colorado's. All of North Dakota's coal is lignite which also has a lower AML fee.

funds—would be in the strip mines of the west.<sup>31</sup> By OSM's own estimates, the coal industry in Wyoming will be the largest contributor to the AML fund, and Montana's coal industry the fourth largest.<sup>32</sup> Of the twenty-five states and three Indian tribes with currently active coal mines, OSM estimates that the west's six coal-mining states will produce over a billion dollars in AML collections, about one-third of the total.<sup>33</sup> These estimates show that the Wyoming coal industry will pay \$536.8 million; Montana, \$247.5 million; Colorado, \$103.3 million; New Mexico, \$82.7 million; North Dakota, \$52.7 million; and Utah, \$39.1 million.<sup>34</sup>

Western fears that most of the benefits from these fees would go to reclamation work in Appalachia were answered in several ways by the Surface Mining Act. First, and foremost, SMCRA specifically mandated that for states with approved state regulatory and approved state reclamation programs, "fifty per centum of the funds collected annually in any State or Indian reservation shall be allocated to that State or Indian reservation. . . ."<sup>35</sup> The balance could be spent in any state at the discretion of the Secretary of the Interior.<sup>36</sup> The distinction between these two fifty percent shares, the states' share and the Secretarial share, has become important in later disputes surrounding AML funds.

The West also benefitted from provisions in SMCRA which allowed AML funds to be spent on more than just abandoned coal mine reclamation. Coal, and electricity produced from coal, have only recently become major exports from the West. In the past, far more western land was damaged from the mining of other minerals than from coal mining.<sup>37</sup>

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31. For example, the House Report on SMCRA showed that only three percent of the land disturbed by coal surface mining, for which there was no provision for reclamation, was found in the six western states of Colorado, Montana, New Mexico, North Dakota, Utah and Wyoming. These same six states, however, were shown to contain fifty-eight percent of "available strippable reserves" of coal. H.R. REP. NO. 218, 95th Cong., 1st Sess. 73-76 (1977), reprinted in 1977 U.S. CODE CONG. & AD. NEWS 593. See also S. REP. NO. 128, 95th Cong., 1st Sess. 66 (1977).

More recent studies confirm the large disparity between East and West in coal-related reclamation problems. See W. JOHNSON & G. MILLER, ABANDONED COAL-MINED LANDS—NATURE, EXTENT, AND COST OF RECLAMATION, U.S. BUREAU OF MINES *passim* (1979); DRAFT OSM-EIS-11, *supra* note 2, at III-15 to III-62, IV-37, IV-50.

32. DRAFT OSM-EIS-11, *supra* note 2, at III-3.

33. *Id.*

34. *Id.*

35. 30 U.S.C. § 1232(g)(2) (1982).

Montana's Senator Melcher stated: "[I]t was my amendment which was supported and cosponsored by the then-Congressman from Wyoming that set up that half of the money to be reserved for those States and Indian tribes where coal mining was ongoing. . . ." *Abandoned Mine Reclamation Fund: Hearing Before the Subcomm. on Energy and Mineral Resources of the Senate Comm. on Energy and Natural Resources*, 98th Cong., 1st Sess. 40 (1983) [hereinafter cited as *AML Hearing*].

36. 30 U.S.C. § 1232(g)(3) (1982).

37. For example, Johnson and Paone show that of the land used for mining in the United States from 1930 until 1980, mining for materials and minerals *other than coal* accounted for ninety-six percent of the acreage mined in Utah; seventy-seven percent in New Mexico; seventy-five percent in Colorado; forty percent in Wyoming; and twenty percent in North Dakota. They estimate that nationally seventy-five percent of the land used for coal mining was reclaimed, compared to eight percent and twenty-seven percent respectively for areas

Section 409 of the Surface Mining Act spoke to this problem.<sup>38</sup> This section allowed Abandoned Mine Reclamation funds to be used for reclamation of lands damaged by "any previous mining operation," not just by coal mining.<sup>39</sup> There were, however, some restrictions on the use of Fund monies for non-coal reclamation. Monies for non-coal reclamation had to be requested by the governor of the state involved, and they could come only from the state share, not the Secretarial share.<sup>40</sup> Also, coal-related projects had to come before non-coal reclamation, except—and this has become a very controversial exception—for those non-coal reclamation projects "relating to the protection of the public health or safety."<sup>41</sup>

Another important provision in SMCRA was directed at a particular western problem. AML funds could be used "for construction of specific public facilities in communities impacted by coal development."<sup>42</sup> As a lower priority to reclamation of coal-mined land, the Act already allowed monies to be spent on public facilities which had been damaged by coal mining.<sup>43</sup> The impact provision differed, however, in that it dealt with the need for new or improved public facilities. Specifically it addressed the need for such facilities in communities facing rapid population growth caused by coal development.<sup>44</sup> Many energy boom towns in the West were suffering from just such a problem when the Surface Mining Act was passed in 1977.<sup>45</sup>

The impact provision, like the pro-West provision permitting non-coal reclamation, contained several restrictions.<sup>46</sup> The most important of these was that state-share AML money could be spent for public facilities in boom areas only after the "Governor of a state . . . certifies that [the] objectives of the fund set forth in sections 403 [coal projects] and 409 [non-coal reclamation] have been achieved."<sup>47</sup>

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affected by metal and nonmetal mining operations. W. JOHNSON & J. PAONE, *LAND UTILIZATION AND RECLAMATION IN THE MINING INDUSTRY, 1930-1980*, U.S. BUREAU OF MINES INFORMATION CIRCULAR No. 8862, at 12, 16-17 (1982). See also *infra* text accompanying notes 52, 60-61, 67, 69, 70.

38. Surface Mining Control and Reclamation Act § 409, 30 U.S.C. § 1239 (1982).

39. Surface Mining Control and Reclamation Act § 409(a), 30 U.S.C. § 1239(a) (1982). The Conference Report for SMCRA states: "The section [409] relates to non-coal mine reclamation of abandoned or orphan lands." H.R. REP. No. 493, 95th Cong., 1st Sess. 100 (1977).

40. 30 U.S.C. § 1239(a), (b) (1982).

41. 30 U.S.C. § 1239(c) (1982).

42. 30 U.S.C. § 1232(g)(2) (1982).

43. 30 U.S.C. § 1233(5) (1982).

44. President Ford had raised objections to an earlier version of this impact provision in explaining his veto of the 1974 Surface Mining Act. He felt it would duplicate other governmental assistance to energy boom towns. Nevertheless, a similar provision was included in the 1975 Surface Mining Act, which President Ford also vetoed. Statutory Comment, *supra* note 19, at 971-72.

45. See J. GILMORE & M. DUFF, *BOOM TOWN GROWTH MANAGEMENT: A CASE STUDY OF ROCK SPRINGS-GREEN RIVER, WYOMING* (1975); see Binder, *Strip Mining, The West and the Nation*, 12 *LAND & WATER L. REV.* 1, 11-13 (1977).

46. 30 U.S.C. § 1232(g)(2)(i), (ii), (iii) (1982).

47. 30 U.S.C. § 1232(g)(2)(i) (1982).



## AML FUNDS: WESTERN EXPECTATIONS

Despite the restrictions on the use of AML funds for non-coal reclamation and impact assistance, Montana and Wyoming both showed an early interest in just such projects.

*Non-Coal Projects in Montana*

Montana's first major request to the Reagan Administration for state share AML funds occurred in January, 1982, when it requested \$8.6 million to reclaim eighteen abandoned mines.<sup>48</sup> Thirteen of the projects, accounting for \$5.3 million, were to reclaim abandoned coal mines. The remaining \$3.3 million was to fund five non-coal mine reclamation projects.<sup>49</sup> As required by SMCRA,<sup>50</sup> Governor Schwinden attested that the non-coal mines "constitute a hazard to the public health and safety and have generated considerable public concern."<sup>51</sup>

All five of the Montana non-coal projects were intended to arrest ground and surface water pollution from inactive placer and hardrock mines (gold, silver, lead, zinc, and copper).<sup>52</sup> Waste materials from the mines and from associated milling and smelting operations often had been dumped in gulches and creek bottoms.<sup>53</sup> Once exposed to the air and moisture, the sulfide minerals in this waste, and in the mines themselves, had decomposed to produce sulfuric acid. This produced what is known as acid mine drainage. Toxic heavy metals were also readily dissolved in these acid seeps, producing a second water contaminant. Finally, sediment and mud could be swept from the waste piles during spring runoff to smother stream life in the drainages involved.<sup>54</sup>

*Wyoming's Interest in Impact Assistance*

Wyoming did not submit its state AML program for federal approval until April, 1982. One reason for this delay was that much of the previous year had been spent holding community meetings in areas impacted by coal development.<sup>55</sup> At the meetings, the Wyoming Land Quality Division gathered requests for new public facilities.

48. Discussed in a letter from Ted Schwinden, Governor of Montana, to Senator Max Baucus (Dec. 23, 1982), *reprinted in AML Hearing, supra note 35*, at 69, 70.

49. *Id.*

50. *See supra* notes 40, 41 and accompanying text.

51. Letter from Ted Schwinden, Governor of Montana, to Murray Smith, Director, Casper, Wyo. OSM Office (Jan. 18, 1982), *reprinted in AML Hearing, supra note 35*, at 80.

52. These five non-coal projects are described in the letter from Steven Pilcher, Chief, Water Quality Bureau, Montana Dep't of Health and Environmental Sciences, to Bill Thomas, OSM, Wyoming State Office (June 23, 1982), *reprinted in AML Hearing, supra note 35*, at 107-09. *See also id.* at 67-136.

53. A good explanation of this problem is found in Walther, *Anthology of a Stream: Prickly Pear Creek*, MONTANA ENVIRONMENTAL SCIENCES, n.d., at 15, *reprinted in AML Hearing, supra note 35*, at 97-101. *See also id.* at 67-136.

54. OSM's eventual response to Montana's request for these five non-coal projects is discussed *infra* notes 146-148 and accompanying text.

55. Interviews, Land Quality Division, Wyoming Department of Environmental Quality, Cheyenne, Wyoming (Aug. 31, 1983) (The files containing these community impact requests are located in the Land Quality Division, Wyo. Dep't. Environ. Quality, Cheyenne, Wyo.).

Wyoming had shown an early interest in using AML monies for impact mitigation. Wyoming's Senator Hansen, who helped write the Surface Mining Act, stated during Senate hearings on SMCRA in 1978, that "in Wyoming the most serious need [for AML funds] is to provide construction of public facilities in the areas impacted by full development."<sup>56</sup> Before Wyoming had even finished negotiating the terms of its new regulatory program, Governor Herschler raised the question of AML impact funds with Secretary of the Interior Andrus.<sup>57</sup> Herschler argued that Wyoming should be allowed to use AML monies for construction of such projects as sewer lines, even before all reclamation work had been completed.<sup>58</sup> Herschler pointed out that "some of these subsidence projects have been worked on since the 1960's, Rock Springs for instance. We could put fill in there for an indefinite period."<sup>59</sup>

When Wyoming finally did submit its plan for a state AML program in April, 1982, it listed twice as many non-coal sites needing reclamation as it did coal sites.<sup>60</sup> The acreage disturbed by non-coal mining was more than nine times that disturbed by coal mining.<sup>61</sup> In general, however, the whole problem of abandoned mine land reclamation was de-emphasized.<sup>62</sup> In fact, the City of Rock Springs, which is built over old coal mines and whose subsidence problems are generally considered to be the most severe coal reclamation problem in Wyoming, made a formal complaint to OSM over the state's planned use of AML monies. City officials claimed that "the Wyoming Plan 'skims over' coal mine reclamation and goes 'directly to assisting noncoal mines [reclamation] and the construction of public facilities'."<sup>63</sup>

56. *Implementation of Public Law 95-87: Hearing Before the Subcomm. on Public Lands and Resources of the Senate Comm. on Energy and Natural Resources*, 95th Cong., 2d Sess. 13 (1978). See also *Surface Mining Control and Reclamation Act of 1977: Hearing Before the Senate Comm. on Energy and Natural Resources*, 96th Cong., 1st Sess. 24, 25 (1979) (comments by Governor Herschler) [hereinafter cited as *Surface Mining Hearings*].

57. Summary of meeting between Governor Herschler and Interior Secretary Andrus, prepared by Bob Uram, Associate Solicitor, U.S. Dep't of the Interior 3 (Jan. 7, 1980) (found in files on Wyoming, OSM Region V which have been moved from Denver to the new Casper Field Office in Mills, Wyo.).

58. *Id.*

59. *Id.*

60. Land Quality Division, Wyoming Department of Environmental Quality, Wyoming State Reclamation Plan—Abandoned Mine Reclamation Program 40 (March, 1982) [hereinafter cited as Wyoming Reclamation Plan].

61. *Id.*

62. For example, the section on "Reclamation Problems" contains the following statements:

Open portals and vents are present in some areas but not all of them are dangerous. . . . Much of the subsidence is not a hazard and in fact increases the wildlife habitat in some areas. In most cases it is not feasible to attempt to prevent subsidence. Unstable highwalls are a problem in only a few areas. . . . Erosion and sedimentation are very rare problems in Wyoming since most abandoned mine areas have long ago returned to equilibrium. . . . Mine fires are uncommon. . . . Esthetic disamenities are a minor problem. Most abandoned mines are in remote areas or the workings are of historical value. . . . Except for hazardous sites, it will probably not be feasible to redisturb most sites."

*Id.* at 36.

63. 48 Fed. Reg. 6,537 (1983). OSM's eventual response to Wyoming's interest in impact assistance projects is discussed *infra* at notes 153-60 and accompanying text.

*Reclamation of Coal Mined Lands*

It would be incorrect to convey the impression that there are few abandoned coal mine problems in the West or little interest in abandoned coal mine reclamation. Even in Montana and Wyoming most early proposals submitted to OSM dealt with the reclamation of abandoned coal mines. Wyoming, for example, has identified 112 coal sites "requiring reclamation for public health and safety hazards."<sup>64</sup>

North Dakota's reclamation problems are primarily coal-related.<sup>65</sup> The state has indicated an interest in impact assistance projects at some future date, although it is doubtful that the relatively limited AML funds available to the state will even cover major coal reclamation work.<sup>66</sup>

In Colorado, a survey of over 10,000 mine sites "found over 200 inactive coal sites and several thousand non-coal sites that pose high priority public health and safety hazards and environmental problems."<sup>67</sup> Nevertheless, the Colorado Department of Natural Resources made an agreement with the Colorado coal industry—the ultimate source of the state's AML funds—that most coal reclamation work would be addressed before non-coal reclamation projects.<sup>68</sup>

Utah and New Mexico both have many serious coal and non-coal reclamation problems.<sup>69</sup> They also will have much less AML money than will Wyoming or Montana. Both Utah and New Mexico are interested in beginning non-coal reclamation projects.<sup>70</sup> For reasons that will be

64. See Letter from Nancy Freudenthal, Acting Administrator, Wyoming Land Quality Division, to William Thomas, Director, OSM Casper Field Office (May 16, 1983), reprinted in *Implementation of the Surface Mining Control and Reclamation Act of 1977: Oversight Hearings Before the Subcomm. on Energy and the Environment of the House Comm. on Interior and Insular Affairs*, 98th Cong., 1st Sess. 355, 356 (1983) [hereinafter cited as *SMCRA Implementation Hearings*].

65. Telephone interview with a staff member from the North Dakota Public Service Commission's AML Program (Oct. 10, 1983).

66. *Appropriations Hearings*, supra note 5, at 440, 446 (testimony of Lynn L. Schloesser, Director, AML Division, North Dakota Public Service Commission); Office of Surface Mining, Annual Report North Dakota Permanent Program 24 (October, 1983) (available from OSM Casper Field Office, Mills Wyo.).

67. *Appropriations Hearings*, supra note 5, at 406 (statement by Fred Banta, Colorado Dep't of Natural Resources).

68. Telephone interview with a staff member of the Inactive Mine Reclamation Program, Colorado Dep't of Natural Resources (Oct. 17, 1983).

69. See New Mexico Energy and Minerals Dep't, Abandoned Mine Land Program History Update *passim* (Nov., 1983) (available from the New Mexico Energy and Minerals Dep't., Santa Fe, N.M.).

In Utah a thorough county-by-county literature search uncovered 1,364 potential reclamation sites. One hundred and seventy-eight were coal-mine sites, and 1,186 were non-coal sites. UTAH ABANDONED MINE RECLAMATION PROGRAM, DIVISION OF OIL, GAS AND MINING, AMENDED UTAH ABANDONED MINE RECLAMATION PLAN 55-57 (May 12, 1983) [hereinafter cited as UTAH AMR PLAN].

70. Telephone interview with a staff member of the New Mexico Bureau of Abandoned Mine Lands (Nov. 29, 1983).

The Utah AMR Plan has as one of its overall goals the "aggressive pursuit of non-coal reclamation." The Plan states that "the high percentage of non-coal abandoned mine sites in the state makes this a virtual necessity. Some of the non-coal mine sites are already recognized as being among the most dangerous." UTAH AMR PLAN, supra note 69, at 6.

discussed below, however, they have emphasized reclamation of abandoned coal mines.<sup>71</sup>

#### CARROTS INTO STICKS

Title IV of the Surface Mining Act has become, for the Reagan Administration and the Office of Surface Mining, what title V was for the Carter Administration—the source of a major dispute with the coal-mining states. This is indeed ironic. In 1980, in coal circles, the Reagan campaign emphasized the states' unhappiness over the implementation of SMCRA. When President Reagan took office the early pronouncements and actions of Secretary Watt and others led the coal-mining states to believe that their diverse concerns and needs would be reflected in the administration of the AML program. At the very least, they believed this would be true for the spending of the fifty percent of AML funds automatically allocated to the states. In the West, for example, the important AML states of Montana and Wyoming both developed projects in their earliest plans that were not related to reclaiming abandoned coal mines. These projects, along with projects to repair the most serious abandoned coal mine problems, reflected the priorities of the two states for expenditure of their AML funds. The restrictions found in SMCRA on non-coal projects, while not ignored, were certainly not seen as a major problem. As we shall see, these states could not have been more wrong in their assessment.

The only major problem that was anticipated by the western states dealt with the division of the fifty percent of AML funds that made up the Secretarial share. Many foresaw a battle between the eastern and western coal mining states over this money, and it did become an issue. The dispute, however, took a form which was not anticipated.

#### UNAPPROPRIATED AML MONIES

Early in the Reagan Administration the AML program faced a problem which was far more serious than either the potential limitations on the use of AML funds or the haggling over the division of the Secretarial share. The Reagan Administration threatened to end the AML program before it got started by failing to appropriate AML funds for actual projects.

By the summer of 1982, most states had received federal approval for their revised state regulatory programs as well as for state AML programs.<sup>72</sup> Yet, no corresponding release of AML money took place. Nor did it appear that it would. The unspent balance in the Abandoned Mine Reclamation trust fund continued to grow under the Reagan Administration as it had under President Carter. At the end of fiscal year 1981, this unspent balance was over \$400 million.<sup>73</sup> It passed a half-billion dollars

71. See *infra* notes 146-52 and accompanying text.

72. Eighteen states had their state AML programs approved by August, 1982. *Appropriations Hearings*, *supra* note 5, at 99, 100.

73. OFFICE OF SURFACE MINING, DEP'T OF THE INTERIOR, BUDGET JUSTIFICATIONS, F.Y. 1984, at OSM-67, 68 (1983) [hereinafter cited as OSM 1984 BUDGET JUSTIFICATIONS]; OSM 1985 BUDGET JUSTIFICATIONS, *supra* note 29, at OSM-90.

in fiscal year 1982.<sup>74</sup> In early 1983, OSM published budget figures in which it estimated that at the end of fiscal year 1984, the seventh year of this fifteen year program, the unappropriated AML balance would approach \$600 million.<sup>75</sup>

OSM representatives defended these large unspent balances as being basically the result of President Carter's failure to approve state regulatory programs.<sup>76</sup> AML state-share funds were the reward that could come only after such approval. OSM claimed that under President Reagan most state requests for AML funds had been met. Requests had only been pared, according to OSM, when the agency decided a state lacked the capability to administer a larger program.<sup>77</sup>

The coal mining states angrily replied that their AML requests had not been met and their AML programs had not been funded up to capability.<sup>78</sup> In 1983, these states launched a major lobbying effort to get Congress to increase the AML appropriation that had been requested by the Department of the Interior in its annual budget proposal. The fundamental problem facing the Reagan Administration and the Department of the Interior was that the level of AML funding requested by the states clashed with the need to reduce the rapidly growing federal budget deficit. The problem for the states, in addition to the lack of AML monies, was that the AML trust fund was not a real trust fund.

The Surface Mining Act speaks of a "trust fund" which is "created on the books of the Treasury of the United States."<sup>79</sup> It also clearly mandates that money from the Fund will become available only when appropriated by Congress.<sup>80</sup> As James Harris, the first director of OSM under President Reagan, has explained, while "SMCRA provides for State-share allocations, the money remains Federal money until appropriated by the Congress and obligated by the Office of Surface Mining."<sup>81</sup> The Abandoned Mine Reclamation Fund "is not an interest-bearing account. It is not a dedicated fund in the true sense of dedicated funds."<sup>82</sup> Harris has also affirmed in testimony before Congress that fees paid into the fund do help offset the borrowing requirements of the federal government.<sup>83</sup> They

74. OSM 1985 BUDGET JUSTIFICATIONS, *supra* note 29, at OSM-90.

75. OSM 1984 BUDGET JUSTIFICATIONS, *supra* note 73, at OSM-67, 68.

76. See *AML Budget Hearing*, *supra* note 6, at 5, 23; *AML Hearing*, *supra* note 35, at 19, 30.

77. *Id.* at 8, 24, 33, 37.

78. See, e.g., *id. passim*.

79. 30 U.S.C. § 1231(a) (1982).

80. 30 U.S.C. § 1231(d) (1982).

81. *AML Hearing*, *supra* note 35, at 31.

82. *Appropriations Hearings*, *supra* note 5, at 104 (testimony of James R. Harris).

Congress made no special provision for interest to be paid on unspent AML balances when SMCRA was passed. This has led to a determination by the Department of the Treasury that the Abandoned Mine Reclamation Fund is a "special fund" under Treasury rules and not an interest-bearing "trust fund." Accordingly, over protests from the states, the Reagan Administration has substituted the words "special fund" for "trust fund" in rewriting of OSM rules and regulations. 47 Fed. Reg. 28,575, 579, 593 (June 30, 1982). See also 30 C.F.R. § 870.5 (1984).

83. *Appropriations Hearings*, *supra* note 5, at 104 (testimony of James R. Harris).

do, that is, unless they are appropriated for abandoned mine reclamation projects.

In the attempt to get Congress to increase the Administration's request for AML funds, Wyoming officials cited a thirty-five million dollar shortfall for the state in OSM's 1984 budget request for AML funds.<sup>84</sup> They characterized OSM's approach to the AML program as "stifling," and cited a letter from Director Harris which explained that "the Congress must appropriate funds for reclamation grants and the grant program must 'compete' with other Office of Surface Mining programs within the Department of the Interior budget."<sup>85</sup>

An official from Montana reiterated the Wyoming complaint when he explained at a hearing before the House Appropriations Subcommittee on the Department of the Interior and Related Agencies that the "states are ready and willing to act. The major constraint on the current level of program efforts is the availability of funds."<sup>86</sup> A Colorado official argued at the same hearings that "in order for Colorado to achieve its program objectives, it must be funded at its requested level."<sup>87</sup> He presented figures which showed "a total shortfall of \$5.4 million" in OSM's 1983 and 1984 requests for AML funds for Colorado.<sup>88</sup> Utah officials similarly asked that AML monies be increased by a million dollars over OSM's request for fiscal year 1984.<sup>89</sup> They argued that "these are funds that have already been paid for and are earmarked for the states. . . ."<sup>90</sup> Finally, North Dakota officials told the committee bluntly that "OSM's estimate of \$1.7 million to meet North Dakota's fiscal year 1984 needs is erroneous."<sup>91</sup> Coal-mining states in the East and Midwest made similar complaints.<sup>92</sup>

Given the recent record budget deficits, Congress was surprisingly responsive to the lobbying effort aimed at augmenting AML appropriations. In the short term, at least, it appears that the problem of unspent AML funds is being solved to the satisfaction of the coal-mining states. In fiscal year 1983 (October 1, 1982 to September 30, 1983) Congress approved supplemental budget appropriations for AML funds which more than doubled OSM's original budget request of about \$100 million.<sup>93</sup> For fiscal year 1984, Congress appropriated about fifty million dollars more from the AML fund than the approximately \$220 million requested by

84. *Id.* at 411.

85. Letter from James Harris, Director OSM, to Walter C. Ackerman, Administrator, Wyoming Dep't of Environ. Quality (May 17, 1982), reprinted in *Appropriations Hearings*, *supra* note 5, at 410, 411, 419.

86. *Appropriations Hearings*, *supra* note 5, at 394.

87. *Id.* at 407.

88. *Id.*

89. *Id.* at 396.

90. *Id.*

91. *Id.* at 402.

92. *See, e.g., AML Budget Hearing*, *supra* note 6, at 57, 94-95, 99-100, 186-87, 190-92 (statements from West Virginia, Illinois, and Kentucky).

93. The final congressional appropriation was \$213.1 million. *Id.* at 2; OSM 1985 BUDGET JUSTIFICATIONS, *supra* note 29, at OSM-90.

OSM.<sup>94</sup> For fiscal year 1985, an election year budget, the Reagan Administration itself requested almost \$300 million for the AML program.<sup>95</sup> It is now estimated that by the end of fiscal year 1985, total unappropriated AML fees will fall below \$400 million for the first time since the end of fiscal year 1980.<sup>96</sup>

Although successful, the lobbying effort in Congress did involve considerable organizational effort among all the coal mining states, as well as expenditures of time and attention by the Congress. When later problems arose over how AML funds could be spent, these states were unable to muster similar resources or congressional interest, and OSM has generally prevailed.

This considerable effort was necessary for a problem that no one had foreseen. The states had been convinced that the funding of the AML program was assured when SMCRA was passed in 1977. The fact that AML funds would be part of the budget request for the Office of Surface Mining, and that these funds would have to be appropriated by Congress, seemed to be normal bureaucratic procedure. The states also assumed that the term "trust fund" in the Act meant an actual trust fund. Yet, as we have seen, budget requests to Congress for fiscal year 1984 projected more than a half billion dollar surplus for the seventh year of this fifteen year program. The Director of OSM also made it clear that there were no plans to ask Congress for an extension of the AML program.<sup>97</sup> The states quite properly worried that much of the AML money might not be spent, or at least not spent for the stated purpose for which it had been collected.

#### DIVIDING SECRETARIAL-SHARE MONIES AMONG THE STATES

Only half the AML fees collected in a state is specifically earmarked in the Surface Mining Act for that state's reclamation program.<sup>98</sup> The remaining half becomes part of the federal or Secretarial share. At the discretion of the Secretary of the Interior this share may be used to fund federal coal reclamation projects, directly administered by the Office of Surface Mining or some other federal agency.<sup>99</sup> The federal share may also be used to make additional grants to the state AML programs for coal related reclamation.<sup>100</sup> The Reagan Administration prefers grants to state AML programs instead of direct federal coal reclamation projects.<sup>101</sup>

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94. OSM 1984 BUDGET JUSTIFICATIONS, *supra* note 73, at OSM-53; OSM 1985 BUDGET JUSTIFICATIONS, *supra* note 29, at OSM-90.

95. OSM 1985 BUDGET JUSTIFICATIONS, *supra* note 29, at OSM-67.

96. *Id.* at OSM-90.

97. *See, e.g., AML Hearing, supra* note 35, at 34.

98. 30 U.S.C. § 1232(g)(2) (1982).

99. 30 U.S.C. § 1232(g)(3) (1982). This federal or Secretarial share has also been called the discretionary share.

100. *Id.* *See also* H.R. REP. NO. 493, 95th Cong., 1st Sess. 100 (1977).

101. In line with its emphasis on funding through state grants, OSM has tried to eliminate AML funds going to the Department of Agriculture for the reclamation of rural lands (the Rural Abandoned Mines Program—RAMP). *See* OSM 1984 BUDGET JUSTIFICATIONS, *supra* note 73, at 54, 82-84.

Given the large percentage of the nation's coal-mine reclamation problems found in the East and Midwest, and an equally overwhelming representation in Congress for these two regions, it was generally assumed that the western states would be dissatisfied when the Secretarial share was divided.<sup>102</sup> This has proved to be the case.

In 1983, OSM announced its first projection of how the Secretarial share would be divided over time.<sup>103</sup> OSM made the announcement to allow the states "to anticipate how many Secretarial-share dollars they were likely to obtain," and thus enable them "to realistically plan their long-range programs."<sup>104</sup> From the end of fiscal year 1982 through 1992, OSM projected that there would be approximately one billion dollars available from these federal-share funds for grants to state AML programs.<sup>105</sup> In this announced allocation, Colorado, Montana, and Utah were each given a token one million dollars, or one-tenth of one percent of the amount to be distributed. New Mexico was to receive \$1.7 million, and North Dakota, \$2.2 million. Wyoming would get \$21.3 million, or 2.1 percent of the total.<sup>106</sup> Wyoming received this larger amount primarily because of a reevaluation by OSM of the seriousness of the subsidence problem in the City of Rock Springs.<sup>107</sup>

With this apportionment of the Secretarial share, one can estimate the total return each state will receive on AML fees collected within that state.<sup>108</sup> Among the six western coal-mining states, only North Dakota will see even fifty-five percent of its AML fees returned for reclamation work in the state.<sup>109</sup>

102. See e.g., G.A.O. SMCRA ISSUES, *supra* note 9, at 36.

103. The actual dollar amounts projected for each state were announced in a document, date July 29, 1983, sent to all state AML programs: OSM, Apportionment of AML Funds, *supra* note 3. The formula for dividing these funds was announced earlier in Office of Surface Mining, Statement of Abandoned Mine Land Policy, at 4-6 (Jan. 21, 1983), reprinted in AML Hearing, *supra* note 35, at 21-26 [hereinafter cited as Statement of AML Policy].

104. OSM, APPORTIONMENT OF AML FUNDS, *supra* note 3, at 1, 2.

105. *Id.* at 3.

106. *Id.* at p. 1 of tables.

107. OFFICE OF THE INSPECTOR GENERAL, DEP'T OF THE INTERIOR, REVIEW OF ABANDONED MINE LAND RECLAMATION PROGRAM—OFFICE OF SURFACE MINING, 44, 45 (March, 1983). Interview with the former head of the Wyoming Abandoned Mine Reclamation Program, Cheyenne, Wyoming (Aug. 31, 1983).

108. Estimates for total fees to be collected in a state (1977-1982) are found in DRAFT OSM-EIS-11, *supra* note 2, at III-4. Half the total fees collected would be the estimated state share to be returned to each state.

The estimated total return for each state can be found by combining this state share with the federal allocation (1983-1982) for each state, and by adding this to federal AML dollars already spent in a state from 1977 through 1982. Figures for past expenditure of federal AML dollars are derived from data contained in OSM, Apportionment of AML Funds, *supra* note 3, at p. 2 of tables, and OSM 1985 BUDGET JUSTIFICATIONS, *supra* note 29, at OSM-92.

109. North Dakota's return would be fifty-eight percent of fees collected. Figures showing all the western coal mining states receiving less than a fifty-five percent return were contained in a letter signed by the six western coal-state governors. Letter to Honorable James G. Watt, Secretary of the Interior, re: Draft policy on apportioning Secretarial share monies deposited in the AML fund (Sept., 1983) (copy available from OSM, Wash., D. C., and from Offices of the Western Interstate Energy Board, Denver, Colo.).



Not surprisingly, the western coal-mining states protested this division of the AML Secretarial share. These states argued that geographical derivation of AML fees should carry more weight in the division,<sup>110</sup> even though the fifty percent state shares were already being allocated on this basis. OSM had divided the Secretarial share on the basis of the cost to each state of reclaiming high priority coal reclamation problems, after deducting state share funds.<sup>111</sup> No matter what this cost was, however, each state was assured a token share of at least one million dollars.<sup>112</sup>

The western states found an easy target in their fight against this division of the Secretarial share in OSM's National Coal Inventory. This inventory was done by the Oak Ridge National Laboratories under contract with OSM, and was used by OSM to determine the number, location, and cost of high priority coal reclamation problems in the states.<sup>113</sup>

Utah officials claimed that the inventory entirely omitted data from ten of the counties in the state with known abandoned coal mines.<sup>114</sup> Colorado authorities reported that the inventory included only thirty-five percent of known coal sites, and left out information which the state had submitted for twelve counties containing twenty-four "extremely dangerous" features and over 100 "hazardous" features already registered on the Colorado state inventory.<sup>115</sup> North Dakota, Wyoming, and Montana officials registered similar complaints about the inventory.<sup>116</sup>

Congress could probably have disregarded the western state complaints if it had not been for the surprising result which OSM's inventory produced in allocating Secretarial-share AML funds in the East and Midwest. It might have been politically acceptable for the six western coal-mining states, taken together, to receive less than three percent of the Secretarial share,<sup>117</sup> and for most to have less than a fifty-five percent total return on AML fees collected. It was not acceptable, however, for each of the important coal mining states of Kentucky, West Virginia, Illinois, Indiana, and Virginia each to receive a return of less than seventy-five cents per dollar on AML fees collected in those states.<sup>118</sup> Nor was it

110. *Id.*

111. OSM 1984 BUDGET JUSTIFICATIONS, *supra* note 73, at OSM-69.

112. OSM, APPORTIONMENT OF AML FUNDS, *supra* note 3, at 3.

113. OSM 1984 BUDGET JUSTIFICATIONS, *supra* note 73, at OSM-68, 69.

114. *Appropriations Hearings*, *supra* note 5, at 398, 439 (testimony of Lorin P. Nelson, Utah Dep't of Natural Resources).

115. Letter from J. David Holm, Program Administrator, Colorado Mined Land Reclamation Division, to Robert Hagen, Director, Albuquerque Field Office, OSM (May 17, 1983), reprinted in *SMCRA Implementation Hearings*, *supra* note 64, at 349, 361-67.

116. For example, an official from North Dakota testified that the criteria for processing data had been changed in June, 1981, after the inventory had been completed in the state. *Appropriations Hearings*, *supra* note 5, at 403. Wyoming complained to OSM that Oak Ridge had spent only eight days in the state and that there had been no request to see inventory data that Wyoming had been collecting for three years. Thus only twenty-eight out of 112 serious coal sites were uncovered. Montana wrote that the inventory was "a scientifically flawed document," and recommended that "OSM throw out the 'standardized' version of the inventory." *SMCRA Implementation Hearings*, *supra* note 64, at 355-60.

117. OSM, APPORTIONMENT OF AML FUNDS, *supra* note 3, at page 1 of tables.

118. See *supra* note 108.

acceptable, when these five states, taken together, received only seven percent of the Secretarial share distribution.<sup>119</sup>

Who got the Secretarial money? Essentially it went to two states. Some might even say it went to one state. Ohio was awarded \$113 million, and Pennsylvania an astounding \$587 million. Together these states received seventy percent of the Secretarial-share distribution.<sup>120</sup> When this money was added to the state share, and to federal dollars already spent in each state through 1982, Ohio would get an estimated 120 percent return on AML fees and Pennsylvania a return of over 200 percent on fees collected there.<sup>121</sup> Instead of the western states paying for reclamation in the East, as had been anticipated, OSM's inventory produced an allocation in which western and eastern coal-mining states would pay for reclamation in Pennsylvania.

Even with an impeccable inventory, it would have been difficult politically for OSM to sustain such a distribution. As we have seen, the inventory was less than perfect. What could have been a battle between the eastern and western coal-mining states became a combined attack on OSM. The charges of federal incompetency hurled against the Office of Surface Mining were reminiscent of the attacks on OSM during the Carter Administration.<sup>122</sup> Even the Inspector General of the Department of the Interior joined the attack on the inventory.<sup>123</sup> Not surprisingly, Congress soon acted. In the Congressional Conference Report on Appropriations, the proposed division of the Secretarial share was labelled "premature."<sup>124</sup> Congress also told OSM that "no 10 year allocation should be made until the inventory has been updated and more accurately reflects the extent of each state's abandoned mine land problems."<sup>125</sup>

The incomplete inventory was not the real concern of the western states. Their complaint was about the unfairness of their coal industries contributing almost a third of the Secretarial share, and their states receiving back less than three percent. It is doubtful, however, that this complaint would have received much of a hearing without the unexpected appearance of allies from the East and Midwest. This was so because a majority in Congress agreed that the major purpose of the Abandoned Mine Reclamation Fund was to repair destruction from past coal mining. The western states had already been given the right to retain half the AML fees collected in their states, irrespective of the seriousness of their abandoned coal-mine problems. They also appeared to have won the right to use AML state-share funds for serious problems that were not directly related to abandoned coal-mine reclamation, such as for impact assistance and repair of damage from non-coal mining.

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119. OSM, APPORTIONMENT OF AML FUNDS, *supra* note 3, at p. 1 of tables.

120. *Id.*

121. See *supra* note 108.

122. See, e.g., *SMCRA Implementation Hearings*, *supra* note 64, at 347-50, 355-73.

123. OFFICE OF THE INSPECTOR GENERAL, *supra* note 107, at 43-49. OSM's response to criticism of the inventory can be found *id.* at 49, 50.

124. H.R. REP. NO. 399, 98th Cong., 1st Sess. 21 (1983).

125. *Id.*

The temporary repudiation of the National Coal Inventory only gave the western states a chance to better document their serious coal related reclamation problems. As Utah pointed out, this meant that "many more sites will have been identified needing reclamation."<sup>126</sup> Yet with all the other AML states also updating their lists of serious problems, Utah and the other western states could still end up with lists constituting only a small percentage of the national problem.<sup>127</sup> A more viable long term solution might be one suggested by several western states. Congress could increase the token amount of the Secretarial share distribution guaranteed to each state. Instead of a million dollars, "it could just as well consist of two, five or ten million, or represent a fixed percent of the State's revenues. Such an apportionment would go a longer way towards addressing reclamation goals in each state but would still distribute the bulk of monies according to the [major] problem."<sup>128</sup>

#### THE CONFLICT OVER PRIORITIES FOR SPENDING STATE-SHARE AML FUNDS

In late 1981, the Reagan Administration proposed revisions to AML regulations issued by the Carter Administration.<sup>129</sup> Uniform reclamation guidelines, and regulations governing project priorities, were determined *not* to be applicable to state AML programs.<sup>130</sup> Regulations dealing with the evaluation of AML projects were deleted entirely.<sup>131</sup> Although OSM admitted to critics that "the quality of reclamation programs may now vary somewhat" OSM argued that "giving the States primacy [was] consistent with the intent of Congress and [would] still result in an orderly reclamation effort of abandoned mine lands without duplication of effort."<sup>132</sup> In explaining these changes, OSM specifically cited section 405(d) of title IV of SMCRA, which reads in part:

If the Secretary determines that a State has developed and submitted a program for reclamation of abandoned mines and has the ability and necessary State legislation to implement the provisions of this subchapter . . . the Secretary shall approve such State program and shall grant to the State the exclusive responsibility and authority to implement the provisions of the approved program. . . .<sup>133</sup>

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126. Letter from Mary Ann Wright, Administrator, Utah Abandoned Mine Reclamation Program, to Dr. Phyllis Thompson, Chief, Division of Abandoned Mine Reclamation, OSM, Washington, D.C. (Aug. 31, 1983).

127. *Id.*

128. *Id.* See also *SMCRA Implementation Hearings*, *supra* note 64, at 350 (statement by member states of the Western Interstate Energy Board).

129. 46 Fed. Reg. 60,778 to -798 (1981) (containing proposed revisions to 30 C.F.R. pts. 870-888). The final rules appeared in 47 Fed. Reg. 28,574 to -604 (1982).

130. 46 Fed. Reg. 60,782 to -783 (1981); 47 Fed. Reg. 28,581 to -582 (1982). The Carter Administration had issued final guidelines for reclamation programs and projects in 45 Fed. Reg. 14,810 to -819 (1980).

131. 46 Fed. Reg. 60,783 (1981); 47 Fed. Reg. 28,582 (1982).

132. 47 Fed. Reg. 28,581 (1982).

133. Surface Mining Control and Reclamation Act § 405(d), 30 U.S.C. § 1235(d) (1982).

Similar actions and pronouncements characterized the early period of the Reagan Administration. This led state governments to anticipate that they would have considerable latitude in determining AML project priorities, at least for the use of state-share funds. We have already seen that Wyoming and Montana showed an early interest in directing part of their considerable state-share funds to problems other than reclamation of abandoned coal mines.<sup>134</sup>

Wyoming hoped to use AML funds to alleviate pressure on public facilities in coal boom towns. Montana intended to use AML monies to clean up inactive hardrock mines that were polluting rivers and streams. In both cases these states severely miscalculated. In what has been for the western states one of the most perplexing and frustrating developments under the Reagan Administration, the Office of Surface Mining has insisted on a very strict interpretation of Abandoned Mine Reclamation Fund priorities.<sup>135</sup> This interpretation has been enforced on the states with little regard for geographical differences, or for state needs and wishes.

The objectives and priorities for spending AML funds are addressed in at least six of the twelve sections of title IV of SMCRA.<sup>136</sup> OSM, however, has emphasized section 403 which deals with coal related reclamation. It states that expenditures from the Fund on eligible lands and water "shall reflect the following priorities in the order stated":

- 1) the protection of public health, safety, general welfare and property from extreme danger of adverse effects of coal mining practices;
- 2) the protection of public health, safety, and general welfare from adverse effects of coal mining practices;
- 3) the restoration of land and water resources and the environment previously degraded by adverse effects of coal mining practices . . . ;
- 4) research and demonstration projects . . . ;
- 5) the protection, repair, replacement, construction, or enhancement of public facilities such as utilities, roads, recreation, and conservation facilities adversely affected by coal mining practices;
- 6) the development of publicly owned land adversely affected by coal mining practices. . . .<sup>137</sup>

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134. See *supra* notes 48-63 and accompanying text.

135. An example of the western states' reaction can be found in *SMCRA Implementation Hearings*, *supra* note 64, at 347, 348, 351 (statement by member states of Western Interstate Energy Board).

136. Surface Mining Control and Reclamation Act §§ 401, 402, 403, 404, 406, 409, 30 U.S.C. §§ 1231, 1232, 1233, 1234, 1236, 1239 (1982).

137. Surface Mining Control and Reclamation Act § 403, 30 U.S.C. § 1233 (1982). See *supra* note 24 and accompanying text for a definition of eligible lands and waters.

*Priorities 1 and 2, Before 3*

Complaints from the states and OSM's own policy statements make it clear that priority 1 and 2 coal reclamation work "designed to protect the health, safety, and general welfare of the public is to take precedence over other types,"<sup>138</sup> such as restoration of the environment. The only occasional exception has occurred with some priority 3 coal-related environmental restoration projects. These have been allowed in conjunction with priority 1 and 2 projects if it would not be economical to bring workers and equipment back to an area at a later date.<sup>139</sup>

The impact of this strict interpretation of section 403 will be greatest in the eastern and midwestern states. Here there are the largest number of priority 1 and 2 coal projects. Such projects tend to cover small land areas, and are often technically difficult and expensive to correct. Examples include: urban subsidence, open mine entrances, and fires in refuse piles and coal seams near populated areas.<sup>140</sup> By OSM's own admission some of the most affected states may never get beyond priority 1 and 2 projects to those involving large-scale restoration of land and water resources.<sup>141</sup> "A vast land area of thousands of acres . . . [may] be left undone," noted Kentucky's Senator Ford in a recent Senate hearing.<sup>142</sup> Given the results of OSM's first attempt at dividing the Secretarial share, one commentator may be prophetic in warning about the large amount of AML money that could disappear into the underground reclamation problems of Pennsylvania.<sup>143</sup>

*All Coal Prior to Most Non-Coal*

The one indisputable exception to the list of section 403 priorities concerns non-coal. Section 409 allows for non-coal reclamation.<sup>144</sup> It also provides that coal related projects are to come before non-coal reclamation, *except* for those non-coal reclamation projects "relating to the protection of the public health or safety."<sup>145</sup> Nevertheless, in both practice and word OSM has developed an extremely narrow definition of "relating to the protection of the public health or safety" where non-coal projects are concerned.

138. Statement of AML Policy, *supra* note 103, at 2, 5.

139. *Id.* at 5.

140. Johnson and Miller estimate that it could cost twelve billion dollars to stabilize urban areas in the East and Midwest having potential for subsidence. The elimination of burning waste banks and underground mines in these two regions could cost over a half billion dollars. JOHNSON & MILLER, *supra* note 31, at 9, 28.

141. AML Hearing, *supra* note 35, at 34, 38, 39 (testimony of OSM Director, James R. Harris).

142. *Id.* at 38.

143. *Id.* at 206 (statement by James S. Lyon, Environmental Policy Center). Johnson and Miller estimate that it could cost \$4.5 billion to stabilize urban areas in Pennsylvania having subsidence potential. W. JOHNSON & G. MILLER, *supra* note 31, at 9.

For fiscal year 1984 Congress especially appropriated forty-two million dollars from AML funds for acquisition of property endangered by the Centralia, Pa. mine fire. OSM 1985 BUDGET JUSTIFICATIONS, *supra* note 29, at OSM-67, 69-71.

144. Surface Mining Control and Reclamation Act § 409, 30 U.S.C. § 1239 (1982).

145. Surface Mining Control and Reclamation Act § 409(c), 30 U.S.C. § 1239(c) (1982).

1. There must be a *clearly definable threat* to the public health or safety;
2. The threat must present a danger that results in a *high probability of serious physical harm* to the health or safety of people;
3. The *threat cannot await resolution* until all coal projects have been completed. . . .<sup>146</sup>

Projects that do meet these conditions will be funded "only from the State's 50% share of the Fund and, except under unusual circumstances, only to the extent necessary to abate, control or prevent the threat."<sup>147</sup> Not one of the five major non-coal projects Montana requested in January, 1982, has been approved after more than two years of acrimonious debate between the state and OSM. Montana officials have accused OSM of wanting "floating body proof" of the need to protect public health or safety.<sup>148</sup> Many of Wyoming's non-coal requests have also been refused.<sup>149</sup> Only projects for sealing mine openings were easily approved. OSM considers non-coal reclamation work to be optional for a state. Thus, no non-coal projects are approved simply because it would be more efficient to do all reclamation work in a single area at one time.<sup>150</sup>

OSM's strict pronouncements on non-coal projects, and its more than two-year battle with Montana, have discouraged New Mexico and Utah from giving much emphasis to non-coal projects, even though some of their worst reclamation problems are non-coal.<sup>151</sup> Obviously, many non-coal projects will not be completed in these two states before AML money runs out. Even Montana, with very large state-share monies, has expressed fears about a lack of AML funds for its non-coal projects.<sup>152</sup>

Meanwhile, OSM quickly disabused Wyoming of any idea that it could declare much potential reclamation work insignificant and proceed with

146. Memorandum on Noncoal Reclamation from William B. Schmidt, Assistant Director, OSM Program Operations and Inspection, to Field Office Directors (April 4, 1983), reprinted in *SMCRA Implementation Hearings*, *supra* note 64, at 375.

147. *Id.*

148. *Appropriations Hearings*, *supra* note 5, at 435, 451.

In addition to demanding more proof of the threat to public health or safety, OSM has also raised questions about unresolved reclamation liability for the important Colorado Tailings project near Butte, Montana. *AML Budget Hearing*, *supra* note 6, at 40, 118, 119. It is not yet clear if OSM will follow an Appropriations Conference Report directive that "\$1,000,000 of the Montana funds . . . shall be used for reclamation of the Colorado Tailings site in Montana." H.R. REP. NO. 399, 98th Cong., 1st Sess. 21 (1983).

149. Interview, Office of Surface Mining, Casper Field Office, Mills, Wyoming (Feb. 24, 1984). As of early 1984, only about one percent of the \$36.4 million that Wyoming has spent on reclamation has gone for non-coal projects. Fourteen of 121 construction sites have been for non-coal. 49 Fed. Reg. 8,092 (March 5, 1984).

150. Statement of AML Policy, *supra* note 103, at 2.

151. Telephone interview with a staff member of the New Mexico Bureau of Abandoned Mine Lands (Nov. 29, 1983); Telephone interview with a staff member of the Utah Abandoned Mine Reclamation Program (Dec. 5, 1983). Utah, however, is proceeding with a complete non-coal inventory.

152. *AML Hearing*, *supra* note 35, at 160 (statement of Tim Gallagher on behalf of Governor Ted Schwinden).

impact assistance projects.<sup>153</sup> As OSM promised when approving Wyoming's AML plan, the state has been forced to address "all coal reclamation projects prior to most non-coal problems."<sup>154</sup> OSM has forced the state to work on some priority 3 coal projects which the state had labelled unnecessary as late as 1982.<sup>155</sup> It is unlikely that the state or any local governments would have paid to reclaim these priority 3 mines.<sup>156</sup> Far more serious environmental damage from bentonite and uranium has gone unrepaired while these coal projects go forward.<sup>157</sup> It appears that OSM will force all the western states to undertake even their most insignificant coal reclamation work before serious non-coal reclamation projects can be started.

### *Subsidence Insurance*

Wyoming has become the first state to receive OSM certification that it has addressed all known coal reclamation work.<sup>158</sup> The state will now move to the remaining non-coal reclamation work and to lower priority, 4 through 6, coal projects.<sup>159</sup> Since late 1982, when Wyoming's energy boom turned to near bust in many areas, there has been less talk of spending AML monies on impact assistance. Colorado is expected to soon request certification from OSM that it too has completed all known coal reclamation work.<sup>160</sup>

Ironically, Wyoming may now be allowed to move out of coal reclamation without having resolved its most severe coal reclamation problem: the widespread undermining of the City of Rock Springs.<sup>161</sup> Areas in Rock Springs which have already experienced subsidence incidents are being

153. In response to the discussion of "Reclamation Problems" in Wyoming Reclamation Plan, *supra* note 60, OSM asked, "What then are Wyoming's AML problems? What AML work justify [sic] the expenditure of 50 million dollars the first year and 20 million dollars for the next two years?" Memorandum on the Wyoming Abandoned Mine Land Reclamation Plan Submission from Jim Fary, OSM Review Team Leader, to Ron Bertram, State Office Representative 14 (June 3, 1982).

154. 48 Fed. Reg. 6,537 (1983).

155. See *supra* note 62.

156. *Surface Mining Hearings*, *supra* note 56, at 24-25 (testimony of Governor Herschler).

157. Interview with staff associated with the Wyoming Land Quality Division, Dep't of Environ. Quality, Rawlins, Wyoming (Nov. 1, 1983).

158. 49 Fed. Reg. 22,139-140 (1984).

159. 49 Fed. Reg. 8,092 (1984); (statements by Wyoming Land Quality Division Personnel before the Mines Subsidence Subcommittee of the Wyoming Legislature, Rawlins, Wyoming (Nov. 1, 1983)).

160. OSM Ann. Rep. Colo. Permanent Program 28 (June, 1983) (available from OSM, Albuquerque, N.M., Field Office).

Wyoming's request for permission to move to non-coal reclamation work has revealed one more western problem with OSM's insistence on "all coal, prior to most non-coal." Wyoming has been informed that it will now lose the more than twenty million dollars in Secretarial-share AML funds which it had been allocated, because this money can only be used for coal-related reclamation. 49 Fed. Reg. 22,140 (May 25, 1984). Colorado stands to lose a million dollars in Secretarial-share funds.

161. On the subsidence problems in Rock Springs, Wyoming, see G.W. Barnes, Coal Mine Subsidence at Rock Springs, Wyoming—Alternatives for Public Action, Report prepared for Land Quality Division, Wyo. Dep't of Environ. Quality (Dec., 1982) (available from Land Quality Division, Cheyenne, Wyo.); Johnson-Fermelia and Crank, Inc., Wyoming Abandoned Mine Lands Engineering Assessment for Rock Springs, Reliance, South Superior, and

repaired and stabilized in an \$8.7 million AML project.<sup>162</sup> Wyoming has also promised to deal with any new subsidence incidents during the life of the AML program.<sup>163</sup> No one is sure, however, who will pay for repairs if there are subsidence events after 1992 when the AML program has ended. In Colorado, similar questions have been raised about paying for unpredictable future subsidence problems in populated areas after 1992.<sup>164</sup>

The cost of stabilizing over 900 acres under Rock Springs could surpass \$250 million, with the effectiveness of the procedures still unsure.<sup>165</sup> An alternative, acceptable to the state and to Rock Springs, would be to use part of Wyoming's state-share AML funds as seed money to start a reserve fund, and to finance subsidence insurance for property owners.<sup>166</sup> Income from the reserve fund would be used to repair subsidence damage.<sup>167</sup> This approach to subsidence has been supported by other western states, most of which have similar problems.<sup>168</sup> Federal solicitors, however, have determined that such projects are not authorized by SMCRA, nor by existing regulations governing the dispersal of federal grants.<sup>169</sup> The reserve fund has been rejected by OSM.<sup>170</sup> At best, OSM may offer Wyoming a million-dollar, interest free AML loan, repayable in 1992, to help reduce the state's cost for a subsidence insurance program.<sup>171</sup> This offer was made at the same time that Wyoming had almost forty million dollars in unspent state-share AML funds.<sup>172</sup>

### *Solutions to OSM's Rigid Interpretation of Priority Rules*

The western coal-mining states have found considerable support in Congress, and from environmental groups, for the view that AML objec-

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Vicinity, Report prepared for Land Quality Division, Wyo. Dep't of Environ. Quality (1981) (available from Land Quality Division, Cheyenne, Wyo.); G. COLAIZZI, R. WHITE & D. DONNER, PUMPED-SLURRY BACKFILLING OF ABANDONED COAL MINE WORKINGS FOR SUBSIDENCE CONTROL AT ROCK SPRINGS, WYOMING, U.S. BUREAU OF MINES INFORMATION CIRCULAR 8846 (1981).

162. Office of Surface Mining, Casper Field Office, Environmental Assessment, Wyoming Project 6A (Subsidence in Rock Springs, Wyo.) (1983).

163. 49 Fed. Reg. 8,092 (1984).

164. OSM Ann. Rep. Colo. (1983), *supra* note 160, at 28. See also *Appropriations Hearings*, *supra* note 5, at 408, 447, 448 (statement by Fred Banta, Colo. Dep't of Natural Resources).

165. G.W. Barnes, *supra* note 161, at 39-41, reprinted in *Appropriations Hearings*, *supra* note 5, at 420-22.

166. See, e.g., 48 Fed. Reg. 6,537 (1983).

167. A description of the proposed program is found in Office of Surface Mining, Casper Field Office, Environmental Assessment, Wyoming Project 6B (subsidence insurance plan and reserve fund) 9-12, n.d.

168. See, e.g., *Appropriations Hearings*, *supra* note 5, at 408, 447, 448, 451.

169. Letter from Christopher Warner, Acting Assistant Solicitor, Branch of Governmental Relations, Division of Surface Mining, to Phyllis Thompson, Chief, AML Reclamation Division, OSM (Sept. 20, 1983).

170. 49 Fed. Reg. 8,092 (1984).

171. Letter from J.R. Harris, Director, OSM to Governor Herschler (Jan. 9, 1984).

172. 49 Fed. Reg. 22,140 (1984).



tives and priorities are being interpreted too narrowly.<sup>173</sup> These supporters, however, do not advocate opening SMCRA for amendment in order to make Congressional intent on AML priorities clearer. Environmental groups, the mining industry, and Congress have all expressed fear at what might be added to SMCRA, or dropped, if it were brought before Congress for amendment.<sup>174</sup> Instead, Congress has urged OSM "to use flexibility in the application of the priority system to state share funds,"<sup>175</sup> and has encouraged OSM "to work through the abandoned mine reclamation fund to assist the states in establishing subsidence insurance programs."<sup>176</sup>

These Congressional directives have had little effect. OSM's position continues to be that it is simply enforcing the law, and that it is not free to do otherwise.<sup>177</sup> As James Harris, OSM's first Director during the Reagan Administration, has stated, "I didn't write the act."<sup>178</sup> In another exchange he explained that OSM cannot change its policy on non-coal reclamation because "it is not a policy matter but rather a matter of law."<sup>179</sup> On another occasion he responded to Congressional complaints about inflexible AML spending priorities by stating, "We have a problem. The Congress would like to see us broaden the scope of our activities. On the other hand, a recent Inspector General's report indicates we are broadening them too much already."<sup>180</sup>

OSM's rigid interpretation of how AML state-share money can be spent has distorted state priorities. States have been denied the right to spend AML funds on large scale restoration of lands and waters damaged by past coal mining because the damage is not strictly a threat to human health and safety. Innovative state solutions for dealing with the extreme uncertainties and expense of subsidence have been denied. In the states of Utah and New Mexico, and possibly even Montana, much serious damage from non-coal mining will go unrepaired. Less serious damage from coal mining will be repaired, however.

OSM's imposition of uniform spending priorities for the AML program obviously has benefits for the federal government. It is easier to justify, defend, and supervise expenditures. Yet, it is still not clear why

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173. See *AML Budget Hearing*, *supra* note 6, at 15, 16 (statement by Rep. Lujan); 18, 33 (statement by Rep. Seiberling); 34 (statement by Rep. Murphy); 39 (statement by Rep. Mollohan); 49, 160, 161 (statement by Hope Babcock, National Audubon Society); 53, 171, 172 (statement by James Lyon, Environmental Policy Center).

174. *Id.* at 14, 18, 51, 173. In June, 1983, OSM Director Harris reported that his consultations showed that in general neither industry nor environmental groups supported opening SMCRA for amendment. *SMCRA Implementation Hearings*, *supra* note 64, at 18.

175. H.R. REP. NO. 253, 98th Cong., 1st Sess. 44 (1983). See also, S. REP. NO. 184, 98th Cong., 1st Sess. 41, 42 (1983).

176. H.R. REP. NO. 253, 98th Cong., 1st Sess. 44 (1983). See also H.R. REP. NO. 399, 98th Cong., 1st Sess. 21 (1983) (directive on Montana non-coal Colorado Tailings Project).

177. Interviews, Office of Surface Mining, Casper Field Office, Mills, Wyoming (Sept. 1, 1983, Feb. 24, 1984).

178. *AML Hearing*, *supra* note 35, at 39.

179. *Id.* at 33.

180. *Appropriations Hearings*, *supra* note 5, at 97 (statement of James Harris).

the Reagan Administration is taking such an inflexible stance on AML spending.

When the Reagan Administration gained control of the Office of Surface Mining, the Administration gave great emphasis to the ideal of increased state responsibility and increased state decision-making. In the SMCRA title V regulatory program, this Administration has appeared to take a different position from that taken in the title IV AML program. In title V, it has been much less rigid in interpreting the law than was the previous administration.<sup>181</sup>

A move towards more flexibility and more innovation at the state level in the administration of the AML program would be a popular and sensible policy. Congress and environmental groups, as well as the states, are calling for this change in policy. But it is not clear how OSM can be brought to adopt a more flexible position on AML spending priorities. There is almost no support for opening SMCRA to amendment. Congressional directives written into appropriations reports have been used, but have had little apparent effect on AML policy. Moreover, the experience during President Reagan's first term would indicate that it is far safer for a federal environmental program to be charged with too strict an interpretation of the law, and too much federal oversight, than to be charged with being too lax.

#### CONCLUSION

Few state officials of the coal-mining states, East or West, expected the battle which took place over the full funding of the AML program. They assumed that funding was assured after the Surface Mining Act was passed in 1977 and the federal government began collecting AML fees from the coal industry. They did not give serious thought to the Surface Mining Act's requirement that AML funds be appropriated by Congress as part of the budget request for the Office of Surface Mining. And perhaps naively, they did not foresee that in this period of large budget deficits any Administration would be under pressure not to fund all of this program.

The pressure to control federal spending is still great. All the AML states will be closely watching Congress to ensure that AML fees are actually appropriated for abandoned mine reclamation work and related projects.

In the West, the Abandoned Mine Reclamation Fund has not been the unfettered reward some had hoped for. Nor will it be the final solution to the region's abandoned mine problem—a problem which is defined by the western states and the Surface Mining Act to include damage from "any previous mining operation," not just coal.

Even with full funding of the AML program by Congress, much of the non-coal reclamation problem in the West is apt to go unrepaired. The

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181. See Comment, *supra* note 19; Rasnic, *supra* note 14; Menzel, *supra* note 14.

Office of Surface Mining has insisted that most coal reclamation work be undertaken first. Those states which exhaust their state-share funds on coal reclamation work have little hope of getting additional funds. The Surface Mining Act clearly states that only the fifty percent, state-share AML fees, earmarked for the states in which they are collected, can be used for non-coal reclamation. Unless the Surface Mining Act is opened for amendment and this provision changed, it is very unlikely that the western states will receive much of the remaining share of AML fees. This money will be distributed by the Secretary of the Interior, based upon the National Coal Inventory. All the AML states are revising their lists of serious coal reclamation problems. There is no doubt that the the new inventories will show that only a small percentage of the nation's coal reclamation problems are found in the West.

In the dispute between OSM and the western states over AML spending priorities, it is hard to fault the states. The Reagan Administration, through its early actions and pronouncements, encouraged the states to believe that they would be granted "the exclusive responsibility and authority to implement the provisions" of their approved AML programs. It may be, as OSM has argued, that the Agency is not free to grant this type of state primacy. If so, this should be an instructive lesson for officials of the western coal-mining states. Too often in the past, these officials have shown themselves to be susceptible to federal laws and federal politicians that promised increased state responsibility and authority.