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The Surface Mining Control and Reclamation Act of 1977

Hamlet J. Barry, III

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OUTLINE

THE SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977

BY

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FEDERAL LANDS, LAWS AND
POLICIES AND THE DEVELOPMENT
OF NATURAL RESOURCES

THE UNIVERSITY OF COLORADO SCHOOL OF LAW

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SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977 (SMCRA)
DETAILED OUTLINE

I. The Scope of this Outline is as Follows:

- A. This presentation will address SMCRA¹ and its state analogs. Many examples and issues are drawn from Colorado. As a Colorado official, the author confesses both an anti-federal bias and a general lack of knowledge about mining facts, issues, and laws, in the eastern part of the U.S., where the geologic, economic, and political climate for mining is significantly different. This outline, therefore, probably reflects these limitations of the author.
- B. The focus of the paper is on the major operational aspects of SMCRA. Once these are described, a discussion of issues, problems, and litigation follows. By itself, this outline is not sufficient for the purposes of putting together a mining and reclamation plan, and cannot possibly mention all the significant issues, problems, and questions that have and will arise concerning SMCRA. Any lawyer who represents a client with a SMCRA, or state analog, problem should become intimately familiar with at least the following materials:
1. The federal regulations implementing SMCRA²;
 2. The preamble to those regulations which often explain³ the reasoning and the regulation;
 3. The analogous State statute and regulations implementing that statute;
 4. The State submission for program approval sent to OSM (Office of Surface Mining) on or before March 3, 1980;
 5. Major litigation concerning SMCRA, particularly the opinions by Judge Flannery discussed briefly in Part V of this outline.

II. The Background and History of the Surface Mining Control and Reclamation Act of 1977.

The Surface Mining Control and Reclamation Act of 1977 was the first comprehensive federal statute to regulate the surface impacts of coal mining on a national scale. Prior to 1977, 38 separate states regulated to one degree or another the surface effects of coal mining. However, the drive for national legislation began in 1968. During the 92nd Congress, a Senate Subcommittee reported out a bill and the House passed a bill, but the Session adjourned before the Senate could consider the Committee legislation⁴. In the next few years, various forms of similar reclamation legislation were introduced, passed and vetoed by the President. President Ford pocket vetoed the statute passed by the 93rd Congress, and also vetoed a similar bill the next year⁵. President Carter signed the current Surface Mining Control and Reclamation Act on August 3, 1977. Since then the act has remained virtually unchanged. The one serious attempt to amend the act itself--Senate Bill 1403--has been tabled by Interior Committee Chairman Udall, and appears to be dead for the time being. It is possible, however, that current and future litigation will result in some deletions from the statute due to constitutional deficiencies in the act.

III. Overview of the Surface Mining Control and Reclamation Act.

A. Purpose and Applicability

Section 102 of the Act lists 13 separate purposes of the Surface Mining Control and Reclamation Act. These purposes display the usual "something for everyone" philosophy of most major pieces of federal legislation.

SMCRA itself provides a comprehensive scheme for the regulation of surface coal mining and the surface affects of underground coal mining. The primary purpose is to mitigate the adverse environmental impacts of coal mining and to insure that land disturbed or otherwise affected by coal mining is reclaimed to its pre-mining appearance and uses.

Coal is the only mineral which is subject to the provisions of the Act⁶; however, the Act does apply to the mining of all coal resources, regardless of whether the coal is leased from the federal or state government or owned privately. Please note that some landowners still believe that they have the right to do anything to the land they own. SMCRA negates that long-held belief; and requires that even if the mine operator owns the land being mined, the reclamation law must still be followed.

The applicability of SMCRA and the state analogs is determined primarily by the definition of the terms "surface coal mining operation", "surface coal mining and reclamation operations", and "operator"⁷. These terms are used to identify who must obtain permits, who is subject to enforcement actions; and most importantly, who must comply with the environmental protection performance standards.

B. Legislative Findings

Section 101 of SMCRA contains the specific findings of Congress with respect to coal mining and reclamation. Of particular significance are findings #101 (c), and finding #101(f)⁸. Section 101(c) places the constitutional basis for SMCRA on the commerce power of the federal government:

(c) "many surface mining operations result in disturbances of surface areas that burden and adversely affect commerce and the public welfare by destroying and diminishing the utility of land for commercial , industrial, residential, recreational, ..."

Section 101(f) recognizes that primary responsibility for implementing the provisions of SMCRA should rest with the individual states:

(f) "because of the diversity in terrain, climate, biology, 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 chapter should rest with the states".

As far as the analagous state legislation is concerned, most of the state acts contain findings and purposes similar to those briefly discussed above. However, as noted by the State of Wyoming in their program submission...."legislative findings at the State level are a more modest exercise..."

C. Organization of the Surface Mining Control and Reclamation Act.

1. Title I of SMCRA contains the statement of findings and the purposes and policy supporting the Act.
2. Title II establishes an independent federal agency within the Department of Interior to implement SMCRA. This agency is the Office of Surface Mining Reclamation and Enforcement (OSM).
3. Title III deals with the establishment of State Mining and Mineral Resources and Research Institute, in order to improve the engineering capabilities and manpower for the development of the country's mineral resources.
4. Title IV creates the Abandoned Mine Reclamation Fund in the U.S. Treasury. It also establishes provisions for acquiring and reclaiming lands which have been previously mined and abandoned.
5. Title V is the substantive heart of SMCRA. Title V sets forth the procedural and substantive requirements for the mining of coal in the United States. The regulatory scheme is typical of many similar state and federal efforts: the operator of a mine must apply for a permit and describe the method of mining to be used and the reclamation plan that will be followed; he must supply a performance bond to cover the costs of reclamation , and will forfeit bond if he fails to complete the required reclamation; the operator is subject to severe penalties, both civil and criminal, and the entire permitting and regulatory program is subject to public scrutiny through a broad variety of public participation avenues.
6. Title VI outlines the procedures for designating lands unsuitable for mining of minerals other than coal. These provisions apply only to federal lands which are of an urban or suburban character or are so situated that mining operations would have an adverse impact on land primarily used for residential purposes.
7. Title VII is a general administrative and miscellaneous provisions section, including grant programs, definitions, and special provisions for Alaska.
- 8&9. Titles VIII and IX deal with university coal research laboratories, and energy resource graduate fellowships .

D. Implementation Stages of SMCRA.

The Surface Mining Control and Reclamation Act sets up a two stage process for the regulation of coal mines in the United States. The first stage covers that period of time from August 3, 1977 (the date the act was signed) until the time when a permanent program is in place⁹. A permanent program will be in place when an individual state has an approved program or when OSM promulgates and implements a federal program for that state, either because the state has chosen not to regulate coal mining or because the state program has not been approved. As of June, 1980 only Montana and Texas have approved programs¹⁰. The majority of state programs will be approved or disapproved by late fall of 1980 and the ultimate deadline for approval or disapproval is February 3, 1981.

Under the Interim Regulatory Program, operators are not required to obtain new permits from the state agency or from OSM, but they are required to comply with certain performance standards listed in the Act. In general, those performance standards embody 8 of the 25 standards set forth in Section 520 of the Act¹¹. The federal government has issued regulations to cover coal mining during this interim period.

Under the permanent program, all 25 of the performance standards are applicable and all operators must obtain new permits either from the state regulatory authority or from OSM itself, depending upon the existence of an approved state program¹².

IV. Major Components of the Surface Mining Control and Reclamation Act of 1977.

A. State Programs.

The Surface Mining Control and Reclamation of 1977 provides that states may assume "exclusive jurisdiction" for the federally mandated program for control and reclamation of land mined for coal, provided that certain conditions are met and that federal approval is obtained¹³. In this sense, SMCRA is a continuation of the federal policy embodied in both the Clean Air Act, and the Clean Water Act, in that both acts allow for state implementation of a federal program. The applicable section of SMCRA reads as follows:

Each state in which there are or may be conducted surface coal mining operations on non-federal lands, and which wishes to assume exclusive jurisdiction over the regulation of surface coal mining and reclamation operations....shall submit to the Secretary....a state program which demonstrates that such State has the capability of carrying out the provisions of this act and meeting its purposes....

The specific requirements for state programs are set out in Section 503 of SMCRA, and in the implementing federal regulations¹⁴. The major statutory requirements for approval of a state program are:

1. A state law for the regulation of surface coal mining and reclamation operations in accordance with the provisions of SMCRA, and which provides sanctions for violations which meet minimum federal requirements;
2. State rules and regulations to implement the state statute, which must be consistent with the federal rules and regulations under SMCRA.
3. A state regulatory authority with sufficient administrative and technical staff, and adequate funds, to regulate surface coal mining operations; and
4. A procedure for designating areas as unsuitable for coal mining, and a procedure for coordination of permit applications with other state agencies, or with federal agencies.

The federal regulations elaborate considerably on the above program conditions, and require in addition, the submission of an Attorney General's opinion comparing the state and federal acts and the state and federal regulations, and explaining any significant differences; sixteen narrative descriptions and related flow charts for all elements of the state program; copies of supporting agreements between state agencies; statistical information concerning the coal industry in the state; and various documents concerning the state regulatory authority budget, personnel, and physical resources¹⁵.

The federal regulations governing the submission and approval of state programs also introduce the so-called "state window" concept. The regulations provide that under certain conditions, state law, or state regulations may deviate from the specific standards of the federal act. State alternatives will be deemed to be "in accordance with" or "consistent with" the federal equivalent, if the states can demonstrate with data, analysis, and information, that the state alternative is no less stringent than the federal equivalent, and that the state alternative is necessary because of local environmental or agricultural conditions. Presumably, the "state window" concept evolved from the legislative finding in 101(f) mentioned above.

The above requirements apply for states which wish to assume "exclusive jurisdiction" over coal mining on non-federal lands. Those states which desire to assume jurisdiction for the program on federal lands must comply with Section 523 of SMCRA, which provides that a state with an approved program (as described above), may elect to regulate mining of federal lands by the signing of a cooperative agreement with the Secretary of Interior. Both the act, and the regulations concerning cooperative agreements ¹⁶ make it clear that a cooperative agreement does not give the states authority to designate federal lands as unsuitable for coal mining plans on federal lands.

Although the Act hints at the concept of a "state window" and although the regulations make that hint more extensive, it is far from clear at this point as to what a "state window" really is. In any event, listed below are some examples of "state windows" as described in recent western state program submissions to OSM.

Utah-Has made provision for occasional departures from the approximate original contour requirement, so as to allow terraces and benches, which resemble the mesa topography present in much of Utah.

New Mexico-Allows highwalls to be left where they fit with the natural terrain.

Montana-

1. No specific replication of the penalty point system.
2. Prohibition on, rather than standards for, operations on steep slopes and for mountaintop removal.
3. Requires the land be returned to native rangeland, rather than to often marginal farmland.

Wyoming-

1. Reduced scope and information needed to show the existence or non-existence of an alluvial valley floor.
2. Has determined, by regulation, that a flexible standard of from 3 to 10% decrease in production from a farm will be deemed significant for alluvial valley floor purposes.
3. More flexible definition of "topsoil".
4. Allows sediment ponds to be removed after restorations of vegetation, rather than when the full revegetation requirement is completed.
5. General elimination of valley fill, head of hollow fills, and durable rock fills, as unneeded in Wyoming's topography.
6. Alternative use criteria for various road classifications.

Colorado-

1. State has incorporated Colorado water law into the provision covering "water rights and replacement".
2. State Engineers criteria on embankments and impoundments substituted for MSHA criteria as per state statute.
3. Performance standard for regrading or stabilizing rills and gullies to reflect nature of semi-arid areas of the state where rilling and gullying are significant components of the natural geomorphic processes.
4. Allowance for alternative design specifications for disposal of excess spoil, mountain top removal, and steep slope operations to accommodate extremes of the state, i.e., mining occurs in elevations of 5,000 ft. to 10,000 ft. in areas of precipitation ranging from 6" to 30"/year and averaging 300" of snow.

As of June, 1980, it is still unclear as to whether Office of Surface Mining intends to allow states to control the program as contemplated by Section 101(f) of SMCRA. OSM always gives lip service to the concept of state program approval. However, in practice, OSM seems unwilling to accept what many state administrators view as necessary changes in the federal scheme in order to accommodate local conditions. To a large extent, the success of the act as a whole depends upon whether OSM can accept the idea of relatively autonomous state programs.

B. Permit Application Requirements.

There are three important questions to ask with respect to permit application requirements: (1) who must apply for a permit; (2) when must such an application be submitted; and (3) what must be included in such an application?. Who must apply is controlled generally by the definition of surface coal mining operations¹⁷. Any person who is engaged, or who intends to engage in surface coal mine operations must apply for a mining and reclamation permit. Such an application must be obtained within eight months after a state program is approved, or within eight months after the imposition of a federal program. The application must be submitted within two months of the date of state program approval. In general, an existing operation under valid state law will be permitted to continue after eight months from the date of state program approval if the failure to obtain the new permit is due to administrative delay on the part of the state agency¹⁸. The precise date when a new permit or permit application is required depends quite obviously on the status of a state program. Finally, the contents of a permit application are controlled by Sections 507 and 508 of SMCRA.

Any prospective applicant should read Sections 507 and 508, or their state analogues, very carefully before beginning compilation of permit materials. Restatement of these lengthy and often redundant requirements would not be particularly helpful as part of this outline. What follows is only a broad characterization of the information required.

1. An applicant must provide information identifying what sort of an entity it is, if not a person. Documentation of the applicant's right to enter the lands within the proposed permit area must also be provided. A potentially troublesome feature for operators is the requirement that the applicant provide compliance information concerning any other surface mining operations conducted by the applicant anywhere in the United States¹⁹.
2. Next, the applicant must comprehensively inventory the natural resources to be found within the permit area and certain adjacent areas. This includes a detailed collection of baseline or pre-mining information on soils, vegetation, surface and ground water, geology, fish and wildlife and other matters. In collecting this information, the applicant must carefully bear in mind the required scope of inquiry. This is emphasized by the use of various areal terms in the OSM regulations implementing SMCRA. These terms include, in order of widening geographic scope, "permit area," "mine plan area," "adjacent area" and "general area." Some of these terms have been altered by litigation. See Section VI infra.

Thus, different kinds of baseline environmental inquiries may have different geographic parameters. For example, the applicant must include a "determination of the probable hydrologic consequences of the surface coal mining and reclamation operation both on and off the site". This information is to make an assessment of the probable cumulative impact "of all anticipated mining in the area upon the hydrology of the area." This requirement is particularly significant because the application cannot be approved until this assessment of the cumulative hydrologic impact is made, yet the completion of that assessment may require hydrologic impact information from other mining operations. Thus, an applicant whose operation shares a topographic or groundwater basin with another surface coal mining operation should consider the exchange of information with neighboring operations in order to facilitate the cumulative assessment.

3. After inventorying and quantifying the resources to be found within or adjacent to the permit area, the applicant must describe the manner in which the area will be mined and formulate several "plans" which loosely combine to form a "reclamation plan" that details how the operator proposes to mitigate or prevent adverse impacts from the mining operation upon identified resources. Again, the specifics of the various plans comprising the reclamation plan are sufficiently detailed and lengthy to preclude their reiteration here.

The above information provides a general outline of what is required in a permit application. For considerably more information as to the content of a mining and reclamation permit application, see Walt Ackerman's article in the Practising Law Institute handbook "Surface Mining Control and Reclamation Act" pages 117-227²⁰.

C. Application Review and Criteria for Decisions

Once a permit application has been received, it will be reviewed by the regulatory authority (either a state agency or OSM). Following that review, the decision on a permit will be made. In general, these two activities are controlled by Sections 510 and 514 of SMCRA, or the analagous state statutory sections.

The process begins with the filing of a complete permit application. After notification from the regulatory authority that the application is complete, the applicant must place notice of his application in a newspaper in the locality of the operation, which notice must continue for four consecutive weeks. Simultaneously, the regulatory authority must provide notice of the application to federal agencies as well as state and local government bodies with jurisdiction in the locality of the surface coal mining and reclamation operation. These governmental entities,

together with any person that is or may be affected by the operation, may submit written comments to the regulatory authority within 30 days after the last newspaper publication.

Within this same period, any person who submits comments or objections may also request an "informal conference" concerning the application. The informal conference must be held in the locality of the mining operation. The informal conference is a device to provide a less adversary atmosphere in which those with differences concerning the permit application can exchange views and information. In the event an informal conference has been requested, the regulatory authority must grant or deny the permit within 60 days after the conference. If no conference is held, the regulatory authority must notify the applicant within a reasonable time of the approval or denial of the permit. If the permit is disapproved, the applicant may request a formal hearing and the regulatory authority shall issue and furnish the applicant and all persons who participated in that hearing with a written decision granting or denying the permit within 30 days after the hearing. The criteria for permit approval or denial are specified in Section 510 of SMCRA. Certain specific criteria must be satisfied before a permit can be approved, including a demonstration that the permit is complete, that reclamation as required by the Act can be achieved, that the assessment of the cumulative, hydrologic impact has been made showing the operation is designed to prevent damage to the hydrologic balance outside the permit area, and that permit approval will not conflict with any designation of lands as unsuitable for surface coal mining.

In addition, the permit application may not be approved if the mining operation will have certain defined adverse affects upon "alluvial valley floors". As interpreted by OSM, virtually any valley-like formation which contains a stream that flows at least intermittently raises the alluvial valley floor issue²¹. While the presence of an alluvial valley floor may not necessarily preclude mining, it can greatly constrict mining operations and make permit approval much more difficult. There are, however, certain "grandfather" provisions which apply to exempt surface coal mining operations that produced coal in commercial quantities in the year preceding August 3, 1977 or prior to that time, had permit approval to conduct operations in or adjacent to an alluvial valley floor²².

Another prerequisite to permit approval is surface owner consent to the surface mining in those instances where the surface and mineral estates have been severed. Alternatively, a conveyance will suffice which expressly grants or reserves the right to extract coal by surface mining methods²³.

Finally, no permit application may be granted to an operator of a surface coal mine found to be currently in violation of SMCRA or state reclamation laws or applicable air or water quality laws of states or of the United States. Likewise, no operator with a demonstrated pattern of willfull violations will be granted a permit²⁴.

D. Environmental Protection Performance Standards

The Environmental Protection Performance Standards are the centerpiece of the Act and the substantive justification for the complicated administrative procedures described earlier. SMCRA prescribes performance standards applicable to the mining phase of the operation as well as to the required post-mining reclamation. These standards will be described roughly in the sequence of implementation.

1. First, topsoil and available subsoil must be removed from all areas to be disturbed by the mining operation, including not only areas from which coal will be removed but also road sites, sedimentation pond sites, future spoil pile areas and the locations of office buildings or other structures incidental to mining operations. Coincident with topsoil removal, the operator must initiate construction of sediment control ponds or other siltation structures. The discharge from such sediment ponds must meet all applicable state and federal water quality standards. Over the course of the mining operations, sediment ponds must be periodically dredged or otherwise cleaned out and then removed upon completion of mining.
2. Roads constructed to provide access to and through the mining operation must be built and maintained to prevent erosion, water pollution or damage to fish and wildlife as well as public or private property. The SMCRA contains a specific prohibition on road construction in or immediately adjacent to streambeds or drainage channels.
3. With regard to the excavation process, SMCRA prescribes detailed requirements applicable to the use of explosives. Protection of off-site structures and individuals not employed by the mining operation is the primary focus of these requirements.
4. In the area of actual coal removal, SMCRA requires the operator to maximize recovery of the coal resource, primarily to preclude re-affecting the land surface by later mining. Auger mining is authorized, but the Act requires that augering be conducted so as not to preclude subsequent underground mining. Augering must also be conducted and completed in a manner which assures protection of the hydrologic balance.

5. Numerous additional hydrologic considerations are involved in the excavation and extraction phase. Contact between water and acid or toxic producing substances is to be avoided, and any acid or toxic drainage that may nevertheless result from mining must be treated. Particularly significant is the requirement that the mining operation restore the groundwater recharge capacity of the mined area. This poses a potentially serious concern in situations where the operation may actually mine through all or part of an aquifer.

Most controversial of the hydrologic protection provisions is the requirement that the operator preserve the essential hydrologic functions of any potentially affected "alluvial valley floor". SMCRA contain a definition of the term alluvial valley floor which is sufficiently broad that the identification of alluvial valley floors remains an uncertain and elusive process, notwithstanding the efforts of OSM to further define the term through issuance of technical guidelines²⁵.

Despite the controversy surrounding this issue, it is possible under the proper circumstances for surface coal mining operations to be conducted in or adjacent to alluvial valley floors. The alluvial valley floor protection measures were included primarily to preserve the agricultural potential of such areas. That potential is largely dependent upon the hydrologic function of alluvial valley floors, and if measures can be taken to preclude adverse effects upon essential hydrologic functions and also to avoid disruption of farming operations, surface mining operations may be permitted.

6. During the course of the mining operation, the operator must "stabilize the surface area" for the purpose of controlling erosion as well as air and water pollution. In the course of promulgating regulations under SMCRA, there was significant controversy over the extent to which this provision allowed the regulatory authority to become involved in substantive regulation of air pollution. Judge Flannery has now reduced OSM involvement in air quality issues to a minimum. For details, see the litigation Section VI infra.
7. Special standards have been developed for the creation of permanent water impoundments and excess spoil piles. The thrust of these standards is to insure that both spoil piles and impoundments are constructed safely in order to prevent failure or mass movement. In addition, the standards require that the spoil piles or impoundments be suitable for their intended use and consistent with the post-mining land use. Based on the Appalachian experience, it is apparent that such structures are not favored by OSM, and any applicant proposing such structures must overcome a significant burden.

8. Upon the completion of extraction operations, the operator must promptly backfill and grade the disturbed area, eliminating all highwalls so as to restore the approximate original contour. Certain variations from this requirement may be available where the coal seam is particularly thick or thin; thereby resulting in either too little or too much material for backfilling. In the process of backfilling the excavated area, the operator must bury, compact or otherwise dispose of debris and acid or toxic producing material in a manner that will prevent contamination of surface or ground water.
9. Following completion of backfilling and regrading, the operator must promptly replace topsoil which was removed and segregated at the outset of the operation. Thereafter the topsoiled area must be revegetated with a seed mixture or seedlings designed to restore a "diverse, effective and permanent vegetative cover of the same seasonal variety native to the area"²⁶. There is clearly a statutory preference for the use of native species; however, SMCRA does allow for use of introduced or exotic species when "desirable and necessary to achieve the post-mining land use." When there is an average of less than twenty-six inches of precipitation per year, responsibility for establishing this vegetative cover will continue for ten years following the last year of seeding, fertilizing, or irrigation.
10. Each step in the reclamation process must be initiated as contemporaneously as possible, with certain limited exceptions, including situations where the operator will combine surface and underground operations. At the conclusion of all reclamation operations, all environmental resources must be restored to a posture that will support the proposed post-mining land use.
11. Beyond these relatively specific standards, two rather vague and open-ended performance requirements are that (1) the operator must conduct the mining operation so as to minimize impacts on fish and wildlife "and related environmental values", and that (2) the operator must "meet such other criteria as are necessary to achieve reclamation in accordance with the purposes of this article"²⁷.
12. Additional standards require the underground operator to seal exploratory holes; to return waste products to the mine workings where possible; to seal portals, drifts and shafts upon conclusion of the mining; to construct waste disposal piles so they are stable, do not contaminate surface or groundwater and blend with surrounding topography; and to revegetate all graded or otherwise disturbed areas. Paralleling the general performance standards, all underground operations must be conducted to avoid adverse impacts upon fish, wildlife, "and related environmental values."²⁸

Underground operations must also be conducted so as to minimize disturbance to the prevailing hydrologic balance, on and off the mine site; however, SMCRA would appear to limit this mandate as it applies to the subsurface aspects of an underground mining operation to the prevention of acid or other toxic mine drainage. Surface facilities or other surface disturbances incident to underground mining must avoid contribution of additional suspended solids to stream flow and also stream channel deepening. Thus, construction of sedimentation ponds will be required in connection with the surface facilities or other surface impacts incidental to the conduct of an underground mining operation.

E. Public Participation

One of the foundations upon which the Surface Mining Control and Reclamation Act was founded was active, and continued public participation in the permit approval and enforcement stages of mine regulation. There are a large number of specific sections insuring public information and participation scattered throughout SMCRA and the implementing rules and regulations. Some of these provisions are briefly listed below:

1. Provision for public comment on the proposed interim and permanent program rules and regulations;
2. Permit applications submitted for mining operations under both state and federal programs are subject to public review;²⁹
3. There is public notice and an opportunity for a public hearing prior to permit approval or denial;³⁰
4. Any person with a valid interest that may be adversely affected may file objections to a permit application;³¹
5. Permits may only be renewed following a public hearing;³²
6. State program submissions are subject to public review and to public hearings;³³
7. Any person may notify the Secretary and the state regulatory authority of violations of the Act;³⁴
8. A complete hearing record must be maintained for review purposes;³⁵
9. The public may petition to designate an area as unsuitable for coal mining;³⁶
10. Inspection and monitoring records, reports, and materials must be made publicly available.³⁷

In general, any practitioner contemplating representation of a client under the Surface Mining Control and Reclamation Act should be aware that there is a statutory basis for very broad, and pervasive public scrutiny of all actions taken by the regulatory authority, and nearly complete public availability for all materials submitted to that agency by any coal operator. The various public interest and environmental groups that have succeeded in getting such language into SMCRA in the first place will be quite diligent about protecting and enforcing the public rights under the statute.

F. Inspections and Enforcement under SMCRA

SMCRA requires that state programs maintain vigorous systems for mandatory inspections and enforcement of the performance standards of the Act. To insure the stringency of state inspection and enforcement programs, OSM retains oversight authority for inspection and enforcement should the state be less than dutiful in carrying out the program.³⁸

1. In order to facilitate determination of compliance with permit terms and applicable provisions of the Act and regulations, operators can be required to monitor surface and ground water quantity and quality. Records of this and other necessary information are to be maintained by the operator and made available upon request.
2. At least once every quarter, the regulatory authority must conduct a complete inspection of every coal mining operation in the state. Inspectors have a warrantless right of entry. The constitutionality of this right was challenged in recent litigation in the District Court for the District of Columbia. As noted, in part V of this outline, that court found that the right of entry provisions do not violate the Fourth Amendment.
3. A dramatic departure from prior law is found in the provision calling for inspections in response to citizen complaints. Specifically, the regulatory authority must act upon a written request for an inspection from a person who is or may be adversely affected by a coal mining operation and who alleges facts indicating that a violation has occurred.³⁹ The person requesting the inspection must be allowed to accompany the inspector provided that the person remains "under the control, direction, and supervision of the inspector".⁴⁰

4. Formal enforcement actions represent some of the most confusing procedures in the Act.
 - a. There are three primary enforcement vehicles: cessation orders, notices of violation, and penalty assessments. Cessation orders require the partial or complete termination of mining activity. They are issued in three situations: (1) where a statutory or permit violation creates "an imminent danger to the health or safety of the public", (2) when a statutory or permit violation causes or can be expected to cause "significant immediate environmental harm to land, air, or water resources"; and (3) when an operator fails to abate a violation within the time prescribed in a notice of violation.
 - b. A notice of violation, on the other hand, is issued in situations where the operator has violated the Act, the regulations, or his permit in a manner that does not threaten significant or imminent harm to the environment or public health and safety. Penalty assessments, the third major enforcement tool, are generally discretionary in connection with notices of violation. However, a penalty must be assessed when a cessation order has been issued.
 - c. The administrative review of violations inevitably involves two separate components -- the fact of violation and the amount of the penalty assessed. The operator can challenge either or both of the components. Operators and their attorneys should consult Sections 518, 521, and 525, and the corresponding regulations for all the procedural details and time schedules.
 - d. It should be emphasized that repeated violations by operators may result in drastic consequences. The regulatory authority may revoke a permit if it determines that the operator has a pattern of violations resulting from unwarranted or willful failure to comply with SMCRA or the permit.
 - e. It may also be useful to set forth the penalties available to the regulatory authority under SMCRA. Each day of a violation is considered a separate violation and the authority may assess a maximum \$5,000 penalty for each violation. Criminal penalties are also available. A civil fine of \$750 for each day of violation may be assessed where the permittee fails to correct a violation pursuant to a citation issued by the regulatory authority.

G. Designation of Lands Unsuitable for Coal Mining

SMCRA introduces a unique and potentially controversial procedure by which lands may be designated as unsuitable for surface coal mining. Section 522 sets forth the criteria, procedures, and data required for designation of areas unsuitable for all or certain types of coal mining. The purpose of unsuitability designations is to protect particularly sensitive areas from some or all types of coal mining, and to give mine operators advance notice of reclamation or environmental problems that would preclude coal mining operations. The primary effect of designating land unsuitable for surface mining is to preclude the issuance of a permit for such lands.

There are numerous troublesome aspects of the unsuitability designation process. For example, questions have been raised as to how the area to be designated is to be geographically defined--for example, whether designation of a surface area as unsuitable might also preclude underground mining. Designation also presents constitutional questions concerning the effect of a designation on the real property interest of one who invested in land in contemplation of future mining.⁴¹

1. The statute sets forth both mandatory and discretionary designation criteria. The regulatory authority must designate an area as unsuitable if reclamation under the Act is not "...technically and economically feasible..." Presumably, the yardstick of feasibility will change over time with improvements in reclamation technology and in economic connections..
2. Secondly, the regulatory authority may designate an area as unsuitable if mining would be (1) inconsistent with existing state or local land use plans; (2) adversely affect fragile or historic lands by damaging important environmental values; (3) adversely affect renewable resource lands by causing substantial loss in productivity; or (4) affect natural hazard areas causing danger to life or property.
3. The designation process may be initiated only by petition. Any duly authorized government agency or any person whose interest is or may be adversely affected by mining may petition to designate an area as unsuitable. The rather minimal information requirements for a petition require only allegations, facts, or evidence which would support designation; identification of the petitioners' interest which is or may be adversely affected; and an identification and brief description of the area proposed for designation. These comparatively light information requirements are consistent with the intent of SMCRA and the OSM regulations to require the regulatory authority to generate all the information needed to resolve a designation petition.

4. Within ten months of receipt of a complete petition, the regulatory authority must hold a public hearing in the locality of the area covered by the petition, with appropriate notice to the public beforehand, as specified in the Act. Any person may intervene in the designation proceeding by filing a petition and supporting evidence. The regulatory authority must render a written decision on the petition within sixty days of the date of the hearing.
5. It should be noted that the designation procedure does not apply to federal lands, or to operations existing as of August 3, 1977, or to land covered by a permit issued under the Act. However, it is possible to designate an area adjacent to an existing mine, provided the adjacent area is not covered by a mining and reclamation permit.
6. In addition, the Act allows for a petition to terminate a designation when the facts have changed or no longer justify a prohibition on all or certain types of coal mining. All designation or designation termination decisions are, of course, subject to judicial review.

V. Major Issues With Respect to SMCRA.

A. Introduction to Major Issues

The factual and legal material presented above does not offer any particularly useful insights into the variety of political, legal, ideological, and procedural issues which arise as a result of the passage of SMCRA, and of implementation of the act by OSM. Some of these "issues" have been, or are planning to be, litigated by individual mine operators, the American Mining Congress, The National Coal Association, or other industry groups. For those issues that have been, or currently are, in litigation, see Section VI of this paper.

Although a large number of issues have already been litigated, there are a significant number of issues which have not yet been tested by the courts. In general, these issues are state and federal issues, which revolve around special concerns in the west with respect to the federal lands portion of the Surface Mining Control and Reclamation Act, or they revolve around the procedural aspects of state program approval. The western states have not - thus far - decided that it is in their best interests to litigate these issues. Whether or not litigation will ensue depends in large part on the timing of OSM approval of state programs, and on whether OSM approves, conditionally approves, partially approves, or denies the state program applications. However, there is no doubt that a number of major state/federal issues exist, as seen in the following representative sample of statements, quotes, or comments from various western Governors or state officials. Some of the statements appear to be firmly held, and indicate the considerable depth of western state feeling about the federal Office of Surface Mining.

1. "As you know, the Surface Mining Control and Reclamation Act of 1977 looks to the states to take the lead in implementing a national program. The thrust of my testimony today is that the federal Office of Surface Mining has jeopardized this fundamental feature of the federal act with its performance to date. And we doubt that the situation will improve in the months to come.

My personal experience has been as bad as any. As a Governor who has built a fine reclamation program, from a state destined to be the nation's leading coal producer, the problems came to my attention early. I have faithfully pursued my remedies within Interior for over a year; the best that can be said about the result is that Interior has occasionally been courteous."⁴²

2. As a practical matter, the window is closed. The regulations require excessive proof that a departure from the federal regulations is warranted. Many state officials believe that the required showing would be as expensive as a lawsuit. The result is particularly frustrating because the federal regulations go beyond the standards of the act to require specific procedures and techniques. It follows that the states will be required to use procedures that clearly do not fit nationwide. This is not what the Congress intended."
3. In May, OSM Region V sent letters to Wyoming operators notifying them that spring was here, and that OSM stood ready to help them get their vegetation in order. I was naturally pleased to hear that spring had arrived and that OSM was on hand to explain it; spring has always been something of a mystery to me. But I don't think OSM has any business handing out free gardening tips in Wyoming, particularly when communications with the operators are supposed to be channeled through the state.⁴³
4. Our problems do not lie with the performance standards in the act, but with the procedures, the timetables, the state program requirements, and the general regulatory and bureaucratic excesses which seem to pervade OSM. In essence, we are here to question whether the scope, magnitude, and extent of present and future OSM activities are mandated by the act, and whether such activities were contemplated by Congress when the act was passed.

However, the question is not whether there is a commitment to state programs; the question is what kind of program does OSM contemplate? Colorado's perception is that OSM contemplates that the only approvable state program is that which is made in the OSM mold, according to the specific, detailed, self generated standards established by OSM, and submitted according to their illegally imposed timetable. Viewed in this light, the "state window" is less of an opportunity, than an obstacle to a state program, because of the substantial burden of proof which must be met in order to satisfy OSM that the state alternative should be permitted. We believe that the act permits, and that Congress intended, for the states to make a prima facie case that the proposed state program will produce a regulatory result of equivalent environmental quality. However, the OSM regulations take the position that every element of difference between the state and federal program must be described, dissected, and demonstrated able to meet the "applicable provisions of the regulations of this chapter."⁴⁴

5. We find many States having no choice but to become "State level clones" of the federal regulations because the federal bureaucracy will not otherwise accept the States' offerings. Having to "lift" whole sections of the final rules for placement in State programs certainly strays from the intent of Congress and places an unacceptable burden on State legislatures.

We find the States must prove overwhelmingly that their programs meet the Secretary's rules and regulations as well as the Act. The state of Wyoming, for example, has been asked to change its statute of limitations and administrative procedures act, not to comply with the Act, but to comply with the Secretary's regulations. The States are, in effect, guilty until proven innocent under this backwards scheme."⁴⁵

It is essential that the decisions on "State Window" alternatives should be made jointly between state regulatory agencies and field offices of the Office of Surface Mining. For example, the final check-off with regard to the Utah program should be made between myself and Don Crane in Denver, and should not be routed back to Washington, D. C. for a final review by the national OSM and its Washington solicitor. It is time for the solicitor's tail to stop wagging the policy dog.⁴⁶

7. The Department of the Interior has taken the position that it is necessary for the Office of Surface Mining to duplicate the review of mine plans currently being performed by the states. Ironically, it has used Section 523(c), a section designed to insure state implementation, to essentially thwart state administration of the program. That section states that "Nothing in this subsection shall be construed as authorizing the Secretary to delegate to the states his duty to approve mining plans on federal lands . . ." In Montana, where nearly every major surface mine is operated at least partially on federal land, this means almost complete duplication of effort."⁴⁷
8. Since the halting establishment of the federal Office of Surface Mining, the varieties of my disappointment have beggared description. I have been, at one time or another, frustrated, annoyed, infuriated, exasperated, bewildered, appalled, alarmed, and disgusted. Perhaps most important, I have found my personal attention to be necessary for one problem after another. Like a small boy, a large dog, or a newspaper reporter, the Office of Surface Mining is constantly up to mischief.

The second major problem is that neither the Nation nor the West has the time to indulge the Office of Surface Mining while it sorts out its affairs. The Nation is facing a period of international unrest, which may have the specific effect of precipitating a renewed domestic energy crisis. The West, as I indicated at the outset of my testimony, has a great deal of building to do. We all have more important work than fussing with a temperamental federal agency.⁴⁸

9. I am sure that you will agree that the state program submittal and review is a tiresome, cumbersome, unwieldy process, which has been extremely frustrating for all of us. We remain extremely concerned about what we view as early institutional ossification at OSM, and the agency's generally low regard for serious questions about jurisdiction, standing, and statutory authority. During the course of many staff meetings regarding our program, we have too often been informed that although our regulatory language, or conceptual plan, or both, are technically or operationally equivalent or superior to the OSM approach, we must conform to the OSM regulations. We are also troubled that in spite of the detailed nature of OSM's authorizing legislation, the agency

apparently feels free to impose additional burdens, requirements, or mandates on states and operators without even asking the hard legal questions about about jurisdiction and statutory authority. When we have asked those questions, we are met with blank stares and shrugged shoulders.⁴⁹

10. The cutting edge of our unhappy relations with the Office of Surface Mining is primarily the federal regulations. As an attorney, I can tell you that these regulations were not drafted to implement a program; they bear the stamp of trusts and estates practice in Philadelphia, not environmental regulation. Instead of a clear structure for performance, they are a lawyer's maze which is designed to confuse and harass an adversary. They present endless opportunities for inquiries, delays, and requests for clarification by federal officials. Where five items sufficed in the federal act, twenty-five now appear in regulation, complete with endless subparagraphs, over-extensive demands for disclosure, and open-ended commitments. This is a system designed with welfare cheats in mind, not sovereign states. It is a system which invites litigation, a system at once too detailed and too ambiguous. It reflects an approach which denies confidence in the integrity of any part involved."⁵⁰

The above quotations accurately reflect the depth of concern in the west about OSM and the progress to date in implementation of the Surface Mining Control and Reclamation Act. However, these pithy quotes are hardly a substitute for careful analysis of the individual issues which are a source of aggravation to the state, to operators, and to OSM. A general description and analysis of the most important issues follows. The first set of issues can generally be described as issues arising because of the existence of federal land.

B. Federal Lands Issues:

1. Section 523(c) of SMCRA states clearly that "Nothing in this subsection shall be construed as authorizing the Secretary to delegate to the States his duty to approve mining plans on Federal lands. . ." In practice, this came to mean that any operator who intends to mine on federal land, or mine federal coal, must submit identical mining and reclamation plans to the state and to OSM. Both agencies then do a full review of the application. This needless duplication occurs under both the interim program and under the permanent regulatory program, and adds confusion, frustration, and extensive delay to the review of applications and issuance of permit on federal lands.

The first casualty of this duplicate review process is speedy action on pending applications. OSM is generally unable to review and approve of permit applications in a timely manner. Promised deadlines are almost never met, and are usually missed by a month or more. Some states have a statutory time period for the processing of applications, but OSM has no such deadline and thus has little interest in meeting state imposed deadlines.

Delayed issuance of mining permits might be acceptable if the OSM review resulted in a higher quality mining plan or better reclamation on the ground. However, the OSM review is often simply a duplicate or a re-hash of the state review. It does not appear that any reclamation purpose is served by this duplication and delay.

It is clear that duplicate state and federal review of mining applications, under nearly identical sets of rules, is a waste of taxpayers money, is inflationary, and is frustrating for everyone involved. However, the issue has been raised before without much success. The Secretary of Interior could legally approve a mining plan after it has been reviewed by the State. Section 523(c) of the SMCRA says that nothing in this act allows the Secretary to delegate his duty to approve mine plans on federal land. The states want to know if any other act gives the Secretary such authority. If the answer is no, the states do not ask that he delegate his authority, but only that he approve based on a state review. In correspondence with the Secretary on this topic, the Secretary has insisted that he maintain the "capability of review". The states with federal lands within their borders do not object to maintenance of review capability, provided that it is exercised in an oversight capacity. As of June 1980, the issue is still unresolved, and the duplicate review continues.

2. The second issue related to federal lands concerns environmental impact statements (EIS) or environmental assessments (EA). The process of deciding when and whether a change in an existing mine requires an EIS or an EA appears to be subjective on the part of OSM, and completed in an uncertain hit-or-miss fashion. For example, one western coal operator has been told that an addition to the size of his bathhouse will require an EIS. Other operators have been told that relatively larger changes in their mining or reclamation operation will not require an EIS. OSM has had a policy paper on "major" and "minor" modifications under development for months. It is unclear what effect, if any, a decision on a "minor" or "major" modification has on a pending

EIS decision. Does the major vs. minor decision control the EIS decision? What is needed is a consistent policy as to when Environmental Impact Statements are required. The current practice is uncertain and unpredictable, and takes place only in response to a request from an operator that his mining plan be amended or revised. OSM should now decide which existing mines on federal land will require an EIS, and which will not, it should identify the point at which an EIS will be triggered, and it should communicate that information to the operator so he can begin to plan for the future. The OSM processes should be closely integrated with the federal coal leasing process, and the system should be designed to produce some certainty as to what will be required, and when.

3. The third "federal lands" issue relates to OSM's primary jurisdiction over "federal mines". Once a mine is classified as "federal", it must obtain Secretarial approval for the mine plan.⁵¹ Simply put, what is a "federal mine"? There are many conflicting OSM statements, opinions and observations on the question. For example, it has been said that any mine currently adjacent to federal coal reserves or federal land, may be a "federal mine" even though the mine is not now abutting, using, or mining any federal land. The apparent logic in this argument is that the mine may, in the future, contemplate mining federal coal or using federal land, and is therefore subject to federal jurisdiction, and the NEPA process, because 30 CFR 784.11 requires a description of the mining operations to be conducted over the entire life of the mine.⁵²

Another example is the extension of federal jurisdiction to a mine where the only federal involvement was use of an access road across federal property to reach private coal.⁵³ There have been OSM decisions going both ways on this question. An additional example is a mine that once mined federal coal, but which has now completed the reclamation of that area and is now mining only fee coal. OSM has asserted that jurisdiction over the mine for the last year or more. Many similar and related questions come to mind: Does an access road across federal minerals to fee coal qualify the mine as a "federal mine"? What if the road is across federal surface? Can federal jurisdiction be lost by completion of mining and/or reclamation on the federal portions of the mine? If an underground mine has 900 panels to be mined, three of which are in federal coal, is the whole mine a federal mine? Do future plans, or intentions, or dreams of mining adjacent federal coal subject a mine to the full OSM treatment? Does acquisition of a new federal lease subject the whole mine, or only the new portion, to OSM review? The answers are not yet clear to any of these questions.

C. OSM Administrative Issues

The second set of issues deals largely with administrative problems and concerns with respect to the management and administration of the Office of Surface Mining.

1. A continuing concern of most western states is the general failure of the Office of Surface Mining to meet time deadlines specified in SMCRA itself or in OSM promulgated regulations or guidelines. For example, OSM was six months late in promulgating final regulations for the permanent program.⁵⁴

Nevertheless, an early solicitor's opinion held that despite the OSM delay, states would be held to the original August 3, 1979, deadline for the submission of their program. Fortunately, Judge Flannery decided that the deadline should be moved to March 3, 1980.⁵⁵ Had he not done so, many states would have been unable to submit their program on time.

Similarly, OSM has unilaterally altered the time they have allowed for OSM to respond to a state submission, changing that period from 60 days to 80 days, and concomitantly reducing the time for the state to resubmit from approximately 40 days to approximately 20 days. Even at that, OSM has not always been able to respond to state submissions in a timely fashion. The states often get the impression that all time deadlines are mandatory for state and operators, but discretionary for OSM.

2. A second issue which has created difficulty for both states, operators, and OSM is the problem of the "moving target". The moving target is the federal regulations promulgated to implement SMCRA. Since the regulations were initially issued in March of 1979, there have been dozens of changes in those regulations. It is virtually impossible for a state or operator to determine the current status of the regulations, and whether they have been withdrawn or amended by OSM, or changed by judicial decree, or simply addressed by OSM in some fashion. Any attorney for a coal company can do his client a great service simply by being up to date on the current status of the OSM regulations, proposed regulations, withdrawn regulations, and regulations changed by judicial decree.

3. A third administrative issue which causes the state and the west some concern is the continuing tug of war between the OSM regional offices and the headquarters Washington office. Without going into great detail, suffices it to say that it is often

possible to get two or three different answers to major questions, depending on which office you ask. For example, three answers have been given to the questions as to whether the area above underground workings are to be included as "affected area" in a permit application. One office said yes, one office said no, and the third said that it depended on whether the land above those underground workings was federal land or not. Some of these difficulties can of course be explained by the fact that OSM is a new agency, with the growing pains that are normally associated with a new bureaucracy.

4.A fourth administrative issue with respect to OSM is the management, consistency, and judgment used in the inspection and enforcement program of OSM. At least some of the western states believe that the enforcement actions have been arbitrary, and that judgment in the field has been lacking. OSM has often chosen to issue violations for relatively minor infractions, while entirely missing major infractions. In other instances, they have issued violations when it would be better to have simply noted and talked about the violation with the operator. For example, there is little sense in issuing a violation for failure to publish a blasting notice one time, or for writing a violation on a road maintained by a county. In addition, OSM inspectors regularly ignore or bypass the state regulatory machinery. Occasionally OSM has written violations on various operations, with instructions to the operator that they are to "submit revised sediment control plans to the OSM inspector." This is in spite of the fact that an OSM inspector has no permitting authority under the interim program and is probably incapable of reviewing the plans even if they are submitted. Under the interim program the state agency is the only agency with authority to issue permits. There is no question that state enforcement and inspection programs have their problems as well, but the general belief is that state inspectors and administrators are both willing and able to use more common sense, and more judgment, in deciding what to enforce and how to enforce it.

D. Miscellaneous Issues

There are a number of other issues with respect to SMCRA that cannot be easily classified. These issues are very briefly described below. Any attorney with a client who has a problem which may fall into one of these issue areas should obviously do a considerable amount of research before proceeding. An open question in June of 1980 may no longer be an open question or an issue in October or November. The purpose of setting forth these issues is simply to illustrate the range and type of issues confronting operators, states, and the Office of Surface Mining.

1. A major issue confronting most state programs in their submission to OSM, is whether and to what extent federal authority, not contained in SMCRA, must be included in a state program. The issue has been raised with respect to the Clean Air Act, the Clean Water Act, the Antiquities Act, and various archeological and historic preservation acts. OSM originally took the position that a state must have the same amount of authority to carry on a program as would OSM. The problem with the OSM position is that they cannot bootstrap a state regulatory authority into having full jurisdiction over subjects for which state law does not give independently authority. The states have generally taken the position that other federal acts are self enforcing, and particular federal agencies exist which are charged with the enforcement of the specific federal acts. The states do not disapprove of those federal acts, but also do not believe that states should be required, by some twist of legal logic and statutory interpretation, to include such authority in their state program.

2. A related issue, and one which surfaced when S.1403 was under consideration, is the precise extent to which state program regulations must be "consistent with" the federal rules and regulations. Senate Bill 1403 would alter that requirement in section 504 of SMCRA to require only that state programs be in accordance with the act itself, and would remove the requirement that state regulations be consistent with the federal rules and regulations. S.1403 has never been reported out of the House Interior Committee, and therefore the consistency test is still the rule. As of mid-summer 1980, it is still uncertain as to how vigorously OSM will interpret the consistency requirement.

3. Finally, an issue which appears to have generated considerable controversy is whether, and to what extent, the states will be required to replicate the provisions of 43 CFR 1294. These regulatory sections address those occasions when operators, citizens, or government agencies may be required to pay the costs of attorneys fees for other parties, and when they may receive such payments. The OSM regulations⁵⁶ say that the regulatory authority can be required to pay the costs and attorney fees of citizens if the citizen has contributed to the outcome of an issue. This regulation appears to be in conflict with the statute itself, and with the position taken by the Department of Interior during pendency of the legislation. It is quite probable that a petition to alter 43 CFR 1294(b) will be initiated on this subject in the near future.

4. Finally, there are a host of issues which have yet to be litigated, or even fully discussed, related to the validity and legitimacy of numerous regulatory provisions promulgated by OSM. In general the issue is whether the specific regulation is within the ambit of the statute. For example, the federal statute does not include coal refuse piles as one of the topographic features which must be returned to the approximate original contour. The OSM regulations have added coal refuse piles to the list of features which must be regraded to the approximate original contour. The regulations have done so in spite of the fact that Section 520 (b)(13) sets forth the specific performance standard required for coal mine waste piles or refuse piles and the standard does not include regrading to the approximate original contour. There are many similar such instances which remain to be raised in the context of a particular operation or application or state program conditional approval. It is good advice to check the preamble to the federal regulations and elsewhere, to ascertain whether the OSM or the state regulations have adequate legal, factual, and scientific support. If they do not, it may be advisable to consider litigation on the specific issue, if the regulatory authority persists in application of what your research indicates to be an invalid, or unjustified, regulation. Be aware, of course, that any broad-based attack on a regulation will be subject to challenge under the 60-day rule laid out in Section 526 of SMCRA, and discussed briefly in Section VI below.

VI. Significant Litigation under SMCRA

A. Litigation Concerning the OSM Regulations⁵⁷

Section 526 of SMCRA provides as follows:

Any action by the Secretary promulgating national rules or regulations including standards pursuant to sections 501, 515, 516, and 523 shall be subject to judicial review in the United States District Court for the District of Columbia Circuit. Any other action constituting rulemaking by the Secretary shall be subject to judicial review only by the United States District Court for the District in which the surface coal mining operation is located. Any action subject to judicial review under this subsection shall be affirmed unless the court concludes that such action is arbitrary, capricious or otherwise inconsistent with law. A petition for judicial review under this subsection shall be filed in the appropriate court within 60 days from the date of such action, or after such date if the petition is based solely on grounds arising after the 60th day. Any such petition may be made by any person who participated in the administrative proceedings and who is aggrieved by the action of the Secretary.

The court shall hear such petition or complaint solely on the record made before the Secretary ...(And) the findings of the Secretary if supported by substantial evidence on the record considered as a whole, shall be conclusive.

Section 526 makes four important points:

- 1) The national rules - both interim and permanent program rules - are subject to review in the District Court of the District of Columbia.
- 2) Other rulemaking, not in the category of national rules, is subject to judicial review only in the U.S. District Court for the district in which the surface mining operation is located. Presumably, this applies to the approval of state programs, which is construed by OSM to be a rulemaking procedure.
- 3) In the case of both national and local rulemaking, the action must be filed within 60 days of the promulgation of the regulations. In order to file suit, it appears that only those who participated in the administrative proceedings related to the rulemaking and who are aggrieved by the action of the Secretary may file suit.
- 4) The standard of review of the rulemaking procedure is whether the action is arbitrary, capricious, or otherwise inconsistent with law.

Based on the above quoted sections of SMCRA various litigation has ensued and it is certain that additional litigation will take place in the future. The litigation concerning both the permanent program regulations and the interim program regulations is described below.

1. Interim Regulation Litigation

In January 1977, a number of law suits were filed in the Federal District Court in the District of Columbia challenging the validity of the interim program regulations promulgated by OSM. The major thrust of these suits was that the regulations go beyond the scope authorized by Congress during the interim period of the OSM program and that the regulations are inadequately supported by the administrative record, and are therefore arbitrary and capricious. Hearings on the above allegations were held in April of 1978, and on May 3, 1978. U.S. District Court Judge Thomas Flannery ruled in part on the issues before him. In his memorandum opinion and order,⁵⁸ Judge Flannery found the following:

- A. That pre-existing non-conforming structures do not have to meet regulatory design criteria but must meet performance standards under the Act.
- B. That the "interim final rules" published by OSM concerning design criteria for sediment ponds were actually interim rules and not final rules and that OSM was enjoined from enforcement of these regulations until the rest of the final regulations were published.
- C. That OSM cannot impose more strict water effluent standards than those in other federal legislative acts.
- D. That the regulations specifying permit revisions and renewals covered by the prime farm land exemption in the Act were within OSM's discretion. However, these provisions were remanded to OSM for reconsideration to the extent that they impose performance standards on certain prime farm land areas.
- E. That Interior did have discretion to grant time extensions for pre-existing non-conforming structures and facilities.
- F. That the Office of Surface Mining had properly included regulations concerning the surface effects of underground mining, prime farm lands, spoil disposal, waste, and alluvial valley floors in the interim program. In addition, Judge Flannery upheld the OSM regulatory provisions concerning topsoil handling, blasting limitations, small operators exemptions, and valley fills.

Following further briefing by the parties, Judge Flannery issued a second memorandum opinion concerning the interim program rules and regulations on August 24, 1978.⁵⁹ The important parts of that opinion were as follows:

1. The historical use clause as contained in the definition of prime farm lands was overly broad and was therefore enjoined from use.
2. Portions of the regulations regarding construction of waste dams were enjoined.
3. OSM was directed to reconsider the requirements prohibiting operators from disturbing land within 100 feet of intermittent or perennial streams.
4. OSM was directed by the Court to reconsider the design and construction criteria for valley and head-of-hollow fills and for the regulatory requirements for under drains and compaction of spoil in valley fills.
5. The Court upheld the OSM regulations with respect to terracing, cover or treatment of toxic materials, restoration of disturbed lands, effluent limitations, road gradient, explosives, enforcement, and on the questions of OSM jurisdiction over Indian land.

2. Permanent Program Regulation Litigation

Although the litigation on the interim program regulations is interesting, the significance of that litigation does not compare with the long-term significance of the litigation concerning the OSM permanent program regulations. This is obviously because the interim period regulations will continue in effect only until state programs are approved or until OSM imposes a program in a state. It is anticipated that this will occur, at the latest, by January 3, 1981. In any event, there have been two significant decisions with respect to the litigation concerning the permanent program regulations. Both decisions stem from complaints filed by industry, environmentalists, or the states, in general; the complaints allege that the regulations promulgated by the Secretary are arbitrary, capricious, and beyond the scope of the Secretary's legal authority.

a. State Program Timetable

The first decision by Judge Flannery under this massive consolidated litigation was an opinion on July 25, 1979, which extended the time for the filing of the state programs under the Act.⁶⁰

OSM had contended that state programs were required to be filed by August 3, 1979, even though OSM had extensively delayed the promulgation of final regulations under which state programs were to be prepared. Therefore, Judge Flannery extended the time period for the filing of state programs by a commensurate period until March 3, 1980.

b. "Flannery I" Decision

On February 26, 1980, Judge Flannery issued a seventy page decision on the first round of the substantive challenges to the OSM permanent program regulations.⁶¹ This opinion covered the issues for more than fifty challenged regulations. The regulations which Judge Flannery overturned or remanded are listed below.

1. Valid Existing Rights. The Court's decision modifies the standard in Section 761.5(a)(2)(i) which required a demonstration that all necessary permits have been obtained as a condition to showing a valid existing right. The Court's decision states that the Department can only require a good faith effort to obtain all permits.
2. Mine Plan Area. The definition of "mine plan area" in 30 CFR 701.5 and used in Parts 779, 780, 783, and 784 of the regulations was remanded because the definition was too broad. As a result, the Department's authority to require this information outside the permit area has been limited.
3. Fish and Wildlife Permit Information. The Court held that the Department presented no statutory authority for the regulatory requirements that require fish and wildlife information in Sections 779.20 and 780.16.
4. Soil Surveys. The Court held that soil surveys for other than prime farmlands are unauthorized by the Act and remanded Section 779.21 and 783.21.
5. Citizen Access for Bond Release. The Court held that a citizen has a right to accompany the inspector on a mine-site inspection during bond release and remanded Section 807.11 (e).
6. Bond Forfeiture. The Court held that the Surface Mining Act does not authorize forfeitures of a reclamation bond beyond that amount needed to cover the cost of reclamation and remanded Section 808..14(b).

7. Small Acreage Exemption, Alluvial Valley Floors. The Court remanded Section 785.19(e)(1)(i) because the regulation unduly restricted the statutory exemption from the alluvial valley floor protection provisions for lands where mining would have only a "negligible impact on the farms' agricultural production."
8. Hydrologic Data Information, Alluvial Valley Floors. The Court remanded Section 785.19(d)(2) to the extent it requires one year of hydrologic data. The Court stated that such data may be provided for a shorter period of time or by extrapolation from existing data.
9. Hydrology Requirements for Undeveloped Rangeland and Small Farm Areas. The Court remanded the requirements in Section 785.19(e)(1)(ii) because the regulation has improperly eliminated the statutory exemption from the hydrology requirements of Section 510(b)(5)(B).
10. The Point System. The Court held that the Department could not require States to use a point system to meet the penalty assessment provisions of the Surface Mining Act and remanded Sections 732.15(b)(7) and 840.13(a). It is unclear from the decision whether this also eliminates the requirement that the States have a penalty system which results in fines at least as high as the Federal system.
11. Proof of Reclamation. The Court concluded that the Surface Mining Act did not authorize the Department to require a mining operator to actually use lands for grazing or as cropland (for prime farmlands) as a measure of showing success of revegetation and remanded Sections 816.116 and 817.115 and portions of 30 CFR 823.
12. Bond Liability. The Court held that the Department improperly extended the period of bond liability by requiring the five-year period to begin when lands had achieved the 90 percent revegetation standard rather than after the last year of augmented seeding and accordingly remanded Sections 816.111(b)(1) and 817.116(b)(1).

13. Letters of Commitment. The Court held that the Department could not require letters of commitment for post-mining land uses because the Act requires only a reasonable likelihood that the post-mining land use would be achieved, and remanded Sections 816.133(c)(4) and (9) and 817.133(c)(4) and (9).

c. OSM Suspensions

In addition to the regulations overturned or remanded by Judge Flannery, OSM itself suspended approximately 20 rules and regulations, or parts thereof, as a result of the issues raised in the permanent program litigation. Generally speaking, those notices of suspension can be found in the December 31, 1979 Federal Register. ⁶² In addition, those regulations which have been suspended, remanded, or under rulemaking as part of the litigation, are listed below.

Suspended Regulations

- 1) 700.11(b)
- 2) 701.11(e)(i) and (ii)
- 3) 761.5 -- public road definition
- 4) 761.11(c) and 761.12(f)(1)
- 5) 783.14(a)(1)
- 6) 785.17(a)
- 7) 785.17(b)(3) and 823.14(c)
- 8) 786.5 -- irreparable damage definition
- 9) 805.13(d)
- 10) 806.12(e)(6)(iii) and (g)(7)(iii)
- 11) 808.12(c)
- 12) 816.42(b)/817.42(b),
816.46(b), (c), (d), (h), /817.46(b), (c), (d), (h)
- 13) 816.83(a)/817.83(a)
- 14) 816.103(a)/817.103(a)
- 15) 817.52(a)(1)
- 16) "mine plan area" in Parts 779, 780, 783, 784

Regulations Not Suspended But Under Rulemaking As Part of Litigation Settlement.

- 1) Subchapter D -- Time Sequence for Permit Processing on Federal Lands
- 2) 761.5(c)
- 3) 779.27(b)(4) and 783.27(b)(4)
- 4) 783.22, 784.15, and 817.133
- 5) 817.116

Remanded Regulations

- 1) 701.5 - mine plan area definition
- 2) 732.15(b)(7) and 840.13(a)
- 3) 761.5(a)(2)(i)
- 4) 779.20/780.16
- 5) 779.21/783.21
- 6) 785.19(d)(2)(iii) and (iv),
785.19(c)(1)(ii), 785.19(e)(2)
- 7) 807.11(e)
- 8) 808.14(b)
- 9) 816.115/817.115
- 10) 816.116(b)/817.116(b)
- 11) 816.133(c)/817.133(c)
- 12) 823.11(c), 823.15(b), 823.15(c)

d. "Flannery II" decision

The February decision by Judge Flannery did not finish the litigation concerning the permanent program regulations. A major decision on remaining issues was handed down by Judge Flannery on May 16, 1980.⁵³ Listed below are those provisions overturned by Judge Flannery in his May 16 ruling:

1. Final rules require operators to control fugitive dust from mining, including dust from truck traffic on haulroads. Flannery ruled that OSM may only regulate air pollution accompanying erosion. Rules 816.95 and 817.95.
2. Final rules establish three categories of roads, setting separate design, drainage, maintenance, and restoration standards for each. Proposed rules called for only one category of roads. Flannery suspended the section and said that if OSM wants to establish a more elaborate system in final rules, it must seek public comment first. Rules 816.150-176, 701.5.
3. Runoff from reclaimed lands must meet the same effluent limits as runoff from actively mined lands, even though active areas don't release as much sediment. Flannery sent this rule back to OSM, noting that the agency must account for costs to operators of curbing runoff from reclaimed sections. Rule 816.42(a)(1) and (a)(7).

4. OSM prohibits blasting within 1,000 feet of any building. Flannery ordered OSM to rewrite the rule in line with a recent U.S. Circuit Court of Appeals decision striking down the same provision in interim rules. The circuit court said the Strip Mine Act clearly limits blasting at 300 feet from a dwelling, not 1,000 feet. Rule 816.65(f).
5. Underground mine operators must replace private water supplies if they "contaminate, diminish, or interrupt" them. Flannery restricted the provisions to surface mining. Rule 817.54.
6. Final rules require underground mine reclamation plans to specify the proposed postmining reclamation land use. In a clarification, Flannery said operators needn't propose alternative uses in their initial permit applications. "Instead, the operator and the regulatory authority may assume restoration of land... 'to a condition capable of supporting the use it was capable of supporting prior to any mining or higher or better use,'" When the mining nears completion, the operator may apply for an alternative use through OSM's permit revision procedures. Rules 783.22, 784.15 and 817.133.
7. The rules require cross sections, maps and plans as part of underground permit applications. Flannery ordered new rules with "less broad informational requirements, and with better justification of their need." Rule 783.25(c), (h) and (i).
8. Final rules require underground operators to comply with prime farmland permitting and performance standards for disturbances created by roads, loading structures, coal processing plants and stockpiles. Flannery suspended the prime farmland rules for underground mines until OSM writes rules exempting some of these facilities. To qualify for an exemption, a facility must be "actively used over extended periods of time" and must only affect small amounts of land. Rule 832.
9. Final rules require all companies conducting underground operations to return surface areas to approximate original contour. Flannery sent these rules back and ordered OSM "to provide some flexibility (for underground operators) for settled fills that have become stabilized and revegetated". Rule 817.10(b)(1) and 102.

10. Flannery said companies may get permits and, after mining, recover bonds for mines on prime farmlands as long as revegetation is "equivalent" to surrounding prime farmland. Final rules had required revegetation to meet a "high management level standard" for a permit and bond release. Rule 784.17(b)(8).
11. The court ruled that notices of intent to explore need not include maps or explanations why operators are entering the land. Both were required in previous rules. Rule 776.11(b)(3) and (b)(5).
12. Flannery said operators at previously mined but unreclaimed sites may either restore land to its "highest and best use compatible with surrounding areas" or to the condition prior to any mining. The second option was not available in final rules. Rules 816.133(b)(1) and 817.133(b)(1).
13. Flannery clarified an earlier ruling handed down in "Round I" of the case in which he barred OSM from requiring states to use point systems to assess civil penalties. The clarification says OSM may not require states to develop penalty systems "at least as stringent" as the OSM's system.

Although Judge Flannery overturned a number of regulations, he also upheld a substantial number of OSM regulations in his May 16 ruling. The provisions that were upheld include the following:

- 1) The provision in the prime farm land regulations, 785.17(d), that the post-mining land use must be cropland.
- 2) The provision in the prime farm land regulations, 701.5, that the Secretary has properly used the phrase "historically used for cropland" in that it properly focuses on the time preceding acquisition for mining purposes.
- 3) The provision of those regulations regarding underground mines, 782.17(b) and 786.25, concerning the five-year permit term.
- 4) The provision of the underground regulations, Section 817.45(a) and 817.00, concerning the necessity of contemporaneous reclamation with respect to underground mining.

- 5) The Court upheld requirements with respect to backfilling of steep slopes, 826.12(e), regarding woody materials for revegetation.
- 6) The Court clearly upheld the authority of the Secretary of Interior to regulate off-site facilities and processing plants, under Section 701(28)(a) and (b).

There are a number of other provisions which Judge Flannery either upheld or remanded, which are either too complex or not significant enough to mention here. Needless to say, any attorney representing a client with a problem which falls into the area regulated by OSM regulations which were under attack under the permanent program litigation should carefully read all the Flannery opinions.

Finally, it should be noted that one significant portion of the Round 2 Flannery opinion is the Court's opinion that the Secretary may not approve state programs which include regulations which are more stringent than those promulgated by OSM. OSM had previously insisted that state programs could, at their discretion, include regulations which are more stringent than those of OSM. The Court ruled that more stringent regulations are "inconsistent with" the federal regulations and therefore not permitted.

As of June, 1980 all the parties to the Flannery opinions on the permanent program regulations are considering full or partial appeals of the district court ruling.

B. Litigation Concerning Constitutional Issues

In addition to the litigation contesting the validity of the interim and permanent program OSM regulations, a variety of operators, industrial organizations, and states have undertaken litigation on the constitutional merits of PL 95-87. Each of these suits are briefly discussed below.

- 1) State of Indiana, et al. v. Andrus, et. al. In August of 1978, the State of Indiana and various coal companies doing business in Indiana filed suit in District Court in Indiana alleging that PL 95-87 is unconstitutional. The plaintiffs argued that the law deprives operators of their property without due process of law and without just compensation in violation of the 5th amendment and that the federal law violated the State of Indiana's rights under the 10th amendment.

Judge Noland, of the Indiana District Court, handed down a decision on June 10, 1980 holding that the prime farm land and approximate original contour provisions of SMCRA and the federal regulations are unconstitutional.⁶⁴ The Indiana Court also struck down the requirement that operators segregate topsoil and that they commit themselves to post-mining land use, and that they pre-pay penalties into escrow until hearings are held. The constitutional ground for the decision that the prime farm land and approximate original contour provisions are unconstitutional are:

- a) The regulations have an insufficient connection with interstate commerce;
- b) That the law and regulation violate the 10th amendment by regulating land use which is a traditional area of exclusive state concern;
- c) That the law and regulations violate substantive due process because no allowance is made for variances as is done for steep-slope mining and mountain top-mining in the eastern part of the United States;
- d) That the provisions constitute a taking in violation of the 5th amendment because they require a burdensome level of land management and that there is no proof that prime farm land can be restored as the Act requires.

The Justice Department, representing the Office of Surface Mining, has asked the Court for a stay pending appeal to the U.S. Supreme Court. If the stay is denied, the government will probably ask the Supreme Court for a stay.

- 2) Midland Coal vs. Andrus. In December of 1979, Midland Coal of Illinois filed an injunction to prohibit OSM from applying federal requirements for prime farm land protection to a mining operation which had previously received state approval to expand. OSM claimed that the extension did not qualify for an exemption from prime farm land rules. U.S. District Court Judge Waldo Ackerman issued a preliminary injunction preventing OSM from shutting down operations at the Midland Mine, on the basis that the company was operating under a valid state permit, and therefore the OSM quarrel was against the State, and not against the operator.⁶⁵ Although OSM and Midland have now apparently worked out a tentative agreement for settlement of the major issue in the case, OSM has appealed the issuance of the original injunction.

That injunction may raise significant legal issues relating directly to the validity of state permits, and the integrity of the state permit and state agency procedure, when confronted by conflicting OSM directives.

3. Star Coal Co. v. Andrus. The Star Coal Case stands in some contrast to the Indiana case cited above. In this case, Star Coal Co. sought declaratory and injunctive relief to prevent OSM from enforcing SMCRA on the ground that the law is unconstitutional. The alleged basis for the claim of unconstitutionality was similar to that alleged in the Indiana case; that SMCRA is beyond the authority of Congress to regulate under the commerce clause; that SMCRA violates the 10th amendment by regulating land use; that the reclamation requirements and the assessment of a fee are a taking in violation of the 5th amendment; and that pre-payment of penalties into escrow is a violation of the procedural due process guarantees of the 5th amendment. In a ruling on a motion for preliminary injunction, the Court held that the only claim which would probably succeed is that portion of the claim relating to the payment of penalties into escrow.⁶⁶ Judge Harold Vietor upheld the prime farm land reclamation standards and the abandoned mine reclamation fee. The Judge also rejected the charge that the federal law discriminates against surface coal operators since strip mining and non-coal mineral is not covered. Judge Vietor did throw out the provision of the law which requires pre-payment of a civil penalty in order to gain a hearing, on the basis that such a procedure did not afford sufficient due process to mine operators. The Judge did not agree with the contention that cessation orders may not be issued without a prior hearing. This is in contrast to the ruling of Judge Williams noted in 4. below that cessation orders without hearings are unconstitutional.

4. Virginia Surface Mining and Reclamation Association vs. Andrus. In October of 1978, the Virginia Surface Mining and Reclamation Association, and various individual operators, filed suit in the U.S. District Court for the Western District of Virginia challenging the constitutionality of the Surface Mining Act.

The Complaint argues that the Act violates the 10th amendment and infringes upon the rights reserved to the state of Virginia; denies operators access to valuable mineral deposits and abridges their rights guaranteed by due process of law; and constitutes a taking of property without just compensation in violation of rights under the 5th amendment.

On February 14, 1979 Judge Glen Williams enjoined the enforcement of many major sections of PL 95-87 including the Environmental Protection Performance Standards and the enforcement provisions. The Judge concluded that the plaintiffs had made:

"a strong showing that they are likely to prevail on the merits of this case, in that the reclamation requirements of the Act may violate the 5th amendment's proscription against the taking of property without just compensation, and that Section 521.(a) of the Act violates the due process clause of the 5th amendment."⁶⁷

The Court was particularly critical of the OSM practice and regulation allowing mine inspectors to issue immediate cessation orders in the field without any requirement of a hearing.

The Office of Surface Mining naturally appealed the issuance of the injunction against the enforcement and performance standard provisions of PL 95-87. On August 10, 1979, the Fourth Circuit Court of Appeals overturned Judge Williams injunction, stating that a District Court had applied an improper standard for granting relief in that it erred by failing to give any consideration to the Congressional findings set forth in PL 95-87.⁶⁸

On January 3, 1980, Judge Williams issued his final ruling on the merits of the case, and enjoined OSM permanently on the same basis as indicated earlier in his February, 1979 memorandum opinion.⁶⁹ The Court declared that Sections 515 (d) and (e) of the Surface Mining Act are unconstitutional. The requirements which require restoration to the approximate original contour were declared unconstitutional on the basis that such requirements are economically infeasible and physically impossible. The Judge also declared the contour provisions unconstitutional as a taking of private property without just compensation. The Court also found that PL 95-87 violated the 10th amendment by intruding into areas of regulation traditionally left to the state. Judge Williams permanently enjoined federal mine inspectors from issuing violation notices, cessation orders, or civil penalties, against coal operators not in compliance with provisions of the federal act, on the basis that such operators are not afforded due process with a formal hearing.

Judge Williams issued his opinion on January 3, 1980 and on January 21, OSM requested the Judge to stay his order pending an appeal to the Supreme Court. Judge Williams refused to do so and on February 26, Supreme Court Justice Warren Berger ordered a temporary stay of the Williams ruling.⁷⁰ Presumably, that stay will remain in effect until the Supreme Court rules on the issues raised in that particular litigation.

C. Other Litigation Under the Administrative Procedure Act Within the Department of Interior.

In addition to the major litigation discussed above, there is a very large volume of reported decisions from administrative law judges and from the Interior Board of Surface Mining Appeals. Every lawyer who has a client with regulatory problems with OSM should consult these decisions on the particular subjects of the controversy facing the client. The subjects include, but are clearly not limited to, the following: burden of proof; mining without a permit; and the question of jurisdiction over so-called "remote" load out facilities; res judicata; retroactive application of regulation; interlocutory appeals; mine maps; hydrology requirements; roads; topsoil; spoil; signs and markers. For further detail on some of these subjects, attorneys should consult the "Review of Litigation Concerning SMCRA" by Charles Cook appearing in the November 1979 program put on by the Rocky Mountain Mineral Law Institute. Mr. Cook has done an admirable job of reviewing all the administrative law, judge, and Interior Board of Surface Mining Appeals decisions up through approximately October, 1979. Since October 1979, there have been numerous additional decisions and subject matters addressed.

FOOTNOTES

1. The Surface Mining Control and Reclamation Act of 1977 (PL 95-87) 30 USC 1201 through 30 USC 1308.
2. 44 Federal Register 14902-15463 (1979), to be at 30CFR 700-899. Many additions and changes to the rules have occurred since the issuance of the basic permanent program rules in March of 1979.
3. 44 Federal Register 14903-15309 (1979)
4. Dole, The Surface Mining Control and Reclamation Act of 1977, 9 St. Mary's L.J. 863 (1978); HR Report No. 95-218 95th Congress 1st Session, 140-141 (1977) as reported in Watson, The Surface Mining Control and Reclamation Act, Monograph 3A, Energy Law Service, June 1979, et 2.
5. Watson, Id at 3.
6. 30 USC 1256 and 30 USC 1291 (28).
7. 30 USC 1291 (13)(27) and (28).
8. 30 USC 1201.
9. 30 USC 1252.
10. Fee Rulemaking notice for approval of Texas program 45 F.R. 12998 (1980).
11. 30 USC 1252(C); 30 CFR 715.
12. 30 USC 1256; 30 USC 1251(B).
13. 30 USC 1253.
14. 30 CFR 731.13.

15. 30 CFR 730.14.
16. 30 CFR 745.
17. 30 USC 1291(28).
18. 30 USC 1256.
19. 30 USC 1257.
20. Practicing Law Institute Handbook, Surface Mining Control and Reclamation Act N4-4345, 1980.
21. 44 Federal Register 15089-95 (1979).
22. 30 USC 1260(b)(5).
23. 30 USC 1260(b)(6).
24. 30 USC 1260(c).
25. 43 Federal Register 38036(1978).
26. 30 USC 1265(b)(16).
27. 30 USC 1265(b)(16).
28. 30 USC 1266.
29. 30 USC 1263.
30. 44 Federal Register 15377-15382(1979).
31. Id.
32. 44 Federal Register 15383-15385(1978).
33. 30 CFR 731.12.
34. 30 USC 1271(a)(1).
35. 30 USC 1263(b).
36. 30 USC 1272(c).
37. 30 USC 12679f).
38. 30 USC 1267.
39. 30 USC 1267(h).
40. 30 CFR 842.12(c).
41. See, e.g., Pennsylvania Coal Co. v. Mahon 260 U.S. 393(1922).

42. Testimony of Governor Herschler (Wyoming) before the Senate committee on Energy Resources and Materials production, June 19, 1979.
43. Id.
44. Testimony of H. J. Barry, III (Colorado) before the Senate Committee on Energy Resources and Materials production, June 19, 1979.
45. "Dear Colleague" letter of June 25, 1979 from Senators Hatfield, McClure, Tower, and Domenici.
46. February 15, 1979 letter from Governor Matheson (Utah) to Ms. Joan Davenport, Assist. Sec. for Energy and Minerals, Department of Interior.
47. Testimony of Feo Berry (Montana) before the Senate Committee on Energy Resources and Materials production, June 19, 1979.
48. Testimony of Governor Herschler (Wyoming) before the House of Representatives Committee on Interior and Insular Affairs, March 5, 1979.
49. Letter from H.J. Barry (Colorado) to Donald Crane (OSM Region V) June 11, 1980.
50. Governor Herschler, note 48 above.
51. 30 USC 1273(a) and (c) citing the mineral leasing act 30 USC 201.
52. August 14, 1979 letter from Mary Wright, Deputy Director, OSM Region V, to Stephen Self, Empire Energy Corporation, Craig, Colorado.
53. April 14, 1979 letter to Al Klein, Head, Reclamation Division, North Dakota Public Service Commission, from Don Crane, Regional Director, OSM Region V.
54. The regulations were to have been final by August 3, 1978. They were final on March 13, 1979. 44 F.R. 14902-15463(1979).
55. In Re: Permanent Surface Mining Regulations Litigation Civil #79-1144 Preliminary injunction filed July 25, 1979.
56. 43 CFR 1294(b).

57. The author is indebted to Charles Cook for his detailed analysis of the litigation as it appears in the November 1979 Rocky Mountain Mineral Law Foundation program. The author has borrowed and paraphrased liberally from this analysis for the discussion of the early OSM litigation.
58. In Re Surface Mining Regulation Litigation, 452 F. Supp. 327 DDC 1978.
59. In Re Surface Mining Regulation 456 F. Supp 1301 (D.D.C. 1978).
60. Op Cit note 55 above.
61. In Re Permanent Surface Mining Regulation Litigation, Civil #79-1144 February 26, 1980.
62. 44 Fed. Register 77447-77457(December 31, 1979).
63. In Re Permanent Surface Mining Regulation Litigation, Civil #79-1144, May 16, 1980.
64. State of Indiana et. al. v. Andrus et. al, Civil No. IP 78-500-C (S.D. Ind. J 23210, 1980) consolidated with Indiana Coal Association et. al. v. United States et. al., Civil No. IP 78-50-1C (S.D. Ind. June 10, 1980).
65. Midland Coal v. Andrus.
66. Star Coal v. Andrus Civil #79-171-2 (S.D. Iowa, filed April 18, 1979).
67. Virginia Surface Mining and Reclamation Association v. Indiana, Civil #78-0224-13(W.D. Va, February 14, 1979).
- 68.
69. Virginia Surface Mining and Reclamation Association v. Andrus, Civil #78-6224-13, W.D. Va, January 3, 1980. Final Order.
- 70.