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# THE FIRST DECADE OF THE IMPLEMENTATION OF THE SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977 IN OKLAHOMA

Theodore M. Vestal\*

## I. INTRODUCTION

On August 3, 1977, Congress enacted the Surface Mining Control and Reclamation Act<sup>1</sup> (SMCRA) to enhance coal production and protect the environment.<sup>2</sup> From the start, the Act was shrouded in controversy.<sup>3</sup> The complex regulations to be implemented by the federal and

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1. Surface Mining Control & Reclamation Act of 1977, 30 U.S.C. § 1201 (1982).

2. *Id.* For a balanced assessment of the effectiveness of the SMCRA, see *The National Coal Issue*, 88 W. VA. L. REV. 509 (1986).

3. Franklin, *President Signs Strip-Mining Bill, But Cites Defects*, N.Y. Times, Aug. 4, 1977, at 1, col. 2. The following quote describes the tortuous steps that led to the passage of the SMCRA:

Hearings on proposed legislation regulating surface coal mining began in 1968. Surface Mining Reclamation: Hearings before the Senate Committee on Interior and Insular Affairs, 90th Cong., 2d Sess. (1968). Three years later, additional hearings were held by Committees of both the House and the Senate. Regulation of Strip Mining: Hearings before the Subcommittee on Mines and Mining of the House Committee on Interior and Insular Affairs, 92d Cong., 1st Sess. (1971); Surface Mining: Hearings before the Subcommittee on Minerals, Materials and Fuels of the Senate Committee on Interior and Insular Affairs, 92d Cong., 1st Sess. (1972). The Committees reported bills for consideration by their respective Houses. The House passed H. R. 6482, but Congress adjourned before the Senate could act on the measure.

Similar bills were reintroduced in the 93d Congress and further hearings were held. Regulation of Surface Mining Operations: Hearings before the Senate Committee on Interior and Insular Affairs, 93d Cong., 1st Sess. (1973); Regulation of Surface Mining: Hearings before the Subcommittee on the Environment and the Subcommittee on Mines and Mining of the House Committee on Interior and Insular Affairs, 93d Cong., 1st Sess. (1973). At the request of the Chairman of the Senate Committee, the Council on Environmental Quality prepared a report entitled *Coal Surface Mining and Reclamation: An Environmental and Economic Assessment of Alternatives* (Comm. Print 1973), and the Senate

state governments buried the intent of the SMCRA to address the environmental concerns prevalent in the late 1970's. The administration of the SMCRA in the following decade called attention to the problems of implementing and enforcing legislation considered to be in the public's best interest regardless of the conflict between good intentions and prevailing reality. The interaction of the federal government and the states raised questions about the consequences of the reach of the federal government and the dividing line between public interest and individual rights.<sup>4</sup> Intertwined with these concerns were the coal industry's pride and its role in a turbulent economy.

A stormy period of transition marked the first decade of the SMCRA. The federal takeover of inspection and enforcement functions of the SMCRA in Oklahoma from 1984 to 1987 brought down the anachronistic political system in the Oklahoma Department of Mines

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Committee held additional hearings to consider the report. Coal Surface Mining and Reclamation: Hearings before the Subcommittee on Minerals, Materials and Fuels of the Senate Committee on Interior and Insular Affairs, 93d Cong., 1st Sess. (1973). The House and Senate Committees reported bills for consideration by both Houses, and Congress passed a bill that was vetoed by President Ford in 1974.

The surface mining legislation was reintroduced in the 94th Congress in 1975, and the Senate Committee held a hearing on administration objections to the bill. Surface Mining Briefing: Briefing before the Senate Committee on Interior and Insular Affairs, 94th Cong., 1st Sess. (1975). Both Committees reported bills to the House and Senate, which again passed a bill reported by the Conference Committee. President Ford again vetoed the bill.

The protracted congressional endeavor finally bore fruit in 1977. The relevant House and Senate Committees held extensive hearings shortly after the opening of the 95th Congress to consider bills introduced at the very beginning of the new legislative session. Surface Mining Control and Reclamation Act of 1977: Hearings on S. 7 before the Subcommittee on Public Lands and Resources of the Senate Committee on Energy and Natural Resources, 95th Cong., 1st Sess. (1977) (1977 Senate Hearings); Surface Mining Control and Reclamation Act of 1977: Hearings on H.R. 2 before the Subcommittee on Energy and the Environment of the House Committee on Interior and Insular Affairs, 95th Cong., 1st Sess. (1977). The legislation was reported to both Houses and passage in both Chambers followed, after lengthy floor debate. 123 Cong. Rec. 12861-12886, 15691-15755 (1977) (1977 House Hearings). The Conference Committee Report was issued in July 1977, H.R. Conf. Rep. No. 95-493 (1977), and after further floor debate, both Houses agreed to the bill recommended by the conferees. 123 Cong. Rec. 23967-23988, 24419-24429 (1977). President Carter signed the Act into law on August 3, 1977.

Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 278 n.19 (1981); see T. VESTAL, *THE PITS: FEDERAL ADMINISTRATION OF THE SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977 IN OKLAHOMA*, 12 n.59 (1986) [hereinafter *THE PITS*]; Harvey, *Paradise Regained? Surface Mining Control and Reclamation Act of 1977*, 15 HOUS. L. REV. 1147 (1978); Note, *A Summary of the Legislative History of the SMCRA of 1977 and the Relevant Legal Periodical Literature*, 81 W. VA. L. REV. 775 (1979).

4. See Note, *Constitutional Challenges to the Surface Mining Control and Reclamation Act*, 43 MONT. L. REV. 235 (1982); Eichbaum & Babcock, *A Question of Delegation: The Surface Mining Control and Reclamation Act of 1977 and State Federal Relations. An Inquiry Into the Success With Which Congress May Provide Detailed Guidance For Executive Agency Action*, 86 DICK. L. REV. 615 (1982); Friedman & Braverman, *OSM Update - the New Federalism and State Lead: Toxic or Tonic for the Coal Industry*, 3 E. MIN. L. FOUND. § 5.02 at 5-3 (1982).

(ODM) and led to the development of a new partnership between scientifically sophisticated state and federal regulatory agencies.<sup>5</sup> Implementation of the SMCRA transformed the Oklahoma coal industry from a basically unregulated business to a closely-scrutinized, highly regulated business.<sup>6</sup> In the wake of change and adjustment, the number of mine operations and the annual production of coal declined.

The collision of the coal industry and the state with federal regulatory agencies produced beneficial changes for Oklahoma. By necessity, a new and more "cooperative federalism" developed in the regulation of coal mining. The virtual disappearance of unreclaimed land in newly mined areas also reflects the success of SMCRA in developing environmentally conscious surface mining practices.<sup>7</sup> Tracing the history of coal mining in Oklahoma, and its nationwide regulation before and after SMCRA, will help explain how this happened.

## II. SURFACE MINING AND ENVIRONMENTAL PROBLEMS

Stripmining, or surface mining as the industry prefers to call it, involves removing the overburden of topsoil, rock, and other material covering a mineral deposit to extract the mineral.<sup>8</sup> Stripmining destroys the landscape, discolors the water, causes blast effect, increases motor vehicle congestion and noise pollution, and disrupts the community ambiance.

5. Stewart, *State Due Coal Mining Oversight*, Tulsa Tribune, Sept. 24, 1987, at D1, col. 1.

6. Stewart, *State Regains Some Control of Mines*, Tulsa Tribune, Mar. 3, 1987, at B1, col. 1.

Total Oklahoma coal production and production by the largest three companies, for selected years.

Year	Total state production (in tons)	Number of producers	Top three production	% top three
1978	5,428,678	45	1,954,680	36%
1981	5,728,461	34	1,972,172	34%
1983	3,635,890	23	1,915,701	53%
1984	4,313,273	23	2,146,035	50%
1985	3,331,510	24	1,314,967	39%
1986	3,138,000	18	915,664	29%
1987	3,300,000			

*Id.*

7. If the abandoned, unreclaimed mine lands of Oklahoma were relocated to an urban area, the despoilation would be larger than that produced by the atom bomb at Hiroshima. In Tulsa, the 29,000 acres of ruined land would cover an area bounded on the north by 1st Street, on the south by 71st Street, on the east by Memorial, and on the west by the Arkansas River.

8. "The term 'strip mine' is considered pejorative by some and a term of honor by others." Burcat & Geary, *Surface Mining Regulation in Pennsylvania*, 57 TEMP. L.Q. 1, 1 n.1 (1984).

Unless mine operators attempt to restore the mined land to some semblance of its natural state, the environment will be permanently damaged.<sup>9</sup> Nevertheless, in pre-regulation days, operators claimed that reclamation costs would ruin their competitive position vis-à-vis other fuels<sup>10</sup> and therefore spent as little time and money as legally possible to reclaim mined land.

Legal requirements varied greatly from state to state, but generally, the coal business regulated itself.<sup>11</sup> A former ODM official stated that the Oklahoma reclamation acts of 1967<sup>12</sup> and 1971<sup>13</sup> were ineffective because they were tailored to ongoing mining practices. Furthermore, ODM, primarily a permit-filing office, lacked mechanisms to handle the serious environmental threats and public safety problems arising from despoiled and abandoned lands. Thus, mining under such conditions left Oklahoma with acres of raped land. Today, eastern Oklahoma has more than 29,000 acres of unsightly reminders of this lax policy.

#### A. *Federal Response To A National Problem*

Like Oklahoma, virtually every coal-producing state had laws regulating surface mining that were either inadequate or not fully enforced. These problems arose because the states sought to protect its coal industries from competition by coal producers in other states and thus hesitated to impose stringent controls on its own industry.<sup>14</sup> In the early

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9. For discussion of the environmental damage caused by strip mining, see Stromp, *The Costs of Coal*, 39 *OUTDOOR OKLAHOMA*, Jan.-Feb. 1983 at 34; H. CAUDILL, *NIGHT COMES TO THE CUMBERLANDS* (1961). A thorough study of coal mining despoilation in Oklahoma has yet to be conducted.

10. In 1978, an industry study estimated that the cost of restoring mined land to the SMCRA standards would require \$10,000 to \$15,000 per acre. The industry accused OSM of using figures from three to eight times too low in estimating a restoration of from \$.25 a ton in level terrain in the Middle West, to \$2.16 a ton on the steep slopes of Appalachia. Franklin, *Peabody is Leading Fight Against Strip-Mining Law*, N.Y. Times, Apr. 30, 1978, at 26, col. 4. See the "best-guess" assessments of available information in Kalt, *The Costs and Benefits of Federal Regulation of Coal Strip Mining*, 23 *NAT. RESOURCES J.* 893 (1983). Oklahoma had one of the highest land reclamation costs when standardized costs per acre were assumed in a 1982 study (i.e., Oklahoma, \$2.78/ton; Wyoming, \$.13/ton). Misiolek & Noser, *Coal Surface Mine Land Reclamation Costs*, 58 *LAND ECON.* 67 (1982).

11. For comparisons of state regulatory laws in the early 1970's see Reitze, *Old King Coal and the Merry Rapiers of Appalachia*, 22 *CASE W. RES.* 650 (1971).

12. OKLA. STAT. tit. 45, §§ 701-13 (repealed 1971).

13. *Id.* at §§ 721-38 (1981), amended by OKLA. STAT. tit. 45 §§ 742.1-793 (West Supp. 1988).

14. States seeking to attract businesses through tax breaks and regulatory laxness are involved in a "prisoner's dilemma" in which each state tries to gain at the expense of others rather than working together as a group. To counter such an economically-inspired "race to the bottom," the public may demand that Congress initiate federal regulations and minimum standards. See Mashaw & Rose-Ackerman, *Federalism and Regulation*, in *THE REAGAN REGULATORY STRATEGY* 117-18 (G. Eads & M. Fix eds. 1984) [hereinafter Mashaw & Rose-Ackerman].

1970's, environmentalists and citizens who had suffered harm from surface mining practices finally took their case to Congress.<sup>15</sup>

The passage of the SMCRA in 1977 established a national regulatory program designed to ensure that future mining operations would be conducted in an environmentally acceptable manner. The SMCRA divided regulatory authority for enforcement of national standards between the states and the Office of Surface Mining (OSM), a pattern called "partial federal preemption."<sup>16</sup> In theory, the federal government, represented by the OSM, would merely supervise the states, leaving them primarily responsible for implementing and enforcing the Act. In practice, however, the states exercised a lesser role.

Similar to other federal environmental legislation, the SMCRA employed cooperative federalism, whereby the federal government offered states both positive and negative inducements, the "carrot and stick" approach, to design and implement regulatory programs consistent with the goals of the Act.<sup>17</sup> Annual federal grants, the "carrots," assisted the states in administering their programs. In addition, states with approved programs could recoup fifty percent of their implementation and enforcement costs from the Abandoned Mine Land Fund (AML).<sup>18</sup> Threats of federal takeover of state programs, the "sticks," punished states with programs that failed to gain OSM approval or that were not administered in accordance with the Act.<sup>19</sup> Through the promise of federal

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15. Harvey, *supra* note 3, at 1150. Harvey's article provides an excellent summary of all of the provisions of the SMCRA as originally passed. See also Note, *supra* note 3, at 776-83.

16. Partial preemption programs are based upon the federal government's authority to preempt certain state and local activities under the supremacy clause and the commerce clause. "While federal laws establish basic policies, administrative responsibility may be delegated to the states or localities, provided they meet certain nationally-determined standards." Beam, *Washington's Regulation of States and Localities: Origins and Issues* 11 (Intergovernmental Perspective, Advisory Comm. on Intergovernmental Relations, Washington, D.C., Summer, 1981). The SMCRA, the Clean Air Act, 42 U.S.C. § 7401 (1982), the Federal Water Pollution Control Act, 33 U.S.C. § 1251 (1982), the Occupational Safety and Health Act, 29 U.S.C. § 553 (1982), and the Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6901 (1982) are examples of partial preemption statutes.

17. Edgmon & Menzel, *The Regulation of Coal Surface Mining in a Federal System*, 21 NAT. RESOURCES J. 245, 246 (1981); Menzel, *Redirecting the Implementation of a Law: The Reagan Administration and Coal Surface Mining Regulation*, 43 PUB. ADMIN. REV. 411, 412 (1983).

18. The Abandoned Mine Land Fund (AML) is a trust fund generated from reclamation fees paid by coal mine operators. 30 U.S.C. §§ 1231-32 (1982 & Supp. III 1985). In Oklahoma, the AML program is administered by the Oklahoma Conservation Commission (OCC), an office independent of the Department of Mines. Oklahoma Abandoned Mine Reclamation Act, OKLA. STAT. tit. 45, §§ 740.1-7 (1981). The OCC's state plan was approved by OSM in January, 1982, and since that time, the commission has received good evaluations from the federal government for meeting its goals and objectives.

19. 30 U.S.C. § 1254 (1982).

funding, OSM hoped that states would quickly enact legislation consistent with the SMCRA's comprehensive scheme.

The SMCRA established new rules for all aspects of surface mining, from permit application to post-mining land reclamation.<sup>20</sup> OSM, in turn, promulgated mandatory mining and reclaiming regulations in the nature of specific "how to comply" instructions designed to help operators comply with SMCRA.<sup>21</sup> Furthermore, cooperative federalism arrangements provided uniform administration of national standards while allowing for diversity. For example, in response to state claims of unique geographical and geological problems in their programs the SMCRA provided the "state window" exception.<sup>22</sup> OSM narrowly interpreted the state window exception and placed the burden of proof of uniqueness claims on state officials.<sup>23</sup>

Unlike previous "cooperative federalism" environmental protection programs which gave the federal government an opportunity to develop expertise in the area to be regulated, the SMCRA required enforcement immediately upon passage of the Act.<sup>24</sup> Operators soon faced the dilemma of either complying with the new Act and its regulations, or ceasing operations. Furthermore, where the state failed, OSM agents could conduct inspections and, after notice, take enforcement action directly against a coal company. The sudden implementation and strict enforcement of the new and complex law put the states in the middle of a battle between federal environmental policy and the state coal mining industry.

To implement the Act, OSM issued a set of interim regulations under which coal mine operators were to operate while the states prepared plans for compliance with the SMCRA.<sup>25</sup> The OSM had to approve the state plans before they could be put into force. Early on, OSM indicated that the state plans needed to be close approximations to the

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20. Gage, *The Failure of the Interim Regulatory Program Under the Surface Mining Control and Reclamation Act of 1977: The Need for Flexible Controls*, 81 W. VA. L. REV. 595 (1979).

21. 30 U.S.C. §§ 1257-1270 (1982 & Supp. III 1985).

22. 30 C.F.R. § 731.13 (1979). The "state window" exception permits a state to "request approval for alternatives to the provisions of the regulations of this Chapter." *Id.*

23. Menzel, *supra* note 17, at 415.

24. The sudden creation and implementation of the SMCRA, instead of a phased entry into mining regulation by the federal government, caused many of the early problems between OSM and state regulatory agencies. Interview with Blaney Qualls, former Deputy Chief Mine Inspector of ODM, in Oklahoma City (June 20, 1985).

25. 30 C.F.R. §§ 710-710.12 (1987). For a critical analysis of the interim regulations, see Young, *Impact on Industry of the Federal Surface Mining Control and Reclamation Act*, 13 TULSA L.J. 687 (1978); Comment, *Cooperative Federalism and Environmental Protection: The Surface Mining Control and Reclamation Act of 1977*, 58 TUL. L. REV. 299 (1983).

federal rules and regulations.<sup>26</sup> Every state had to substantially improve and revise its regulatory programs to meet OSM compliance standards.

### B. *Coal Industry Counterattack*

In response to the government's new regulatory initiatives, coal mine operators throughout the country exploited loopholes in the federal system and launched attacks against the SMCRA, OSM, and the state regulatory bodies. Legal challenges questioned the constitutionality of the Act,<sup>27</sup> while lobbyists in Congress and state legislatures sought to amend the act or weaken its impact.<sup>28</sup>

Litigation over various provisions of the SMCRA brought mine operators some early legal victories in state courts and lower federal courts. In 1981, the industry faced defeat in the United States Supreme Court in the companion cases of *Hodel v. Virginia Surface Mining and Reclamation Association*<sup>29</sup> and *Hodel v. Indiana*.<sup>30</sup> Justice Marshall, writing for a unanimous court, reversed the findings of two district courts and held that the SMCRA did not violate the tenth amendment. The district courts had declared the Act unconstitutional because some of its provisions, such as those governing steep slopes and prime farmlands, interfered with the states' traditional governmental function of regulating land use.<sup>31</sup> However, the Court emphasized that Congress had the power to regulate surface mining under the commerce clause, and that the cooperative federalism arrangement of the SMCRA was a legal means to do it.<sup>32</sup>

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26. According to one critic of the regulations, OSM was guilty of a mystical misinterpretation in insisting that "consistent with" meant "identical to." Shostak, *The Pit and the Pendulum, The Senate and S. 1403*, 82 W. VA. L. REV. 1221, 1236 (1980).

27. McGinley & Barrett, *Pennsylvania Coal Company v. Mahon Revisited: Is Federal Surface Mining Act a Valid Exercise of Police Power or Unconstitutional Taking?*, 16 TULSA L.J. 418 (1981).

28. Abrams, *The Rockefeller Amendment: Its Origins, Its Effect and Its Future*, 82 W. VA. L. REV. 1241 (1980).

29. 452 U.S. 264 (1981).

30. 452 U.S. 314 (1981). For a discussion of the cases, see Conner, *Hodel v. Virginia Surface Mining and Reclamation Association and Hodel v. Indiana*, 10 ECOLOGY L.Q. 69 (1982).

31. In the Virginia case, the district court, relying heavily on *National League of Cities v. Usery*, 426 U.S. 833 (1976), *rev'd*, *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985) concluded that the steep slope provisions of SMCRA impermissibly constricted the state's ability to make "essential decisions." *Virginia Surface Mining & Reclamation Ass'n v. Andrus*, 483 F. Supp. 425, 435 (W.D. Va. 1980), *prob. juris. noted*, 449 U.S. 817 (1980), *aff'd in part, rev'd in part sub nom. Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981). In the Indiana decision, the district court found that surface mining on prime farmlands had "an infinitesimal or trivial impact on interstate commerce." *Indiana v. Andrus*, 501 F. Supp. 452, 458 (S.D. Ind. 1980), *prob. juris. noted*, 449 U.S. 816 (1980), *rev'd sub. nom. Hodel v. Indiana*, 452 U.S. 314 (1981).

32. For the Court, Justice Marshall stated:

[T]he States are not compelled . . . to participate in the federal regulatory program in any

Despite opposition, by mid-1980, most of the coal states met their deadlines for submitting their permanent compliance programs required by the SMCRA. OSM viewed state compliance as a major accomplishment involving months of behind-the-scenes negotiation between federal administrators, and the governors and legislators of the coal states.<sup>33</sup>

### III. SURFACE COAL MINING REGULATION IN OKLAHOMA

Since pre-statehood, Oklahoma has had a long and colorful history of coal mining.<sup>34</sup> By the time of statehood in 1907, coal was one of the most important industries in the state which helped fuel the area's economic development.<sup>35</sup> Since then, the coal industry has been on a carousel of boom and bust.<sup>36</sup> After World War II, surface mining became the dominant means of coal mining in Oklahoma, and throughout the United States. Today, however, coal produced from underground mines accounts for only a minute fraction of Oklahoma's total coal production.<sup>37</sup>

In the late 1960's, the industry prospered with the development of foreign markets for Oklahoma coal. The opening of the McClellan-Kerr

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manner whatsoever. If a State does not wish to submit a proposed permanent program that complies with the Act and implementing regulations, the full regulatory burden will be borne by the Federal Government. Thus, there can be no suggestion that the Act commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program. . . . [The] Act establishes a program of cooperative federalism that allows the States, within limits established by federal minimum standards, to enact and administer their own regulatory programs, structured to meet their own particular needs.

*Hodel v. Virginia Surface Mining and Reclamation Ass'n*, 452 U.S. 264, 288-89 (1981).

33. *Most Coal States Agree on Plans for Enforcing Strip-Mine Statute*, N.Y. Times, May 5, 1980, at 14, col. 3.

34. See I. GUNNING, *WHEN COAL WAS KING: COAL MINING INDUSTRY IN THE CHOCTAW NATION* (1975). Oklahoma produces three million tons of coal annually and has reserves of 7.8 billion tons. Friedman, Jones, & Jackson, *Developments in Coal in 1982*, 67 AM. A. OF PETROLEUM GEOLOGISTS BULL. 1983. For a geological analysis of Oklahoma coal, see 1984 KEYSTONE COAL INDUSTRY MANUAL 575-79. Coal is found throughout a huge L-shaped region of Oklahoma, dropping down from the Kansas border west of the Ozarks and extending eastward in a rough line south of the center of the state to Arkansas. The coal industry has a strong impact on the state's economy, employment, and environment. See memorandum from Dan Loague, Okla. Dept. of Economic & Community Affairs to Senator Stratton Taylor (June 12, 1985) (regarding the impact of the decline in mining on Oklahoma); OFFICE OF BUSINESS AND ECONOMIC RESEARCH, COLLEGE OF BUSINESS ADMIN., OKLAHOMA STATE UNIVERSITY, 1985 OKLAHOMA ECONOMIC OUTLOOK; A. DEBO, OKLAHOMA, FOOT-LOOSE AND FANCY-FREE 103 (1949); see also Friedman, Jones, & Jackson, *supra* (the coal area of the state extends 185 miles from north to south and 110 miles east to west, covering about 21 percent of the total area of the state).

35. I. GUNNING, *supra* note 34.

36. The history of the ups and downs of the coal industry in Oklahoma closely parallels the national experience. See Perry, *Coal in the United States: A Status Report*, 222 SCIENCE 377 (1983).

37. A new underground mine was developed in 1986. Robinson, *Going Underground*, Tulsa Tribune, Apr. 9, 1986, at B1, col. 1.

Navigation System in 1972, provided Oklahoma with ports near coal-producing areas and facilitated overseas barge shipments. The international energy crisis of 1973 enhanced the demand for coal, increasing statewide production to a peak tonnage of 5.7 million in 1981.<sup>38</sup> Presently, nationwide surpluses and soft prices have reduced profits and cut back exports of coal.<sup>39</sup>

#### A. *Oklahoma's Response To The SMCRA*

By 1978, the Oklahoma mining industry was reconciled to the new federal law. For decades the ODM had enjoyed an intimate relationship with coal mine operators and had developed a paternalistic attitude toward its charges. Mine operators became a constituency to be protected as ODM, little more than a coal industry spokesman, failed to enforce existing laws consistently and uniformly. During a series of meetings about the new federal law in 1978 and 1979, ODM and Oklahoma mine operators devised strategies to use the state window exception to lessen the impact of the SMCRA or to circumvent some of its more costly features. Promises and agreements were made behind closed doors, and citizen involvement was minimal. The industry showed its appreciation by providing political support for the elected, and later appointed, Chief Mine Inspector.

Over "the next two years, the Oklahoma coal mine operators embark[ed] upon a brilliantly convoluted, Byzantine strategy to delay implementation of the SMCRA. . . ."<sup>40</sup> In state courts, the operators used temporary restraining orders to prevent the state compliance plan of the ODM from gaining OSM approval. When these judicial tactics failed, the operators pressured the Oklahoma legislature to rescind the state's permanent program regulations. Finally, under the threat of a federal takeover of the SMCRA implementation, ODM adopted new rules which were approved by OSM on April 2, 1982.<sup>41</sup> With these new rules, Oklahoma was ready to implement its own regulatory program.

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38. 1982-1983 ODM Annual Rep., at 54-56.

39. The average value of United States coal exports (1,000 net tons) overseas declined from \$56.84 in 1982 to \$47.75 in 1985. The quantity of United States coal exported overseas declined from 112,541,000 tons in 1981 to 92,680,000 tons in 1985. *International Coal, 1986*, II-3, II-1 (1985).

40. *THE PITS*, *supra* note 3, at 22.

41. For a detailed review of the tactics that Oklahoma coal mine operators used to delay strict enforcement of the SMCRA, see *THE PITS*, *supra* note 3, at 18-25. See also 47 Fed. Reg. 14,152-53 (1982).

## 1. Oklahoma's Substandard Administration

After Oklahoma's first year of implementing the SMCRA, the OSM documented the informal, substandard administrative practices of the ODM in its 1983 annual report.<sup>42</sup> OSM oversight meetings called attention to specific problems with inspecting procedures and permitting, bonding, and also with reclamation practices. For example, when OSM inspectors caught mine operators violating regulations, they would frequently dissemble or disappear with impunity.<sup>43</sup>

In addition to administration problems, ODM lacked the trained personnel to implement the sophisticated regulatory scheme of the SMCRA. As a result, ODM had difficulty enforcing many of the regulations. Because of these problems, OSM inspectors accused ODM of not only violating federal standards, but also of failing to correct its errors. Operating under its own rules, Oklahoma had done an inferior job of implementing the SMCRA in its first year.<sup>44</sup>

After observing ODM's permanent program operations, the Director of OSM informed Governor George Nigh that the state had not adequately implemented its approved program and then initiated "733 proceedings"<sup>45</sup> against Oklahoma. During the next eight months, OSM and ODM exchanged written materials and held an informal conference authorized by federal regulation.<sup>46</sup>

Dissatisfied with Oklahoma's responses, on November 17, 1983, the Director of OSM published in the *Federal Register* that the state was not "adequately implementing . . . its approved program."<sup>47</sup> At public hearings, landowners, environmentalists, and mine operators documented problems with the state's administration of the compliance program by declaring a preference for a federal takeover.<sup>48</sup> They portrayed ODM as

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42. 1983 OSM ANN. REP. (Okla. Permanent Program).

43. See THE PITS, *supra* note 3, at 26; see also *Coal Mining Regulation Historically Lax*, Tulsa Tribune, Mar. 3, 1987, at B1, col. 1.

44. In 1983 to 1984, prior to the federal takeover, OSM's annual evaluation of the Oklahoma program documented ODM's accomplishments in improving permit filing and record keeping, tracking systems for bonding and lands unsuitable for mining, administrative procedures for processing lands unsuitable petitions, and penalty assessments, filing, and documentation. OSM found problems in all other areas of the program, a listing which took one and a half pages. 1984 OSM ANN. EVALUATION REP. (Okla. Permanent Program).

45. 30 C.F.R. § 733.13 (1987).

46. 30 C.F.R. § 733.12(f) (1987).

47. 49 Fed. Reg. 14,674 (1984).

48. Memorandum No. OK-551 from ODM to OSM; Bean, *Federal Fact-Finders Get Few Answers From State Mining Agency*, Daily Oklahoman, Dec. 22, 1983, at 16, col. 1.

an agency bound by political considerations unable or unwilling to enforce the law. Furthermore, coal company representatives favored federal regulation over the maintenance of ODM's regulation, alleging favoritism in enforcement of reclamation standards. Other coal operators complained about having to deal with a dual bureaucracy with two sets of inspectors frequently in disagreement and expressed hope that OSM would provide a uniform enforcement of the law. This testimony favored a federal takeover. A few months after this hearing, Governor Nigh appointed Deputy Chief Mine Inspector, Gayle Townley, the first Director of ODM to have the professional academic training and job experience for the technologically-sophisticated requirements of the post.<sup>49</sup>

## 2. The Federal Takeover

Townley had been at the helm of ODM for less than a month when the Director of OSM published the final rule on Oklahoma's Permanent Regulatory Program.<sup>50</sup> Citing serious unresolved problems, the OSM Director found that the steps taken by ODM to resolve identified program deficiencies were neither extensive nor progressive enough to ensure compliance with the SMCRA. The OSM noted that ODM lacked adequate staff and resources to implement all aspects of the state program. Therefore, "to ensure that the adverse effects of surface mining were controlled as required under SMCRA and the State program," OSM assumed the responsibility for the inspection and enforcement provisions.<sup>51</sup> ODM continued its permitting, bonding, and processing systems with increased monitoring and technical assistance from OSM.<sup>52</sup>

While OSM implemented the inspection and enforcement rules, ODM formulated a new plan whereby Oklahoma could resume full authority for all aspects of its approved program. The OSM warned the state, however, that it would take additional federal action if Oklahoma failed to carry out its remaining enforcement authority satisfactorily.<sup>53</sup>

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49. Gayle Townley, an experienced public sector executive and environmental coordinator for Western Farmers Electric Cooperative, had previously worked for the State Legislative Council. At ODM, she also helped write the state permanent program. In 1985, the legislature created the position of Director of the Oklahoma Department of Mines to "assume the duties and responsibilities of the Chief Mine Inspector. . . ." OKLA. STAT. tit. 45, § 3.1 (1986). The Director of ODM was to be chief executive officer, appointed by a newly created policy-determining Oklahoma Mining Commission. *Id.* at §§ 1a-1d. A constitutional amendment abolishing the antiquated Chief Mine Inspector post was approved by the electorate August 26, 1986. OKLA. CONST. art. VI, § 25.

50. 49 Fed. Reg. 14,674, 14,685 (1984) (codified in part at 30 C.F.R. § 936.17-.19 (1987)).

51. *Id.* at 14,686.

52. *Id.*

53. *Id.* at 14,687.

As a condition to regaining inspection and enforcement authority, OSM required ODM to submit a plan which addressed the problems of staffing, training, and supervising of inspection and enforcement personnel, and to make assurances that it would comply with the approved program. OSM also required ODM to submit a permitting and bonding plan and to file quarterly progress reports.<sup>54</sup>

To begin the joint administration of the SMRCA, termed "cohabitation,"<sup>55</sup> OSM established an office with seven federal mine inspectors to handle all inspection and enforcement actions.<sup>56</sup> Federal officials described the action as a congenial method of "assisting" Oklahoma with its compliance with the SMCRA. Leading Oklahoma politicians expressed regret that the takeover had occurred but did not call it unjustified.<sup>57</sup> The State of Oklahoma did file a legal challenge to OSM's action, but the challenge was not pursued and had no effect upon federal inspection and enforcement activities in the state.<sup>58</sup>

The strict commencement of OSM's inspection and enforcement program on April 30, 1984,<sup>59</sup> sent shock waves throughout the Oklahoma coal industry and resulted in violations at almost every mine site. Operators who had previously received little more than verbal warnings from state inspectors suddenly received citations.<sup>60</sup> Having felt the sting of vigorous, federal enforcement, the Oklahoma coal mine operators formed the Association of General Contractors (AGC) which was a grassroots lobbying organization. Believing that a strengthened state agency would be more understanding of local industry concerns, the AGC pressured the legislature to provide ODM with sufficient funds and

54. 30 C.F.R. § 936.19 (1986).

55. "Cohabitation" is a "new term in the political vocabulary," used in France's Fifth Republic to describe the accommodation of a President of one political party to an Assembly of another. Giniger, *Mitterrand May be Facing Some Checks and Balances*, N.Y. Times, Feb. 2, 1986, at E3, col. 3.

56. Shortly thereafter, the OSM staff was expanded to seventeen. *Two State Mine Operators Cited by Federal Inspectors*, Tulsa World, May 5, 1984, at A1, col. 4.

57. Gipson, *U.S. Seizes Control of State Coal Mining Law Enforcement*, Tulsa Tribune, Apr. 13, 1984, at D1, col. 1.

58. *Oklahoma v. Clark*, No. 84-1202 (W.D. Okla. filed May 11, 1984).

59. 49 Fed. Reg. 14,674 (1984) (codified in part at 30 C.F.R. § 936 (1987)).

60. During implementation of the federal inspection and enforcement programs in Oklahoma, OSM issued 640 notices of violation and 235 cessation orders in the state. Telephone interview with Jack Carson, OSM Tulsa Field Office, in Tulsa, Okla. (Sept. 29, 1987); *State of the Coal Industry in Oklahoma: Hearing on S. 144 Before the Subcomm. on Natural Resources Development and Production of the Senate Comm. on Energy and Natural Resources*, 99th Cong., 1st Sess. 99-144 (1985) (statement of Jed Christensen, Acting Director, Office of Surface Mining) [hereinafter *State Hearings*]. Federal inspectors issued more violations than their state counterparts in other Midwestern states. Lowe, *Regulatory Enforcement of the SMCRA, PL 95/187: A Comparison of State and Federal Compliance in Three Midwestern States*, 27 NAT. RESOURCES J. 201 (1987).

personnel to regain primacy.<sup>61</sup>

Governor Nigh, doubtlessly embarrassed by the federal takeover, encouraged ODM Director Townley to do whatever was necessary to end the cohabitation. Townley launched a drive to get more funds from the legislature, to provide for and hire a better educated, technically trained staff, and to reorganize the agency so that it could more effectively carry out OSM's requirements.<sup>62</sup> Despite declining state revenues and budget reductions, ODM received a twenty-nine percent increase in funding and a forty-three percent increase of staff.<sup>63</sup> Townley successfully upgraded the entire program's administration and submitted the OSM-required compliance plans for permitting, inspection, and enforcement to the federal government on schedule.<sup>64</sup>

#### a. National Leadership Changes

During the time that OSM scrutinized Oklahoma's program, the federal agency itself experienced changes. The 1980 presidential election of Ronald Reagan brought a major shift in the philosophy and leadership of OSM by introducing a comprehensive domestic strategy, called "federalism initiatives," designed to eliminate governmental restraint of free trade and to devolve power from federal to state jurisdictions.<sup>65</sup> The new Secretary of Interior, James Watt, transformed the Department of Interior and the OSM by appointing officials devoted to President Reagan's commitment to "curb the size and influence of the federal establishment." The restructuring allowed Watt to reshape, "without necessarily changing [the] laws,"<sup>66</sup> the federal coal mining program by encouraging

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61. According to an industry spokesman, factors contributing to the operators' preference for the return of primacy to the state included: (1) the increased number of notices of violation and cessation orders issued by federal inspectors; (2) the more vigorous collection of fines for outstanding violations by OSM; and (3) a feeling that ODM was more responsive to operators' concerns because of its closeness to the industry.

62. *State Hearings*, *supra* note 61, at 19-27 (Statement of Gayle Townley, Director, ODM).

63. Interview with Gayle Townley in Tulsa, Okla. (July 29, 1985). ODM's budget increased from \$1.5 million to \$2.1 million and staff increased from 33 to 57, 34 of whom worked with the surface coal program.

64. ODM, Oklahoma Permitting Plan (May 13, 1985); Inspection and Enforcement Plan (June 7, 1985) (available at the Office of Surface Mining Reclamation and Enforcement, Tulsa, Okla. and Washington, D.C.).

65. For a critical analysis of the Reagan administration's "rhetorical commitment to states' rights and devolution," see Mashaw & Rose-Ackerman, *supra* note 14, at 111-45. The authors concluded that a commitment to devolution may be unworkable when guided by beliefs in efficiency, democratic representation, and regulation. *Id.* For a general review of federalism during the Reagan administration, see *Assessing the New Federalism*, 16 PUBLIUS 1-197 (1986).

66. Schorr & Pasztor, *Reaganites Make Sure That the Bureaucracy Toes the Line on Policy*, Wall St. J., Feb. 10, 1982, at 1, col. 1. For a critical review of OSM reorganization that generated a high attrition rate among experienced professionals in technically demanding fields and created what

states to take the lead in implementing the SMCRA and in revising the federal regulations.<sup>67</sup> For example, he deleted the state window provision from the federal regulations and adopted new language which gave the states more flexibility. Under the old regulations, state laws and regulations were to be "no less stringent"<sup>68</sup> than federal regulations. However, the new wording, "no less effective,"<sup>69</sup> broadened the performance standard and gave OSM greater flexibility in comparing federal and state programs. By reducing the size and influence of the Department of Interior and the OSM, Watt gave the states more authority over their SMCRA implementation programs.

Secretary Watt also adopted a new enforcement style emphasizing cooperation and persuasion rather than confrontation and coercion. Unfortunately, before resigning in October 1983, he had so altered the ticket collection function of OSM that unpaid and ignored fines against violators of the SMCRA exceeded \$200 million.<sup>70</sup> Under Watt's successors at Interior, William P. Clark and Donald P. Hodel, Congress continued to criticize OSM's inability to carry out its responsibilities for assessing and collecting civil penalties and for implementing other enforcement provisions.<sup>71</sup>

#### b. *OSM Invades ODM*

On April 12, 1984, OSM moved to take over portions of the Oklahoma and Tennessee mining regulation programs. The initiation of actions against the two states was contrary to OSM's stated intention to "cut federal involvement to the bone by giving the states the ultimate responsibility to define and enforce the law."<sup>72</sup> Both the Oklahoma and

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Representative Patricia Schroeder called "total agency chaos and employee panic," see G. EADS & M. FIX, *RELIEF OR REFORM?* 158-60 (1984).

67. OSM's quickening of the pace of delegation of regulatory authority to the states during the Reagan administration resulted from the waiving or removal of conditions imposed on state programs by the Carter administration, the restatement of the state window rule, and the maturity of the program. Fix, *Transferring Regulatory Authority to the State*, in *THE REAGAN REGULATORY STRATEGY*, 153, 160-61 (G. Eads & M. Fix eds. 1984).

68. Menzel, *supra* note 17, at 412-16.

69. 30 C.F.R. § 730.5(a) (1981). According to an OSM spokesman, the new standard has not affected Oklahoma and has only marginally increased total approvals nationwide.

70. HOUSE COMM. ON GOVERNMENT OPERATIONS, OFFICE OF SURFACE MINING: BEYOND RECLAMATION?, H.R. REP. NO. 206, 99th Cong., 1st Sess., pt. 12, at 7 (1985); see also NAT'L WILDLIFE FED'N, *FAILED OVERSIGHT: A REPORT ON THE FAILURE OF THE OSM TO ENFORCE THE FEDERAL SMCRA* (1985).

71. Stanfield, *Mine Disaster*, 17 NAT'L J. 2342 (1985).

72. Mosher, *Regulatory Striptease—Watt Takes Aim at Surface Mining Regulations*, 13 NAT'L J. 971, 971 (1981). One can but speculate about the reasons for OSM's action and timing. OSM would have been particularly justified in taking over the Oklahoma operation at an earlier time

Tennessee programs had been floundering since the adoption of their permanent rules. OSM's annual reviews sharply attacked both states for completely failing to implement and enforce their programs as required by law.<sup>73</sup> Because the coal industry in neither Oklahoma nor Tennessee had political clout compared to other economic interest groups, political repercussions would be small compared to those which might be expected in major coal producing states. Because both states were of manageable size, partial takeovers of their programs could be accomplished by small contingents of OSM inspectors and support personnel without severely taxing the agency's resources.<sup>74</sup> Additionally, the programs in both states were under attack by citizen groups, environmentalists, and certain coal operators. The lack of regulatory sophistication and the malfeasance on the part of the state regulatory bodies embarrassed the OSM.

In Oklahoma, OSM sought cooperation and negotiation, giving ODM the opportunity to mend its ways. However, by not complying with OSM's requirements, the state agency placed itself in an untenable position. The agency needed to put the states and coal operators throughout the country on notice that OSM was serious about enforcing the SMCRA. Although Oklahoma served as an example and a warning, the task of policing Oklahoma's coal industry was more than OSM had bargained for. Coal mine operators contested virtually every inspection, challenged assessed penalties, and accused the agency of over-regulation and of doing a bad job of inspection and enforcement.<sup>75</sup>

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because the legislature rescinded the state's permanent program in early 1981. Watt, reacting to derogatory allegations from Congress and other critics, may have decided to blunt the charges that his policies were weakening the environmental safeguards in the law. OSM, decimated by cuts in budget and personnel, and by attacks from many quarters, may have felt that it needed a victory to demonstrate that the agency still had teeth. The agency's move may have been a "power grab" by turf-expanding bureaucrats, as some mine operators alleged. Reasons for OSM's choice of states are clearer considering that both states rank relatively low in surface mining production. *See id.*

73. Friedman, Jones, & Braverman, *supra* note 34, at 1988, Table 1, U.S. Production in Coal, 1981. Tennessee ranks 17th among the 26 coal states, and Oklahoma ranks 19th. Oklahoma produced 2,970 thousand short tons in 1986. *Id.*

74. Squillace, *Cooperative Federalism Under the Surface Mining Control and Reclamation Act: Is This Any Way to Run a Government?* 87 W. VA. L. REV. 687, 700-701 (1985). It is estimated that the takeover of the Kentucky program, which has over 7,000 mining operations, would require OSM to increase its staff by 300 to 400 persons. *Id.* at 702.

75. *See, e.g., State Hearings, supra* note 61, at 82-92, 93-96, 102-110, 170-71 (statements of Roger Dahlgren, K & R Co., and Robert P. Cooper, Farrell-Cooper Mining Co.). Tolchin, *Telling Local Officials the Administration Cares*, N.Y. Times, July 3, 1985, at A18, col. 3. According to Mitch Daniels, Deputy Assistant to the President and Director of the Office of Intergovernmental Affairs, "the President has always stood for" a return to greater state and local autonomy. For a preliminary critical assessment of the Reagan Regulatory Strategy in 1984, see G. EADS & M. FIX, *THE REAGAN REGULATORY STRATEGY* (1984); G. EADS & M. FIX, *RELIEF OR REFORM? REAGAN'S REGULATORY DILEMMA* (1984).

### 3. Oklahoma's Return to Primacy

Having taken over partial enforcement of the Oklahoma program, questions remained regarding how to judge improvement in the competency of the state program and when to return primacy to the state. To answer these questions, OSM developed a phased return-to-primacy schedule published at the time of the takeover, which relied heavily on subjective evaluations by OSM officials. Because the SMCRA set forth no requirements for evaluating Oklahoma's repentance or preparedness, OSM had full discretion to judge the return-to-primacy plan.

OSM's slow return of primacy to Oklahoma undermined the Reagan Administration's "fundamental confidence in local competence and local decision making."<sup>76</sup> By curtailing the federal government's policy of innovation and financial participation in domestic policy areas, Reagan's policies empowered and energized the states. David Broder noted that "initiative on education, social and most economic and environmental issues now rests in the state capitols" as a result of the Reagan revolution in domestic policy.<sup>77</sup> Why the administration drifted from its policy of cooperative federalism in the case of the SMCRA enforcement in Oklahoma is puzzling. Perhaps OSM's preoccupation with Congressional criticism contributed toward giving Oklahoma lower priority. The lack of political clout of the coal industry in the state plus the intransigence of the federal bureaucracy also may have contributed to OSM's prolonged discretionary tenure.

Rules published in the *Federal Register* required Oklahoma to submit to the Director of OSM detailed compliance plans in order to resume full authority for implementing inspection, enforcement, and permitting.<sup>78</sup> Although OSM scheduled and held a public hearing for comment, the Director ultimately determined the time to return state primacy to Oklahoma. Within seven months of the federal takeover, ODM submitted a plan with a petition to resume state inspection and environmental actions, but OSM demanded further revisions.

On July 29, 1985, ODM held a public hearing to facilitate returning inspection and enforcement power to Oklahoma. The witnesses agreed that primacy should be returned to the state.<sup>79</sup> In late October, however,

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76. Tolchin, *Telling Local Officials the Administration Cares*, N.Y. Times, July 3, 1985, at A18, col. 3.

77. Broder, *Revolutionary Trade Off*, Tulsa World, Aug. 11, 1985, at I8, col. 1.

78. 50 Fed. Reg. 49,376-87 (1985) (codified in part at 30 C.F.R. § 936 (1987)); see also 30 C.F.R. §§ 936.17, 936.19 (1987) (removed by 52 Fed. Reg. 36,924 (1987)).

79. See Memorandum No. OK-649 from ODM to OSM.

the Director of OSM found that although the state plan for resuming full inspection and enforcement authority seemed worthy of approval, there was “potential for confusion because of procedural changes and modifications to policy that have occurred since the initial submission of the plan.”<sup>80</sup> After ODM made the necessary clarifications, the OSM on, December 2, 1985, published a phased plan that would go into effect on January 1, 1986, for restoring state primacy over the coal mining industry.<sup>81</sup>

Without establishing a specific timetable for resuming inspection and enforcement authority, the OSM’s phased plan required “[Oklahoma to] achieve certain benchmarks in critical regulatory areas before resumption of full State authority.”<sup>82</sup> One such benchmark mandated that before inspection and enforcement authority for a particular permitted area could be returned to the state, a complete inspection would have to be conducted jointly by ODM and OSM. Carefully drafted regulations specifying the authority of the Secretary of the Interior, and the procedure for assuming control over all or part of a state program and terminating such an arrangement, would have provided greater stability, continuity, and predictability to implementation of the SMCRA.

Under an agreement between the OSM and the ODM, the state took over inspection and enforcement of all inactive mines. Later, OSM turned over the activities for the twenty-five active mines to Oklahoma “on a case-by-case basis as the state revised permits and bonds.”<sup>83</sup> The agreement provided that after ODM had resumed inspection and enforcement authority for all of the state’s surface mining, the Director would initiate “procedures to terminate the 30 CFR 733 action in Oklahoma.”<sup>84</sup> An OSM official estimated that ODM would need a year to regain authority over all operations in the state, followed by another year of close scrutiny by OSM to assure the federal government that ODM could indeed do the job as required.<sup>85</sup> On October 2, 1987, OSM issued its “final rule,” a determination by the Director of OSM that Oklahoma had sufficiently corrected its problems in implementing the state program.<sup>86</sup> As three-and-a-half years of OSM-ODM cohabitation

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80. 50 Fed. Reg. 49,383 (1985).

81. 50 Fed. Reg. 49,376, 49,387 (1985) (codified in part at 30 C.F.R. § 936).

82. 50 Fed. Reg. 49,376, 49,384 (1985).

83. 30 C.F.R. § 936.17(c) (1987) (removed by 52 Fed. Reg. 36,924 (1987)). ODM received a \$671,421 grant in 1986 and \$1.3 million of AML monies for five in state projects.

84. 30 C.F.R. § 936.18(a-f) (1987); 52 Fed. Reg. 36,923-24 (1987).

85. THE PITS, *supra* note 3, at 55.

86. By May 1987, OSM’s inspection and enforcement staff had only two inspectors, one an

came to an end, Oklahoma resumed full program authority.

The return of primacy to the state may have coincided with an improvement in the coal industry's fortunes. In January 1987, a new law required state public utilities to burn at least ten percent Oklahoma coal in their power-generating plants.<sup>87</sup> This legislation will increase coal sales by almost one million tons annually. Some operators have hailed the legislation as "the salvation of the coal industry in Oklahoma."<sup>88</sup>

### B. *Oklahoma's Benefits*

Although positive results accrued to all parties that went through the transformation process, Oklahomans may have benefitted the most from the federal regulation of the SMCRA in Oklahoma. First, the greatest change was in the ODM. Under Townley's leadership, ODM achieved the level of training, organization, sophistication, and expertise required by OSM to implement the SMCRA effectively.<sup>89</sup> Today, the state agency has a large staff and the financial resources to administer the state's permanent program as required by law.<sup>90</sup> To prove its bona fides, however, ODM must resume inspection and enforcement activities with vigor. Anything less will be viewed by coal mine operators as a return to the lax ways of interim program days. ODM must depoliticize and restore public confidence in the professionalism, fairness, and integrity of the agency.<sup>91</sup> The creation of the Oklahoma Mining Commission in 1986 was a major step in this effort.

Second, Oklahoma has benefitted from an attitude change by state coal mine operators, evidenced by a subtle change in the rhetoric of their

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oversight inspector for both Oklahoma and Arkansas, and another who worked at ODM on an Interagency Personnel Assignment. With reduced personnel, OSM planned to close its Muskogee office.

87. OKLA. STAT. tit. 45, § 939 (Supp. 1987).

88. Averill, *New Law Gives Coal Industry Shot in Arm*, Tulsa World, Oct. 4, 1987, at D1, col. 5; *Law Requiring Use of Oklahoma Coal Lauded*, Tulsa Tribune, Jan. 3, 1987, at B6, col. 1.

89. Interview with James Moncrief, Director, Tulsa Field Office, OSM, in Tulsa, Okla. (Oct. 1, 1987).

90. According to an OSM official, "the new roster of ODM inspectors is well-trained and educated and won't be intimidated by coal company engineers and scientists" because they had on-the-job training with OSM inspectors. Federal officials trained ODM staff in permitting and record keeping procedures. Nelson, *Federal Mine Takeover Ends*, Daily Oklahoman, Apr. 20, 1986, at B1, col. 2.

91. The Advisory Commission on Intergovernmental Relations (ACIR), an independent agency committed to examining issues bearing on the proper role of differing levels of government in the federal system, is representative of groups concerned about the delegation of federal authority to the states. See, e.g., ADVISORY COMM'N ON INGOVERNMENTAL RELATIONS, REGULATORY FEDERALISM, POLICY, PROCESS, IMPACT, AND REFORM (1984).

spokesmen. While maintaining a basic mistrust of government intrusions, the operators now speak of a willingness to comply with the regulations. They have recognized the benefits of working without the threat of arbitrary or politicized regulations. Furthermore, the operators' reconciliation with contemporary reclamation methods will help the entire coal industry overcome a bad name.<sup>92</sup>

Third, OSM has benefitted from "cohabitation" by learning to appreciate the difficulties encountered in implementing a federal program. OSM had the unpleasant task of smoothing out rough spots inherent with enforcing any new law. In the process, the agency accepted the need for patience, perserverence, and cooperation with the parties involved in surface mining. According to an AGC spokesman, OSM came to Oklahoma expecting immediate implementation and compliance with its policies and regulations, whatever the cost to the industry. Now, however, OSM operates in a more "business-like" manner with more concern for reclamation than with violations. The leadership of James Moncrief, Director of OSM's Tulsa Field Office, greatly contributed to the better relationship between the agency and the mine operators.

Fourth, the implementation and enforcement of the SMCRA gave federal inspectors an opportunity to test regulations and to appreciate the need for site-specific variances.<sup>93</sup> This experience may encourage OSM to be more tolerant of the use of state window provisions in the future. In overview, OSM educated the state, the industry, and the public about the wisdom of land reclamation. In the process, OSM and ODM developed closer working ties and learned to trust each other.<sup>94</sup> In the future, the two agencies should be able to settle differences without resorting to "733 remedies."

Finally, the general public now knows more about the problems of surface mining in Oklahoma.<sup>95</sup> Indeed, one measure of the success of the SMCRA may be the greater citizen participation in enforcing the law. In the past, people living in the coal mining areas failed to organize and

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92. Interview with R. L. Pommier, Manager of Reclamation, Bill's Coal Company, Inc., in Tulsa, Okla. (June 28, 1985).

93. According to Bennie Cox, Director of ODM, federal inspectors became more flexible in their Oklahoma inspection reports as they gained practical experience in the field and as the program matured. In addition, operators responded to notices and orders more quickly and permit requests improved markedly after the federal takeover. Telephone interview with Bennie Cox, Director of ODM, in Tulsa, Okla. (Oct. 13, 1987).

94. Interview with Bennie Cox, in Tulsa, Okla. (Oct. 13, 1987); interview with James Moncrief, in Tulsa, Okla. (Oct. 1, 1987).

95. Interview with Rick Jameson, Executive Director Oklahoma Wildlife Federation, in Tulsa, Okla. (June 20, 1985).

challenge the industry responsible for despoiling their environment.<sup>96</sup> Those who stood to lose a profit, on the other hand, quickly organized and used the political system to protect their interests. Since 1986, though, citizen environmental groups have been more outspoken in protecting the environment and individual property interests.<sup>97</sup> Even so, after a century of unregulated strip mining, Oklahomans still lack a thorough understanding of the deleterious effects that surface mining has on the environment. Much remains to be done to educate the citizenry about the problems associated with exploiting the mineral wealth lying beneath their feet.

#### IV. CONCLUSION

The end of the federal takeover of Oklahoma surface mining regulation came at a time when the "Reaganizing" of government shifted power from the federal government to the states. Furthermore, the Gramm-Rudman-Hollings Act has forced Congress to realize that the fiscal resources of the United States are finite. The effect of these two forces will be fewer employees in government regulatory agencies and less money. The beleaguered OSM will find increasing difficulty maintaining a coercive posture in its oversight of state regulatory actions. By default, state primacy will have a new meaning. The OSM must somehow maintain state agency support to achieve policy goals while still allowing the states to maximize decisional discretion. Federal regulations that maintain this diversity may prove more effective and enforceable in the long run. The success of adapting to the new roles will determine the future effectiveness of the SMCRA. A symbiotic relationship can be developed by building on the experience of the first decade.

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96. *Id.*

97. *See, e.g.,* Crawley, *Rogers County Mine Opposed*, Tulsa Tribune, Jan. 8, 1986, at D3, col. 1.