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STATE PRIMACY UNDER THE OFFICE OF SURFACE MINING

CARL E. BAGGE*

I. INTRODUCTION

The Surface Mining Control and Reclamation Act (SMCRA or the Act) was passed in the ninety-fifth Congress and signed into law by President Carter on August 3, 1977.¹ The statute resulted from a long and devious legislative struggle that began with congressional hearings and the introduction of legislation in the ninetieth Congress. Earlier bills had been introduced over the years, beginning with the first one sponsored by Rep. Everett Dirksen of Illinois in 1940.

Between 1949 and 1970 over forty bills calling for some form of surface mining regulation were introduced; however, the major effort for federal legislation began in the ninety-second Congress when Rep. Ken Heckler of West Virginia introduced a bill calling for a total ban on the surface mining of coal within six months of enactment. Several bills calling for federal control of surface mining were introduced and one sponsored by Rep. Wayne Hays of Ohio was used as the vehicle for the development of a bill that passed the House floor late in the session. The Senate, under the leadership of Sen. Frank Moss of Utah, also moved a bill through subcommittee, but Congress adjourned before further action could be taken on either of the bills. Unfortunately, efforts by a small handful to prohibit rather than regulate surface mining only added fuel to the inflammatory rhetoric that was to become more intense as the debate continued during the next five years.

In the ninety-third Congress bills were reintroduced in the House and Senate and a bill was finally adopted by Congress that, unlike the original Hays bill, shifted primary regulatory authority to the states. However, it was pocket vetoed by President Ford. Similar legislation was passed the following year and was again vetoed by Ford, citing the nation's dependency on foreign oil and the worsening economic situation. The House failed to override the Presidential veto.

In view of the vetoes and the years of bitter debate, to the supporters of the legislation who had taken part in many of the legislative skirmishes, the enactment of SMCRA in 1977 and the creation of the Office of Surface Mining (OSM) marked the end of their frustration and the opportunity to demonstrate to the nation how surface mining should be regulated. Spurred on by the enthusiastic support of the environmental community, OSM charged off in the aftermath of the legislative victory with an assured sense of direction and self confidence that all the surface mining problems, complaints, and past abuses would soon be put to rest. However, what started out on such a high note has come crashing down around the feet of those who have inherited the shambles of the regulatory scheme that was developed and put in place by OSM under the Carter Administration.

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¹ Surface Mining Control and Reclamation Act of 1977, Pub. L. No. 95-87, 91 Stat. 445 (1977) (codified as amended at 30 U.S.C. §§ 1201-1328 (1982)) [hereinafter SMCRA].

II. OSM CRITICISMS

Even though OSM's responsible critics admit that most of the coal operators are complying with the Act, they contend that in many instances OSM's oversight and enforcement efforts are insufficient. For example, they allege that OSM still has not collected upwards to \$200 million in penalties; that the agency has failed to set up a system to track multiple offenders; that wildcat operators without any concern for the environment continue to mine in some areas; that over 2,000 mines have avoided any regulation by illegally claiming the two acre exemption; that thousands of cessation orders have not been followed up by OSM; and that bond forfeitures from 1978 to 1981 were not used by the states to reclaim the sites. They maintain that the program is in chaos.

On the other hand, coal operators find OSM oppressive, contradictory, and high handed. The agency gives lip service to state primacy and often uses its oversight authority to override the state regulatory authorities. Consequently, operators are caught in the middle. OSM also uses its enforcement authority directly against operators although they are in compliance with the state requirements and their approved permits. The agency attempts to second guess every aspect of state administration and enforcement often causing long delays and seriously undermining reliance on state actions. The worst of all worlds has been created—dual regulation with the uncertainty and red tape that goes with it.

From the beginning OSM has been confronted with litigation brought by the states, the environmentalists, the coal industry, and others challenging the agency's authority, programs, and regulations; with continual remands from the courts requiring regulatory revisions and reevaluation of administrative policies and objectives; with critical congressional oversight hearings and investigations; and with internal and external studies conducted by the Department of the Interior as well as other governmental entities.

Mr. Jed Christensen, OSM's acting director, is more than cognizant of the criticisms leveled at the agency and has pointed out that the old arguments are all too familiar today. OSM has been reprimanded for waivering or not being tough enough. Congress and the environmentalists press for more enforcement. Others see coal operators being put out of business by regulatory controls they claim are unrealistic and oppressive. Mr. Christensen also maintains that, amid the contention and litigation over how the law is supposed to work, it is little wonder the public remains skeptical. Part of the problem, he says, is that there is still a hard-core minority who continue to circumvent the law and, if unchecked, their irresponsible practices could seriously harm the environment and are ruinous to the reputation of the responsible operators and to public confidence in the regulators.

In the 1983 Justice Department report on OSM's initial regulatory approach, it was pointed out that there was a strong environmentalist commitment on the part of some key OSM officials which was instrumental in forging the direction

of the agency. According to the study, there appeared to be a reluctance to compromise and develop alternative strategies. Consequently, in order to guard against the development of new, innovative approaches, the agency became intransigent in dense of what it had done rather than to create new programs. The Justice Department quoted a solicitor from the Department of the Interior (DOI) stating that whenever OSM had an opportunity to implement more, as opposed to less, they did it.

The DOI and the House Interior Committee reports found that there was a need for a clearer understanding of OSM's policy and mission: new measures should be defined and implemented to promote compliance; a long-range strategy for insuring viable and effective programs must be developed; and, with respect to oversight, a system of sanctions and incentives is needed for the states to use in taking corrective action. It was also pointed out in one report that OSM has undergone several changes in leadership and major shifts in policy since the agency was first established which have not helped the situation during these critical years.

The House Committee on Government Operations issued a report in 1984 which concluded that the agency had "failed miserably" in its duty to assess and collect civil penalties under Title V and questioned its ability to administer the law with respect to the collection of reclamation fees and the establishment of adequate bond amounts to assure reclamation. The committee, in its followup report in 1985, concluded that OSM had "failed to implement most of the recommendations" suggested in the earlier study and that OSM "improvements . . . are insignificant overall."² The 1985 report recommended that if OSM shows no "demonstrable improvement . . . within six to nine months" Congress should "consider transferring administration of the programs from the Department of the Interior to another appropriate regulatory agency."³

In 1985 the National Institute for Urban Wildlife completed a study⁴ for OSM of the reclamation achieved since SMCRA was enacted, and the overall results were very favorable. Admittedly, it was impossible for the Institute staff to visit every mine site, but it did undertake a comprehensive tour of most of the major coal mining areas and it was impressed with the quality of the reclamation work being done by most operators. The report concluded that for the most part the law is working even though more flexibility and variances are necessary, some regulations are unclear, and stronger and more uniform enforcement is needed.⁵ Even though focus on OSM and state programs is usually directed at breakdowns in administrative and enforcement activities, it is important to keep in mind that in the final analysis

² H.R. REP. NO. 206, 99th Cong., 1st Sess. 22 (1985).

³ *Id.* at 23.

⁴ NATIONAL INSTITUTE OF URBAN WILDLIFE, ENVIRONMENTAL RECLAMATION & THE COAL SURFACE MINING INDUSTRY (1985).

⁵ *Id.* at iii.

the success or failure of a program must be determined on the basis of the reclamation that is achieved. Restoration is not an exact science. It is much more of an art and is, therefore, with respect to specific aspects, extremely subjective. Furthermore, neither the Act nor the regulations make any distinction between serious violations and those lesser infractions that actually are of little consequence to overall reclamation. For example, missing topsoil signs or gullies which develop before revegetation takes hold are only significant if not corrected. It is the position of the industry that most operators are responsible and are dedicated to the achievement of good reclamation pursuant to the performance standards enumerated in SMCRA.

However, in light of the severe criticism leveled at OSM, a serious question arises as to the ability of the agency to regulate effectively. The Act provides for the establishment of state programs based on SMCRA's federal standards and gives the state the primary governmental responsibility to regulate the surface mining of coal within their borders. This statutory approach is referred to as "state primacy." The federal role during state primacy is limited to one of oversight to make certain the states are doing an effective job of administering and enforcing their state programs. Particularly significant is the underlying and more basic issue of whether state primacy and the federal oversight role, as structured by OSM, is effective in meeting the objectives of the Act. This paper addresses this issue.

III. STATE PRIMACY AND THE FEDERAL ROLE

The Surface Mining Control and Reclamation Act of 1977 was enacted after almost seven contentious years of legislative effort. The purposes of the Act are set forth in section 102 and cover the broad spectrum of interests that are usually listed in support of federal legislation. However, one of the primary purposes is to assist the states in developing and implementing a program to assure that surface mining is conducted to protect the environment, which taken together would provide a nationwide scheme to protect society and the environment from the adverse effects of such operations.⁶

Even though most of the coal producing states had over the years enacted progressively stricter laws of their own to regulate coal mining within their borders, Congress was convinced that a federal statute was necessary to set minimum nationwide standards to insure that competition among coal producers in the different states would "not be used to undermine the ability of the several States to improve and maintain adequate standards on coal mining operations within their borders."⁷ Clearly, the Act did not attempt to destroy or eliminate the existing state programs, nor was it Congress' intention to do so. On the contrary, they were to continue to function until modified by the states in accordance with the requirements of SMCRA.

⁶ SMCRA § 102(a), (g) (codified at 30 U.S.C. § 1202(a), (g)).

⁷ SMCRA § 101(g) (codified at 30 U.S.C. § 1201(g)).

Thus, the Act establishes minimum mining and reclamation performance standards and affords the states the right to assume "exclusive jurisdiction over the regulation of surface coal mining and reclamation operations" on non-federal lands within their borders provided each state adopts a program based on the federal criteria.⁸ As Congress expressly found in the Act, because of the localized nature of coal mining operations, state primacy is essential to the success of the regulatory scheme. "Because of the diversity in terrain, climate, biologic, chemical and other physical conditions in areas subject to mining operations, the *primary governmental responsibility* for developing, authorizing, issuing and enforcing regulations for surface mining and reclamation operations subject to this chapter should rest *with the States.*"⁹

Congress, however, wanted state laws enacted to affect the necessary changes in the state programs.¹⁰ It recognized that to achieve this the states would need a reasonable period of time to enact legislation, during which some modified regulatory scheme would be required. The Act, therefore, establishes a transitional mechanism by setting up a two-phased implementation process.¹¹ The first or transitional phase is referred to as the initial or interim program which covers the period from the date the statute was signed into law to initiation of the second phase, referred to as the permanent program. The interim program was to last approximately two years but in most instances was of considerably longer duration. The permanent program comes into place upon approval by the Secretary of the Interior (Secretary) of the state-enacted program¹² or when OSM promulgates a federal program for a state that declines to submit a state program or its program is not approved.¹³

It was Congress' intention that the regulatory programs and the underlying regulations that were to be established, whether interim or permanent, should provide flexibility. As set out above, Congress recognized that the vast diversity in mining conditions throughout the country would require a regulatory scheme flexible enough to accommodate the changes that would have to be made by mine operators in the different mining regions in order to meet the requirements of the Act. The same regulatory approach would hardly be appropriate for both the arid and semi-arid great plains in the west and the steep mountainous terrain of southern Appalachia with its heavy rainfall.

A 1981 study by the National Academy of Sciences confirmed the need for flexibility and the approach adopted by Congress. According to the findings of the study, it was essential for the regulations "to provide an adequately flexible response to variations in local conditions" and to "the extent that states . . . are given

⁸ SMCRA § 503(a) (codified at 30 U.S.C. § 1253(a)).

⁹ SMCRA § 101(f) (codified at 30 U.S.C. § 1201(f)) (emphasis added).

¹⁰ SMCRA § 503(a) (codified at 30 U.S.C. § 1253(a)).

¹¹ SMCRA §§ 502, 503 (codified at 30 U.S.C. §§ 1252, 1253).

¹² SMCRA § 503(b) (codified at 30 U.S.C. § 1253(b)).

¹³ SMCRA § 504(a) (codified at 30 U.S.C. § 1254(a)).

the authority to respond to local conditions, flexibility will be achieved.”¹⁴ The report pointed out that even the best set of national design standards could bring about absurd results:

Surface mining and reclamation present massive challenges to the regulatory environment because each region and locality is different, as is extensively documented in this study. The complexity of the interactions among the geological, hydrological, ecological, and social systems in the context of surface mining and reclamation guarantees that the best practical set of design standards nationally imposed will occasionally have unreasonable and even absurd results in particular localities.¹⁵

The Act not only indicates that the programs should take into account the differences in local conditions, but there is also substantial legislative history indicating that the regulations must be flexible and provide for variances:

[F]lexibility is a necessary element in a rational program of surface mining regulation. While performance standards should be cast in terms of general applicability, the Committee recognizes that land use considerations may justify a variance from the general standard or that a variable standard should be implemented in recognition of the distinctions in climate, terrain, and other physical features.¹⁶

The legislative history drew a distinction between reclamation goals and the methods of achieving those goals and left the latter to the discretion of the operator to accommodate his site specific conditions:

The original emphasis on return to the approximate original contour should not obscure the fact that the appropriate methodology will vary from site to site. Responsibility for devising methods for reaching any necessary reclamation goals should be left up to the operator. Within the limits of economic constraints, the available equipment and his own ingenuity, the surface mining operator will develop whatever approach best suits his needs and the peculiarities of his mining site.¹⁷

During discussion in the Senate of the statutory provision requiring an operator to return mined lands to their approximate original contour, it was erroneously suggested that the Committee preferred a specific reclamation method used in Pennsylvania. The Committee said: “This is not the case. The Committee is prescribing performance standards to achieve a certain degree of reclamation—the Committee has no intention of dictating how those standards are achieved.”¹⁸

Furthermore, Congress recognized the problems operators would have coming into initial compliance and did not want operators acting in good faith to be unfairly penalized. The House Committee said:

¹⁴ NATIONAL ACADEMY OF SCIENCES, NATIONAL RESEARCH COUNCIL, SURFACE MINING: SOIL, COAL & SOCIETY at 194-95 (1981).

¹⁵ *Id.* at xxii.

¹⁶ H.R. REP. No. 1072, 93rd Cong., 2d Sess. 73 (1974).

¹⁷ *Id.* at 65.

¹⁸ S. REP. No. 402, 93rd Cong., 1st Sess. 44-45 (1973).

[A]n operator may have to accomplish significant adjustment in his operations to achieve initial compliance. . . . Where an operator is attempting to obtain a variance under the Act to allow the continuation of a particular operation, it is not the intention of the Committee that the operation be interrupted if action on the variance application is not taken prior to the implementation of the interim standards. . . . The operator acting in good faith should not be unfairly penalized.¹⁹

The requirements set out in the Act were general in order to provide an "element of flexibility" and not preclude beneficial practices.²⁰ From the legislative history, there appears to be no intention by Congress to establish nationwide design criteria nor inflexible performance standards that could not accommodate local characteristics, problems, or practices.

Under the interim program, virtually all the functions required by SMCRA were to be performed by OSM. It was responsible for promulgating interim program regulations incorporating eight of the Act's twenty-five or so performance standards.²¹ Implementation of a federal enforcement program, including the inspection of operations and taking the necessary actions to insure the corrections of violations, was an OSM responsibility.²² Administrative adjudication of any contested federal enforcement action was also a federal function within the Secretary of the Interior's jurisdiction,²³ and subsequent judicial review authority was also vested in the federal district courts.²⁴ However, it is important to note that the existing state programs were to continue to function during the interim program and that operating without a state permit would be a violation of the Act.²⁵ The Act declared that the state permits shall contain terms requiring compliance with the eight interim standards.²⁶ There was no *federal* permit process under the interim program; instead, Congress relied on the existing state programs for back-up in this regard and for additional enforcement.

Unlike the permanent program, during the transitional phase Congress created a preeminent federal lead with state support. As a result, OSM's direct enforcement role in the interim program was much greater with respect to the operators than it would be under a permanent state program. However, its enforcement and oversight authority as to the states was much more limited. In a permanent state program, the dominant role would belong to the state. It is important to keep in mind the distinction made in the Act as to the respective state and federal roles in each of the programs. Many of OSM's problems today stem from its failure to understand the different state-federal relationships in each of the two programs

¹⁹ H.R. REP. NO. 45, 94th Cong., 1st Sess. 85-86 (1975).

²⁰ H.R. REP. NO. 218, 95th Cong., 2d Sess. 85 (1975).

²¹ SMCRA § 501(a) (codified at 30 U.S.C. § 1251(a)).

²² SMCRA § 502(b)-(c), (e) (codified at 30 U.S.C. § 1252(b)-(c), (e)).

²³ SMCRA § 525 (codified at 30 U.S.C. § 1275).

²⁴ SMCRA § 526 (codified at 30 U.S.C. § 1276).

²⁵ SMCRA § 502(a)-(b) (codified at 30 U.S.C. § 1252(a)-(b)).

²⁶ SMCRA § 502(c) (codified at 30 U.S.C. § 1252(c)).

and how critical those relationships are to the effective functioning of the regulatory scheme. For example, OSM's failure to restructure its preeminent enforcement role upon the demise of the interim program has undercut the achievement of viable state primacy.

The permanent program would be in place when the individual state had developed, and the Secretary of Interior approved, a state program developed in accordance with the requirements of SMCRA and consistent with the permanent program regulations to be promulgated by the Secretary within two years of the passage of the Act. The operative language is that the state must demonstrate its capability to carry out the Act through enactment of "a State law which provides for the regulation of surface coal mining and reclamation operations in accordance with the requirements of this chapter," and the program is "consistent with" regulations issued by the Secretary.²⁷ The major statutory requirements for approval of a state program set out in section 503 are:

- 1) A state law for the regulation of surface coal mining and reclamation operations in accordance with the provisions of SMCRA. The law must include sanctions, which meet minimum federal requirements, when violations occur;
- 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;
- 4) A procedure for designating areas as unsuitable for coal mining; and
- 5) A procedure for coordination of permit applications with other state or federal agencies.

Upon approval of the state program by the Secretary, the state obtains "primacy," that is, the governmental responsibility for the regulation of surface mining and reclamation under its permanent state program. If a state declines or fails to submit an acceptable program, Congress expressly granted authority to the Secretary to implement a federal program for that state.²⁸ However, short of a state's failure to request primacy or obtain approval of its program, the federal government was clearly assigned a supporting role, namely, "to assist the States in developing and implementing a program to achieve the purposes of the Act."²⁹

The House report reinforces the delegation of "primary regulatory power to the states" with a "limited Federal oversight role."³⁰ Because environmental regulation of mining is intrinsically bound up with state and local land use decision making which involves constitutional and common law constraints, and because society

²⁷ SMCRA § 503(a)(1), (a)(7) (codified at 30 U.S.C. § 1253(a)(1)-(a)(7)).

²⁸ SMCRA § 504(a) (codified at 30 U.S.C. § 1254(a)).

²⁹ SMCRA § 102(g) (codified at 30 U.S.C. § 1202(g)).

³⁰ H. R. REP. NO. 2181, 95th Cong., 1st Sess. 661 (1977).

values local self determination, Congress elected to allocate primary authority to the states. Direct federal assumption of local control in this area would create serious political and practical difficulties that could impair the substantive achievement of the Act's environmental goals.

Under its approved program, the state assumes primary responsibility for administering and enforcing a comprehensive regulatory program that includes an extensive permitting process and a full array of inspections, enforcement, and adjudication responsibilities.³¹ Although the state authority is described as having "exclusive jurisdiction," there are, of course, several OSM functions specifically spelled out in the Act which are required to operate in conjunction with the state program and to interact with the exclusive authority of the state. These OSM functions were essentially created to ensure that the state programs can and do carry out the Act's regulatory scheme. These federal functions essentially include OSM's authority to issue regulations to assist the states in developing and implementing a state program to meet the requirements of the Act and an ongoing oversight role to insure that the state programs are effectively enforced. Included as part of that oversight role are federal on-site inspections and limited direct federal enforcement as described by the District of Columbia Court of Appeals as follows:

The statute requires occasional federal on-site inspections 'to evaluate the administration of approved State programs.' Act 517(a). Interested persons may also report suspected violations of the Act or of state imposed permit conditions to the Secretary, and if he has reason to believe the allegations he must notify the state regulatory authority. Act 521(a). If the state fails to take appropriate action, the Secretary is to order a federal inspection of the minesite. *Id.* Violations that threaten imminent environmental harm are to be halted by a cessation order from the Secretary. Act 521(a)(2).³²

The Act also requires OSM, as part of its oversight authority when it has "reason to believe" (whether as a result of its own inspections or from other sources) that violations result from the failure of a state to enforce its program or any part thereof, to divest the state of all or part of its authority and take over itself the direct enforcement of all or part of the state program not being enforced.³³ The Secretary shall offer public notice, shall hold a hearing on the state's failure to enforce, and from the time of the public notice, may use all the federal enforcement authority, including the issuance of Notices of Violation (NOVs).³⁴ However, the only enforcement authority OSM has that can be used directly against an operator *when there is a functioning state program in place* is the right to issue a cessation order to protect health and safety and the environment from imminent and significant harm.³⁵

³¹ SMCRA § 526(e) (codified at 30 U.S.C. § 1276(e)).

³² *In re Permanent Surface Mining Regulation Litig.*, 653 F.2d 514, 519 (D.C. Cir. 1980), *cert. denied sub nom.*, *Peabody Coal Co. v. Watt*, 454 U.S. 822 (1981).

³³ SMCRA § 521(b) (codified at 30 U.S.C. § 1271(b)).

³⁴ SMCRA §§ 521, 504(b) (codified at 30 U.S.C. §§ 1271, 1254(b)).

³⁵ SMCRA § 521(a)(2) (codified at 30 U.S.C. § 1271(a)(2)).

This view of the federal-state relationship has been recognized and reinforced by the courts. The District of Columbia Court of Appeals outlined the federal-state relationship quite clearly and pointed out that Congress chose a special kind of regulatory structure for SMCRA by affording states the opportunity to propose regulatory programs of their own.³⁶ The court held that, unlike the *continuing* role of the Environmental Protection Agency after a state has assumed responsibility for the discharge permitting program, in an approved state program under SMCRA that is being effectively enforced, the state has the primary responsibility for achieving the purposes of the Act. First, the state is the sole issuer of permits. In performing this centrally important duty, the state regulatory authority decides who will mine in what areas, how long they may conduct mining operations, and under what conditions the operations will take place.³⁷ It decides whether a permittee's techniques for avoiding environmental degradation are sufficient and whether the proposed reclamation plan is acceptable.³⁸ The state sets the amount of the bond to be posted by the operator and inspects the mine to determine compliance.³⁹ When permit conditions are violated, the state is charged with imposing appropriate penalties.⁴⁰ Finally, it is with an approved *state law* and with *state regulations* that surface mine operators must comply and administrative and judicial appeals of permit requirements are "matters of state jurisdiction in which the Secretary plays no role."⁴¹

The court went on to say that once the state has assumed the regulatory functions, the Secretary's role is primarily one of oversight, shared in part by the public which is given the right to sue in federal court to compel compliance with a state program and its permits. The Secretary's power over lax state enforcement is set out in section 521(b) of the Act which permits him to take over the enforcement of all or any part of a state program if the state fails to enforce.⁴² It should be noted that under section 521(b) the Secretary need only give public notice of the hearings on the program breakdown, and he can take over direct enforcement of the allegedly defective part of the program until corrected or taken over by OSM.

In a recent federal district court case,⁴³ OSM's federal oversight authority was severely curtailed and state primacy was defined in its proper perspective. Clinchfield Coal Company obtained a permit revision from the state regulatory authority to relocate certain drainage ditches for one of its valley fills. Some months later during a statistical sampling inspection, an OSM inspector held that the ditches were improperly located under OSM's interpretation of its regulations and issued

³⁶ *Permanent Surface Mining Regulation Litig.*, 653 F.2d 514.

³⁷ See SMCRA §§ 506, 510 (codified at 30 U.S.C. §§ 1256, 1260).

³⁸ SMCRA § 510(b) (codified at 30 U.S.C. § 1260(b)).

³⁹ SMCRA §§ 509, 507 (codified at 30 U.S.C. §§ 1259, 1257).

⁴⁰ SMCRA § 518(i) (codified at 30 U.S.C. § 1268(i)).

⁴¹ *Permanent Surface Mining Regulation Litig.*, 653 F.2d at 519.

⁴² *Id.*

⁴³ *Clinchfield Coal Co. v. Hodel*.

a ten-day notice. The state regulatory authority declined to take action and informed OSM that the relocation was approved pursuant to the state regulations.

Judge Kiser squarely recognized that this case turned on the basic primacy issue:

The underlying questions in this case are the scope of authority given to a state which has achieved primacy under the Surface Mining Act, and what reliance, if any, permittees can place on the decisions of the appropriate state regulatory body.... Where there are differing interpretations of the meaning of the federal or state regulations, can the state make an interpretation, or is OSM's interpretation the binding one?⁴⁴

Although he recognized that the issue of the federal-state enforcement relationship under the Act is "quite complex" and needed to be explored more fully on the merits of the case, his preliminary answer to the question he posed was nonetheless direct:

[I]f the term 'primacy' is to have any meaning, then the state regulatory authority must have principal responsibility for interpreting and enforcing its own regulations and the Surface Mining Act. If the state fails to enforce the Act, then OSM may take action to withdraw approval of the state program under 30 U.S.C. Section 1721(b). I do not believe that Congress intended the OSM to serve as a duplicative regulatory body conducting inspections and directly issuing notices of violation, especially when the state authority had made a determination that no violation exists.⁴⁵

One aspect of the court's opinion is particularly interesting. Although it was not the basis for his decision, Judge Kiser engaged in an intriguing discussion of OSM's authority to issue NOVs. He acknowledged, of course, OSM's clear right to issue cessation orders for imminent danger or significant, imminent environmental harm, even in the context of an oversight inspection. With respect to NOVs, however, his conclusion was different. He analyzed section 521(a)(3) of the Surface Mining Control and Reclamation Act as giving OSM authority to issue NOVs in only three circumstances: where OSM is enforcing a federal program, where OSM has enforcement responsibility pending approval of a state program, or where OSM is enforcing a state program pursuant to public notice that the state was failing to enforce that program effectively. Since none of those circumstances applied in the *Clinchfield* case (nor do they in the typical OSM oversight situation in a primacy state), Judge Kiser observed that OSM's action was probably without statutory authority. He therefore questioned the validity of the federal regulation which seeks to give OSM the power to issue NOVs on the basis of any federal inspection when the state fails to take appropriate action.⁴⁶

⁴⁴ *Id.* at ____.

⁴⁵ *Id.* at ____.

⁴⁶ 30 C.F.R. § 843.12(a)(2) (1984).

Thus, it appears from the legislative history that Congress recognized the need for flexibility and variances and was fully aware that a careful and realistic implementation of the Act would be necessary to avoid penalizing good faith operators. Initial compliance at best would call for significant adjustments by operators and failure to take this into account could have a drastic effect on the transition. During the interim program, OSM would have direct enforcement authority, but reliance on existing state programs with their permitting and bonding requirements would provide critical backup. It was also contemplated that the Act would provide the states with leeway to develop their own permanent programs modeled upon SMCRA criteria, subject to secretarial approval, and OSM would retain oversight authority to make certain that the states effectively enforced their programs or OSM would take them over. No mechanism for simultaneous dual regulation of operators was included in the Act when there was an approved state program in effect. A relatively straightforward scheme with a realistic governmental approach was designed that had been used successfully in this country since colonial times—the states retain regulatory jurisdiction unless they demonstrate that they cannot do the job effectively. But what has happened did not follow the intended regulatory scheme.

OSM under the Carter Administration failed to effectively implement the state role in both the interim and permanent programs and, consequently, became overwhelmed by the task of trying to second guess every aspect of state programs and duplicate state enforcement. OSM today is faced with criticism that follows in the wake of the mistakes made in early years of the statute's implementation. Admittedly, the courts have upheld some key aspects of OSM's approach as *lawful*, but the underlying question is one of effectiveness and, taken in its entirety, the attempt to elevate the federal role into the dominant one while continually eroding state primacy has been disastrous.

In developing the interim program, OSM apparently gave little heed to the concerns expressed by Congress as reflected in the legislative history and the Act. Presumably aware of the need for flexibility to meet local mining conditions; the care that would be required to structure an effective transition so that good faith operators would not be penalized; and the need to rely on the existing state programs for permitting, bonding, and enforcement assistance, OSM went ahead and steamrolled over these concerns.

The Act listed eight of SMCRA's twenty-five standards that operators would have to meet during the interim transition period. These involved land restoration, topsoil handling, hydrologic balance, control of waste piles, control of explosives, revegetation, and steep slope overburden handling and backfilling.⁴⁷ All of these standards were addressed in state programs to some degree although only a few required complete backfilling to the approximate original contour. As written in the Act, these eight standards would probably take up perhaps two columns on

⁴⁷ SMCRA § 502(c) (codified at 30 U.S.C. § 1252(c)).

one page of the *Federal Register*. Instead of building upon the existing state programs and taking advantage of their existing mechanisms, OSM on December 13, 1977 came out with about 222 columns of fine print in the *Federal Register* (seventy-four pages)⁴⁸ of detailed regulations setting forth in many sections rigid design specifications and criteria applicable nationwide. According to some, these interim regulations were at the time the most extensive set of regulatory rules in the history of DOI and certainly one of the most pervasive ever issued by any federal agency.

The great detail and limited flexibility of these regulations often imposed unrealistic and impractical restrictions on operators and succeeded only in creating a regulatory maze with which operators, states, and even OSM were unable to cope. No state program was structured in anywhere near the cookbook details set out in the regulations. Most state programs relied heavily upon working out the specifics in the permit and permit revision process and through their enforcement mechanism taking into consideration the site specific conditions.

Both the state and the operators made a tremendous effort to understand and adjust to the new regulations and initially OSM tried to be helpful and constructive in these efforts. But in the early spring of 1979, OSM made an abrupt turnabout in its policy (one that continues in spirit, if not in fact, even to this day) and everything started unravelling fast from that day forward. During the first months of the interim program, as Congress intended, OSM relied upon the existing state programs and let the states take the bulk of the enforcement action⁴⁹ and if they did OSM took no action itself. OSM concerned itself primarily with violations which threatened imminent harm. OSM announced the change in policy stating that "whenever a violation is observed by an OSM inspector, the inspector must take the appropriate enforcement action. This is so regardless of whether a State inspector accompanying the OSM inspector also takes enforcement action."⁵⁰

This policy change specifically required OSM to ignore ongoing state enforcement for the same violation at the same site, thereby guaranteeing duplicate enforcement, double fines in some instances, widespread confusion, and an unworkable program. As one state official said:

The clearest indicator of OSM's approach to enforcement is its practice of defining performance in terms of the number of violations it issues to operators. These numbers clearly give OSM a dramatic basis for criticizing the states, just as they give OSM an excuse for expanding its activities. But the practice represents a separation of the permit review, technical assistance, and inspection functions which are usually integrated at the state level. This leads to federal inspectors incapable of giving operators competent advice on alternatives for curing violations. It abdicates

⁴⁸ 42 Fed. Reg. 62,639-714 (1977).

⁴⁹ The interim standards were incorporated in the state permits pursuant to SMCRA § 502(b) (codified at 30 U.S.C. § 1252(b)).

⁵⁰ Richard Hall, O.S.M. Assistant Director, Memo for Inspection and Enforcement, to Regional Director (March 2, 1979).

a field responsibility for educating operators. It builds more inertia and red tape into the system as the checklists of OSM inspectors become even longer and ever less flexible. The experience of the states indicates that this is a mistake; we do not need an inflexible bureaucracy to enforce the standards of the Act.³¹

Since the detailed federal program had in effect superseded the state programs, the policy change wiped out the effective utilization of the state permitting process and enforcement mechanism as an effective tool to implement the standards of the Act. These state mechanisms were used to determine the specifics of the corrective measures to be taken by the operators. Keep in mind OSM had no permit process and no revision process and very little expertise at the time for determining corrective action. Most operators continued to turn to the states but OSM's time schedule for action began to preclude this. Operators were caught in the middle and most continued to work with the states since they controlled their permits. This, of course, marked the beginning of the avalanche of violations with which OSM was unable to cope. Many apparently were not even filed and when discovered some time later by the new administration had already (at \$750 a day for uncorrected violations) grown into the "megabucks" monster that has been hung around OSM's neck. Unfortunately, there is no way to determine how many of these citations were in fact corrected by state action. The states and operators were dismayed and discouraged and as one witness said:

In summary, the OSM inspection and enforcement program is poorly managed. In many instances, the program is not coordinated with state actions at the same mine. In some cases, OSM has written violations for inconsequential, nonexistent, or unimportant violations, at the same time ignoring the larger issues. OSM has often forgotten or ignored the fact that the state regulatory agency is not the only authority in the state that currently can review and issue permits for mining activities.³²

OSM issued its basic set of regulations governing the development of the permanent program by the states.³³ Undaunted by its experience with the interim program, OSM surpassed its earlier effort and issued regulations of unparalleled length and dimension. Introduced by a 408 page preamble of triple-column fine print in the *Federal Register*, the regulations themselves required their own *Federal Register* volume of 152 pages of triple-column fine print. They describe in minute detail every element of the federal and state regulatory program deemed important by OSM. The states are required to fashion their program in the precise image of OSM's regulations. The so-called "state window"³⁴ provision drafted by OSM purportedly to permit the states to deviate if they can demonstrate that it is "necessary"

³¹ *OSM Oversight Hearings Before House Comm. on Interior and Insular Affairs*, 96th Cong., 1st Sess. 5 (1979).

³² Testimony of H. Barry before House Comm. on Interior and Insular Aff. (March 28, 1980).

³³ 44 Fed. Reg. 14,901-15,463 (1979).

³⁴ 30 C.F.R. § 732.15 (1984).

because of local requirements, was of no help. The burden was on the states and the change would be permitted only if it is "as stringent" as the federal regulations. As a result there is little room to maneuver and the Carter Administration "state window" was really a one-way mirror. By defining "consistent with" and "in accordance with" to mean "no less stringent than and meet the applicable provisions of (these) regulations," OSM distorted the generally recognized meaning of the words and left the states with little choice but to accept the federal "model program" virtually *in hanc verba*. The 1979 Comptroller General's report⁵⁵ pointed out that several states claimed the permanent regulations further demonstrated what they consider to be Interior's overextension of authority. These states, as well as the industry, think this to be in contrast to the Act's intent that the regulations "be concise and written in plain, understandable language." They believe the principle of state primacy is lost with "volumes of specific design criteria and comprehensive standards to be applied to nationwide mining operations." They believe the regulations have been drafted in such detail that they preclude state management flexibility in prescribing the practices or means by which the underlying environmental objectives of the Act are to be achieved.

Some state officials maintained that they have been successful in the past by keeping their regulations simple while correspondingly enforcing a tough but "streamlined" surface mining law. One state official stated that for years his state did a good job with seventeen pages of law and eleven pages of regulations. In his opinion, ". . . the proposed final regulations are so restrictive and inclusive that the regulatory authority might just as well be running the draglines and bulldozers itself."⁵⁶

The permanent program regulations are a prime example of regulatory overkill requiring a "cookbook" approach to most technical questions and leaving no flexibility to the operator or discretion to the regulatory agency. The states have indicated their frustration:

There can be no excuses for the flood of 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, amplified by endless subparagraphs and overextensive demands for disclosure. 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 party involved.⁵⁷

⁵⁵ COMPTROLLER GENERAL OF THE UNITED STATES, ISSUES SURROUNDING SURFACE MINING CONTROL & RECLAMATION ACT 14 (1979).

⁵⁶ *Id.*

⁵⁷ *OSM Oversight Hearings, supra* note 51, at 5.

OSM has adopted an activist interpretation of its federal role in promulgating and regulating and approving state programs. It has dictated every conceivable aspect of state administration deemed relevant by OSM and has thoroughly frustrated the goal of primacy while ensnaring implementation of the Act in a morass of legislative, administrative, and judicial hurdles. OSM's permanent regulations delayed the implementation of the permanent program leaving the ineffective interim program structured by OSM in place for years longer than anticipated which permitted the backlog of violations and uncollected fines to continue to mount.

Because of the breakdown in critical areas, as well as in managerial and administrative control over such a cumbersome and detailed regulatory scheme, OSM over the years has been forced to take a direct role in interpretation of state regulations and to impose duplicative federal enforcement. Interpretation has taken the form of rulings and policy clarification directives as well as on-site interpretation of the regulations, thereby overruling state inspectors. Such intrusion constitutes federal usurpation of the states' rights to administer, interpret, and enforce their own laws.

Although the courts did not strike down OSM's overall approach, they did not hold that such a massive regulatory scheme was called for by the Act. However, as a practical matter, failure to share the burden of regulation with states shackled OSM's effectiveness. OSM became so involved in directly regulating the vast majority of operators who were making every effort to comply that it was unable to focus on the serious problems of multiple violators, two acre exemptions, and others. OSM apparently believed that implementation and enforcement of such a detailed program would eliminate a major problem area and were therefore slow to recognize or respond to their development.

Unfortunately, OSM did not create viable state primacy. Using its regulatory authority to develop extremely detailed regulations, including specific design criteria for the performance standards, the states were in effect forced to accept them almost verbatim in order to have their programs approved. The states were provided little if any discretion in the development of their programs. OSM also used its oversight authority to coerce the states to modify the administration of their programs. Furthermore, the agency uses its enforcement and interpretive authority (particularly as to permit terms, regulations, and determination of violations) to supersede state actions upon which operators have relied. In effect, OSM has created a federal program for the states to enforce in the first instance with a complete overlay of direct federal enforcement if the agency disagrees with the state. There is no real state primacy and operators are frustrated in their efforts to comply with the state program.

IV. CONCLUSION

The Act contemplated the creation of state programs, through the enactment of state law and regulations modeled upon SMCRA, which would be developed,

administered, and enforced by the states with "exclusive jurisdiction" to regulate surface mining within their borders. Upon approval of a state program OSM's role should revert to one of oversight including monitoring of the state program with the right to divest the state and take over all or any part of the program that the state fails to enforce. Short of divestiture, OSM also has the authority to provide federal enforcement for that part of a program not being enforced by the state. Absent state failures which amount to a program breakdown, OSM has only the authority to issue cessation orders when state programs are in effect to protect against imminent threat to public health and safety or significant harm to the environment. Of course, in specific instances OSM could elect to go to court to force the state to take action.

OSM's creation of such a complicated and detailed structure in each of the mining states, coupled with its commitment to directly enforce every aspect of these programs, has enmeshed the agency in the day-to-day administration and enforcement. This situation was never intended by the Act as an administrative policy; it is ineffective and unworkable. The Act contemplated a valid delegation of authority to the states unless they cannot do the job. OSM, instead of taking the programs away when enforcement breaks down, wants to correct each and every breach. If you do not trust your delegee, there is no realistic choice but to replace him because there is not enough time or manpower to monitor his every move and do his work for him. The Act never contemplated such an unworkable scheme. Some critics simply urge more and more federal duplication as the solution, but this is futile. Basic restructuring of the federal role is required.

As a result, OSM initiatives are not focused on some of the critical problem areas and they spend too much time and effort on the operators who are making every effort to comply. Responsible operators are subject to heavy-handed and onerous enforcement while wildcatters, chronic violators, and abusers of the two acre exemption receive inadequate attention. It was intended that OSM assist the states to be more effective. Therefore, OSM should concentrate on the trouble spots and not continue to tighten up on the responsible operators.

OSM must give the states more authority and autonomy in administering and enforcing their programs. It should encourage the states to use the new "state window" regulations developed by former OSM Director James Harris to modify their regulations for more flexibility. OSM should concern itself with the overall effectiveness of state programs and not become involved in day-to-day duplication of administration and enforcement. OSM's oversight authority must be restructured to achieve effective state programs. Further, the unenforced state programs or portions thereof should be taken over by the federal government. OSM enforcement should not duplicate state enforcement. The existing duplicate regulatory functions of the state and federal entities undermine state authority, create uncertainty, frustrate operators who are striving to meet the requirements of the Act, and cause untold and costly delays. OSM should concentrate on major problem areas and permit the states to assume the burden of enforcing the Act within their boundaries

as Congress clearly intended. Only in this way can OSM effectively perform its regulatory function.

Much of the criticism comes from the mistakes made in the early years of the Act's implementation. OSM failed to properly and effectively structure the state role. Because of the breakdowns that have resulted (unprocessed violations, uncollected fines, and multiple violators unidentified), there is a tendency to maintain that more federal enforcement is needed. This will only exacerbate the original mistakes and impose more federal administrative overlay which is unworkable and futile.

If the situation has deteriorated to an unacceptable degree, the program should be taken over by OSM. Improved guidelines spelling out what factors will determine the takeover of a program or part of a program could be helpful. This authority was intended and certainly should be the keystone to federal oversight—not direct federal enforcement. The responsible operators have adjusted to the requirements but simultaneous dual regulation and second guessing every state decision (permit conditions, bond release, drainage ditch locations, etc.) creates havoc.

OSM should monitor state programs, but the efforts at this time to develop a “true sampling” of every aspect is counterproductive. OSM should concentrate its efforts on the major problem areas. Responsible operators do not want violators to get away with poor reclamation and OSM should do everything in its power to assist the states to rid themselves of wildcat operators and those who abuse the two acre exemption.

There has been a suggestion that OSM might be well served if it were moved out of Interior and into another agency. What is needed is a restructuring of the state and federal roles and a recommitment by OSM to its role as monitor of the state programs. The Department of Interior has jurisdiction over the federal lands, land use, and mining. It is well suited to administer OSM and removal to a different agency would not be beneficial and more than likely would be extremely detrimental. The primary question is not one of commitment but one of properly structuring a workable regulatory system. A change in agencies would make it more difficult. Duplicative regulation was not intended, it is unworkable, and must be eliminated.

Furthermore, the criticism leveled at OSM must be kept in perspective and should not let us lose sight of the fact that most operators are doing a good job and reclamation is being achieved better than ever. In addition, many of OSM's initiatives are not flawed and should not be tainted with the overall criticism. Some of these initiatives must stand on their own merits and should be given a chance. It is encouraging to note that OSM has undertaken an agency policy review referred to as the Management Action Plan (MAP). This initiative discloses that OSM is aware of the serious problems confronting the agency and is attempting to address them. The industry believes there is much that can be done and looks forward to the achievement of a realistic regulatory scheme under SMCRA.