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MONTANA COAL: THE ALAMO OF INTERSTATE COMMERCE

DANIEL M. HALL*

Drastic changes in law dealing with the mineral assets of the Northern Plains have taken place, are being plotted, or will be forced by circumstances. The imperatives of a world-wide energy crisis[1] plus the gathering of various political blocs within this nation leave no other prospect.[2] New statutes on surface mining have been enacted in the past three years in six of twelve states where there are leading coal operator mines,[3] and at least ten bills have received serious consideration in Congress in the same period, ending in the current House-Senate compromise.[4]

Becalmed in the eye of this legal hurricane, a theoretically robust coal industry sits, ever more dubious about its role and its ability to play that role.[5] Trying to describe the political and legislative happenings which, even now, are setting the fate of the coal industry on the Northern Plains unfortunately is like discussing the hurricane while sailing in the midst of it.

I. THE APPROACH: AMERICAN LEGAL REALISM[6]

An attempt to deal "scientifically" with the nether-world behind this windstorm of law would probably arouse as angry a reaction as did the abortive efforts at University of Chicago Law School in the 1950's, when researchers attempted to record and scientifi-

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1. Wakefield, *"Supply-Demand Assessment of Major Energy Fuels . . ." The Energy Crisis and the Lawyer*, 3 ABA NAT'L INST. (Nat. Res. Sec. 1974); NATIONAL COAL ASSOCIATION, NATION MUST HEED COAL'S CAPITAL NEEDS 4 (Coal News No. 4232, 1974); St. Louis Post Dispatch, Sept. 29, 1974.

2. McKinsey and Hayes, *Regional Energy Development in Comparative Federal Systems*, MONTANA PUBLIC AFFAIRS REPORT (July 1974).

3. WYO. STAT. ANN. §§ 35-502.20—502.41 (Cum. Supp. 1974); MONT. REV. CODES ANN. §§ 50-1034 *et seq.* (Supp. 1974); OHIO REV. CODE ANN. §§ 1413.11, 1513.01-99 (Page 1964); ILL. REV. STAT. ch. 93 §§ 201-16 (Smith-Hurd Supp. 1974); OKLA. STAT. tit. 45, §§ 721-38 (Supp. 1973-1974); MO. ANN. STAT. §§ 444.760 to .786 (Vernon, Cum. Supp. 1974); KY. REV. STAT. ANN. §§ 350.005-990 (1972); COLO. REV. STAT. ANN. §§ 92-13-1 *et seq.* (1972).

4. S. REP. No. 93-402, 93d Cong., 1st Sess. 47-48 (1973); H.R. REP. No. 93-1072, 93d Cong. 2d Sess. 111-13 (1974); Draft Comm. Print S.425/HR 11500, Sept. 24, 1974 [hereinafter cited as Draft.]

5. Young, *"Economic and Legal Problems Facing Major Energy Industries . . ." The Energy Crisis and the Lawyer*, 3 ABA NAT'L INST. 45 (Nat'l Res. Sec. 1974); BUS. WK., Nov. 4, 1972, at 50; Energy Resources Report, Mar. 29, 1974.

6. L. FULLER, THE PROBLEMS OF JURISPRUDENCE (1949).

cally examine the deliberations of jurors.[7] There are some things which even modern man refuses to give over to inquistion by the plodding torture of recording, classification, and analysis practiced in the name of science. Politics falls in this category.

There is no tight legal authority here; the cases have not happened yet. There are no clear, authoritative statements of principle by the people now in this arena of American legal change; they do not want it. Out of the experience of one of the largest coal owners in the West, the author hopes to draw patterns, and put a new face on common experiences—the face of the Constitution of the United States. By backing off far enough, perhaps there will be. a new light upon a number of things.

This article follows an earlier essay for the special Institute on Western Coal Development, presented by the Rocky Mountain Mineral Law Foundation in Denver on March 1, 1973.[8] What was in March, 1973, a question of operational limitations and costs to the coal industry, resulting from free-wheeling legal experimentation amongst the coal states, is now an issue of constitutional proportions, affecting the financial health of the electric utilities of the country and, consequently, of its economic development in the future.[9]

The basic point to grasp is almost too obvious to state: this nation is going through a deep and significant change in public policy in at least two areas, both going to the roots of our production and financing systems. The first is in the use of the nation's resources in production, as a question of both allocation of assets and of effect on peoples' environment. The second is in the financing and marketing of the products of this system, as a question of effect on the consumers of those products. Policy changes of this magnitude, such as the Federal Water Pollution Control Amendments of 1972[10] and forthcoming legislation of surface mining of coal, will require all the deliberation and management which the nation can muster.[11] Mistakes made in the politics leading to such legislation will lead to heavy loads of litigation, which can well exceed the capacity of courts and counsel, and thus frustrate the intended policy.[12]

Let there be no doubt about the philosophy reflected here. This article is an attempt to deal with the legalistic changes controlling

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7. *Preface to* H. KALVEN & H. ZEISEL, THE AMERICAN JURY AT xiv-xv (1966).

8. Hall, *Problems of Compartments in Politics and Thinking: The Political Games They Support and the Economic Issues They Disguise for the Coal Industry,* in WESTERN COAL DEVELOPMENT INSTITUTES MANUAL (Rky. Mt. Min. L. Inst. 1973).

9. Investment Counsel, Problems Abound for Electric Power Industry, Aug. 23, 1973 (Staff Letter).

10. 33 U.S.C. §§ 1251 *et seq.* (1970).

11. Drucker, *Saving the Crusade,* 244 Harper's Magazine, Jan. 1972 at 66-71.

12. BUREAU OF NAT'L AFFAIRS, 5 ENVIRONMENTAL REPORTER, PERMIT PROGRAM UNDER CLEAN WATER ACT, CHALLENGED IN NUMEROUS LEGAL ACTIONS 652 (1974).

of the development of the Northern Plains in terms of the political realities stressed by Professor Herbert Wechsler.[13] Wechsler pointed out in his little-quoted, but notable article, that within the American constitutional system it is often more important to know who has the right to make the law, than to follow what the law may say.[14] Structuring of the electorate through party politics and election law is paramount. Only in those terms can we follow the welter of congressional moves and countermoves which have burst upon the nation in the year past—since the author first tried to describe the western coal problem in terms of its constitutional overtones.[15] The magnitude of the changes will rival the New Deal of the 1930's.[16]

It now seems certain that policies which have controlled the economic development of this nation since the time of Theodore Roosevelt will not be reversed.[17] A literal coup d'etat by a minority group has occurred. New tribes now command the plains.[18] They are not unattractive, but their intent is clear.[19] It is to control a significant item in interstate commerce. And walled up in the midst, 'leaguered' round like the Tennessee volunteers in the Alamo, sit the pioneering coal operators of Montana.[20] Harrassed, hammered and dubious, they are forced to either abandon their property at the dictate of the state, or on the other hand, to mine it for the benefit of the state's coffers, even being told where to mine the coal.[21] The coal industry is proving a poor advocate of the constitutional issues involved. Perhaps this article can signal, if not help, at least to mark the battle. An ultimate recourse to federal power to preserve the economic life of the nation against the new tribes can also begin to be predicted, although dimly.

II. THE PROBLEM: ONE YEAR AGO

In handling the kind of problems being discussed, it is unfortunately the American way to get lost, to lose sight of our big policies in the scuffle of politics. We equip ourselves with a most peculiar instrument for making such changes: the United States Constitution. Under it exists the most effectively compartmentalized gov-

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13. Wechsler, *Political Safeguards of Federalism*, 54 COLUM. L. REV. 543 (1954).
14. *Id.* at 558.
15. Hall, *supra* note 8, at 8-1.
16. *Id.* at 8-2 to 8-4.
17. King, *Letter*: *"Strip Mine Bill Will Allow Profiteering,"* The Denver Post, Sept. 29, 1972.
18. Weininger, *Old West States Want a Voice*, The Billings Gazette, Nov. 29, 1972.
19. *Mont. Dept. of Interior, Hearings, Preliminary Position Statement, Coal Development Under EMARS Program*, Aug. 14, 1974. [hereinafter EMARS].
20. Rosenfeld, *Coal*: *Golden Goose or Sitting Duck*, The Independent Record (Helena, Montana), March 14, 1974; Geissler, *Coal Taxes are Argued*, The Billings Gazette, July 20, 1974; The Billings Gazette, February 6, 1973, *quoting* Gov. Thomas Jduge.
21. MONT. REV. CODES ANN. §§ 50-1034 *et seq.*; 50-1042, 50-1401 *et seq.*, 84-1302 *et seq.*, (Supp. 1974); The Montana Standard (Butte), March 19, 1974 (reporting state interest in promoting coal mining under Coal Conservation Act of 1973).

ernmental system in the world. A nation divided into 50 separate states, which, even today, are in may respects as sovereign as the separate nations of the world. Above this system of states is the separate federal domain of navigable water, interstate commerce, and federal lands in the West.[22]

In the operation of this governmental system, in most matters, reform or policy changes are permitted to bounce around at the state level, with a very poor balancing of local and interstate issues. When the proponents of change harry together enough votes to seriously disrupt business or governmental functions, Congress has usually asserted the overriding interest in national unity and interstate commerce with a massive legislative pre-emption of control of an industry or of an aspect of commerce, establishing a massive new federal system of controls and bureaucracy.[23]

One year ago, it appeared that the coal industry stood at the first step of the process of legislative change, the so-called "experimentation by the states."[24] Even at that stage, the coal industry on the Northern Plains was suffering rapid degeneration as a result of costs and prohibitions engendered by what may rather glibly be called "The Kentucky Syndrome." The Syndrome is the flow from East to West, initially within Kentucky, then within the nation, of irrelevant ideas and regulations of the coal industry, a flow accompanied by a frequent failure of the coal industry to even appreciate it when its product, bad regulation, appears.[25]

A recent example of this Syndrome was Kentucky's promulgation of its first mine drainage regulation[26] under its 1965 strip mine statute.[27] Two key requirements were that *all* surface drainage be diverted, and that all drainways be conduited across the working area.[28] This language was apparently established as a handy and useful set of words for Appalachian bench mining in which as little as one cut may be made back into a slope, starting from the outcrop of the seam in the hillside above a valley or stream. The working area will resemble a roadway under construction, and can be handled in similar fashion with conduits and the like. Peabody Coal Company, which mines in western Kentucky by area methods, quitely blew its collective mind. Conduits in bench mining may be no greater problem that culverts in a road. The same words in area

22. 16 Am. Jur. 2d, *Constitutional Law* §§ 198-209.
23. *See generally* Wechsler, *supra* note 13.
24. *E.g.*, West Coast Hotel v. Parrish, 300 U.S. 379 (1937) (upholding state minimum wage law and overruling Adkins v. Childrens Hospital, 261 U.S. 525 (1923) on the issue of due process power). *See* Huron Portland Cement v. Detroit, 362 U.S. 440 (1960).
25. Hall, *supra* note 8, at 8-4 to 8-7.
26. Kentucky Dept. of Nat. Res. and Environ. Protection, Strip Mine Regulation, Regs. pt. IB, SMR-11 (1971). [hereinafter Strip Mine].
27. KY. REV. STAT. ANN. § 350 *et seq.* (1972).
28. *Supra*, note 26, at SMR-11(2)(f).

mining require a Roman aquaduct across a huge pit 100 feet wide at the bottom and up to 300 feet wide at the top! This pit is traversed by a towering machine sometimes 300 feet high, which would rip out every aquaduct constructed. The result is an absolute impossibility. A similar impossibility exists for diversion ditches. In Appalacian bench mining, the work extends linearly across a slope, the diversion ditch parallels the working mine and is extended with mining. Area mining, in which the work progresses back and forth into whatever slope there is in the terrain, would progressively rip out any diversion ditch built above the highwall. The result is just short of an impossibility, depending upon pit length.

The outcome was that a knowledgeable Kentucky official looked at a written statement of objections, and said, "Okay, I see your problem. We've written a set of regulations for eastern Kentucky and you mine in western Kentucky. Well, we can do something about that!" And they did, by simply allowing some room in the regulation for variations for western Kentucky terrain.[29]

After leaving West Virginia, Kentucky and Pennsylvania, and the area of the Appalacian Regional Council, the supply of knowledgeable officials drops drastically. The coal industry protection becomes its own ability to recognize the Kentucky Syndrome, and to speak out against it—if legislators and regulators will listen.

The worst case to date of the Kentucky Syndrome is in Montana which actually reproduced the Kentucky statute, or at least, its most stringent features, with none of its workable alternatives, or even any attention to its very significant history of administration.[30] The inclination of both state and industry in Montana, prior to enactment of its Senate Bill 94 in 1973, was to take Kentucky verbiage as a familiar tool. This totally ignored the pattern of enforcement followed in Kentucky. Because Kentucky has a long history of coal mining, there were few new problems when it massively updated its reclamation statute in 1965. The legislative standard for forbidding mining was "experience in the Commonwealth. . . !"[31] Although Montana's 1971 statute relied upon such a background, and several existing mines gave a reasonable exemplification of geologic conditions of Montana mining, the state legislature chose to downplay the Montana experience. It enacted a statute that has been administered to require extensive field exploration for toxic materials, and prevention of nonexistent acid drainage, and similar legislatively mandated problems.[32]

29 *Id.*
30. Hall, *supra* note 8, at 8-7 to 8-9; Memorandum to Coal Operators from Kentucky Division of Reclamation, Sept. 11, 1972.
31. KY. REV. STAT. ANN. § 350.085(2) (1972).
32. MONT. REV. CODES ANN. §§ 50-1040(2)(j), -1044(r) (Supp. 1974).

Such an outcome is not constitutionally forbidden to Montana, until the financial burdens reach the level of "burden upon interstate commerce."[33]

The significance of the recent Montana legislative history now lies in the *reason* for the shift in law within Montana, and the political consequences that have burst forth from Montana upon the congressional scene. Such a shift in state policy is not confined to Montana. Similar shifts have occurred in Ohio, and other states. The same shift in political philosophy is usually accompanied, not surprisingly, by a new spirit in enforcement, fostered in a spirit of evangelism and vengance which goes with the organization of new electorates within any state. An example of this spirit was the initial use by the reclamation chief in Ohio of direct filing of criminal complaints in local courts, without the use of administrative compliance procedures.[34] This approach was coupled with a very technical interpretation of extensive statutory language. For instance, sloughing and sliding of spoils has been interpreted as a violation of a requirement to prevent landslides even though the shift was caused primarily by weather.[35]

Such an underlying shift in attitude, however, is the political reality underlying the constitutional "experimentation" by the states. It is the moving spirit which the courts have allowed relatively free rein until it runs head-on into a clear congressional mandate[36] or until it passes into that vague area of "burden on interstate commerce."[37]

These problems of language and enforcement in passing from one state jurisdiction to another make the Kentucky Syndrome a real problem for the coal industry. Inappropriate and unnecessary statutory language can be the basis for revocation of permits, with catastrophic losses in capital and income to a modern mining operation.[38]

Although not a matter of the direct subject here, the fact that the statutory shift from state to state is usually accompanied by a passionate shift in public attitudes, does give rise to other important constitutional legal consequences. A criminal penalty based upon a regulation designed as an indirect means of surpressing a certain

33. *E.g.*, Pennsylvania R. Co. v. Driscoll, 330 Pa. 97, Atl. Att. 130 (1938) (State laws cannot unreasonably affect revenues which go to build up interstate commerce).
34. *See* Ohio v. Hardy Coal Co. (Tuscarawas County Ct., N. Dist. Dover Ohio, Oct. 25, 1972).
35. Ohio v. Peabody Coal Co. (Muskingum County Ct., E. Dist. Coshocton, Ohio, Nov.. 8, 1973); OHIO REV. CODE ANN. § 1513.16(B)(5) (Page 1964).
36. Burbank v. Lockheed Air Terminal, 318 F. Supp. 914, *aff'd* 457 F.2d 667, *aff'd* 411 U.S. 624 (1973) (City prohibition on jet flights at night pre-empted by F.A.A. control of flights); Allegany Airlines v. Cedarhurst, 132 F. Supp. 871, *aff'd* 238 F.2d 812 (2d Cir. 1956).
37. *E.g.*, Soap & Detergents Ass'n of Chicago, 357 F. Supp. 44 (N.D. Ill. 1973).
38. Young, *supra* note 5, at 56.

activitiy restores the right under the Fourth Amendment to resist searches under inspection and recordkeeping provisions common in most mine-regulation statutes today, at least as to certain private locations.[39] The popular pattern of imposing criminal penalities upon not only the corporation, but upon its employees, should restore their rights to resist making statements and giving data under the Fifth Amendment, and to exclude evidence at trial such as water samples obtained from mine superintendents without the warnings required under the *Miranda* Decision.[40] A corporation is well advised to consider the rights of such individuals before giving up data, absent a court decree.

The resistant and fairly combative posture which must be maintained in such an atmosphere of potential criminal penalties is not attractive to a large coal operator, particularly those which are now parts of corporate conglomerates, which in turn have carefully nurtured an internal attitude of public service, and an external image of public benefit.[41] However, when governmental action hits one defendant too hard, his constitutional rights can be invoked.[42] That assertion of these rights will be needed more and more is made painfully clear by the pattern starting with Section 309(c) of the Federal Water Pollution Control Amendments of 1972.[43] That provision exacts six months in jail for even a negligent violation of either a state or federal effluent standard or permit condition. Section 309(c) (3) makes corporate officers vicariously liable, and a similar position will prevail under the coal surface mining bill now before Congress.[44]

In March of 1973, four factors could be seen influencing the form of the Kentucky Syndrome in state legislation as it passed from state to state across the western coal fields:

1. There are geographic differences, and the economic differences between the eastern coal fields and populations, and the western coal fields and populations. For example, in Kentucky there are 125,000 farm holdings averaging 127 acres, worth $253 per acre, while in Montana there are only 25,000 holdings but averaging 2,000 acres of an average value of $60. Significantly, from the 1972 statistics fo the U. S. Department of Agriculture, it was not too difficult to discover that the investment value of land, power equipment, seed, fertilizer, and financing interest costs of each ranch in the

39. Air Pollution Variance Bd. v. Western Alfalfa Corp., 94 S. Ct. 228 (1974) (no showing of invasion of privacy in air pollution inspectors).

40. Trucker v. Johnson, 352 F. Supp. 266 (E.D. Mich. 1972); *citing* Miranda v. Arizona, 384 U.S. 436 (1966).

41. J. GALBRAITH, THE NEW INDUSTRIAL STATE 139-49, 176-88 (1968).

42. *E.g.*, Russell-Newman Mfg. v. NLRB, 370 F.2d 980 (1966).

43. 33 U.S.C. § 1313(c) (Supp. II, 1972).

44. Draft, *supra* note 4, at § 518(g).

western Montana area in 1971 was $19,200, compared to only $6,200 in Appalachia![45] Even more significantly, in discussing a readily apparent drop in cash investment shown in the statistical area including Kentucky, the Departmental official stated that it probably reflected a very high rate of abandonment![46]

2. A basically passive attitude toward local government exists in eastern coal areas, at least when compared to the social attitudes in the Northern Plains.

3. The different political attitudes usually go with such economic and social differences.[47] In view of the discussion below as to the shifting electoral makeup in even the western states, further political historical comparison of the two areas is justified. The point which was made in March, 1973, is still valid: the coal industry, on observing the apparent economic and political differences, could have predicted a strong reaction to its appearance upon the northern plains.[48] It should not be assumed, however, that this reaction is all negative. Striking differences appear in the public philosophy of Wyoming and Montana, for example.[49] The choice of Montana as a discussion-base here is only partly based upon its negative public reaction. As will be apparent, Montana's spectacular legislative reaction definitely rests upon a split between economic advantage, and a true "ecological concern." This ecological concern is not new, and goes beyond economics to include social and personal aspects of life.[50]

4. Added to these differences, there are real technical problems of reclaiming surface mining disturbances between the two areas. It would appear valid to state that reestablishment of vegetative cover is likely to take more time than in the western Kentucky coal field,[51] where small grains can be grown directly on spoil immediately after mining, with respectable yields. The problem of evaporation and lower rainfall probably will make impoundments

45. ECONOMIC RESEARCH SERVICE, U.S. DEPARTMENT OF AGRICULTURE, CHANGES IN FARM PRODUCTIVITY AND EFFICIENCY, Supp. I (Statistical Bull. No. 233, 1973).

46. *Id.*

47. Our analysis to this point was a bit obsolete when it was made, stressing the traditional pattern of courthouse politics and public attitudes in the southeastern United States with the much more open and active populist control of local and state politics in the western States. To make this comparison, I drew heavily upon personal experience in local politics in the State of Washington.

48. McDowell, *The Shootout Over Western Coal*, The Wall Street Journal, June 31, 1974; Curran, *Resource Council Amplifies Ranchers Voices*, The Missoulian, November 16, 1972; The Billings Gazette, November 14, 1972.

49. Freeman, *Montana, Wyoming Governors Disagree on Energy Issues*, The Independent Record (Helena, Montana), Sept. 6, 1974; Schleyer, *The Ashes of Power: A Question of Where*. The Billings Gazette, Feb. 21, 1974; EMARS, *supra* note 19; Casper Star Tribune, June 16, 1974.

50. K. TOOLE, MONTANA, AN UNCOMMON LAND 243 (1959).

51. STUDY COMM., NAT'L ACADEMIES OF SCIENCE AND OF ENGINEERING, REHABILITATION POTENTIAL OF WESTERN COAL LANDS (1974).

at least longer to accomplish.[52] Much fear of water problems beyond this is, in fact, hard to justify.[53]

Use of these four factors a year and a half ago stopped short of what might have been apparent then, and certainly is apparent now: Who wants what out of the coal industry in the Northern Plains?

III. THE PROBLEM TODAY: THE MONTANA VIEW

The thesis in this continuing discussion has been that the peculiar American system of compartmentalized government allows legislation to develop on many fronts, and on local, state and federal levels. And that for any national industry, this compartmentalization can mask for considerable time the underlying interests giving political impetus to legislation. For the Kentucky Syndrome, laterally shifting statutory language into inappropriate situations, is probably an early and clear sign that the old statute is fronting for a new interest.

Therefore, discovery of "who" is acting is important. Any shift in the structure of the electorate is highly likely to follow with a shift in political objectives.[54] The urban pressure to change the basically rural pattern of apportionment of voters in most of our states has been evident in United States Supreme Court decisions in the last 10 years. It should have had national business raising all of its feelers for subsequent change.[55]

Using Montana as an example[56] there has been a shift in voting weight to the comparatively urban areas.[57] This shift in voter structure has given voice to a significant new population in some of the plains and foothills, where young professional and academic persons have eschewed the pressures of eastern metropolitan centers specifically for the uncrowded and unindustrialized regions of rangelands and old mining camps.[58]

A circumspect statement of local relationships between the electorate and the mining industry has been made by Lauren S. McKinsey and Louis D. Hayes in the July, 1972, Montana Public Affairs Report.[59] They clearly identify the present political objective of

52. *Id.* at 11.
53. Letter from S. L. Groff to Joint Conference Committee, Aug. 19, 1974.
54. Wechsler, *supra* note 13; McKinsey and Hayes, *supra* note 2, at 3,5.
55. *E.g.*, Kelly v. Bumpers, 340 F. Supp. 568 (D. Ark. 1972), *aff'd* 413 U.S. 901 (1972) (Every member of bicameral legislature should as practicable, represent the same number of people).
56. Which will also apply to some extent at least in Colorado, and to lesser extent in Wyoming, North Dakota, Arizona, and New Mexico.
57. K. TOOLE, *supra* note 50, at 253; The Billings Gazette, Mar. 19, 1973 (Young legisators show anti-business attitude. Gubernatorial candidate loses support because of his support of sales tax).
58. McKinsey and Hayes, *supra* note 2, at 3.
59. *Id.*

the Montana state government: the absolute power to state the conditions under which coal will be mined in the Powder River Basin within Montana, including the right to order mining not yet planned by its owner, and the right to direct where coal can be mined.[60] A more intensive attempt to control interstate commerce in an important commodity could not be posed. The Bureau of Government Research also identified four groups or interests influencing this development in differing and conflicting ways. The Bureau blatantly ignores the supreme legal interest which should be viewed: the Interstate Commerce Clause of the Constitution of the United States.[61]

The thesis that the Bureau of Government Research supports is that "the response of the energy producing areas to the increasing energy demands of the nation as a whole may produce conflicts which cannot be handled by the existing federal structures."[62] This, of course, is true if you ignore Article II of the United States Constitution, and the familiar powers in its section 8, clause 3: "The Congress shall have the power. . . to regulate commerce with foreign nations, and among the several states, and with the Indian tribes. . . ."

In fact, the Report goes on to suggest:

> The possibility may exist for development of an international energy region. If Montanans and Albertans perceive themselves to be exploited to meet the energy demands of industrial population centers of the two nations, they may come to identify with one another. Shared interests may have little effect on respective federal patterns, but state-provincial contacts are likely to be more frequent. . . . [T]he institutional matrix within which energy policy is made is extraordinarily complex. Policy affecting Montana and Alberta is developed on six levels. . . .[63]

The description of the six levels ignores judicial fences around interstate commerce.

> [T]he operation of this six-layered matrix will not only determine the character of energy policy affecting Montana and Alberta but will affect the very nature of their respective federal systems . . .[64]

It is submitted that this portion of the Report is over-blown analysis, especially since the Great Equalizer of Matrices—Congress —has been ignored. This truncated analysis may, in fact, be a true reflection of the facts for the purposes of some interest. For it is the equivocal stance of Congress, its failure in perception

60. *Id.* at 5
61. *Id.* at 3.
62. *Id.* at 1.
63. *Id.* at 2-3.
64. *Id.* at 2.

of certain dangers not limited to Montana alone, nor to the economic system alone, but to our institutions of government and the federal system which we must consider below.[65]

However, as an exercise in identifying the conflicting interests behind the current legislative furor over surface-mining of coal in the Northern Plains, the Report[66] sets up some useful categories:

1. Resource Isolation.

> In the United States, some energy-producing regions take the position that their needs should be met first when energy supplies run short. The oil-producing states on the Gulf of Mexico took this position during the height of the energy shortage last winter. . . . A growing attitude of resource isolation reflects increasing Canadian awareness . . . that Canada's energy reserves are incapable of supporting . . . the long term energy requirements of the United States.

2. Environmenal Protection.

> [A]n environmental theme is difficult to develop . . . when a producer region is also a heavy consumer of its own resources or has come to depend on the revenue derived from their development. Where demand exceeds supply, as for the United States as a whole, the basic need for energy may preclude the possibility of effective environmental protection.

The report continues to show three factors leading to Montana's environmental concern: past history of mining, absence of an energy-using industry, and lack of early dependence of tax on resources.

3. Economic advantage. This factor, it is stated, causes an electorate to accept environmental tradeoffs when revenues from sale of resources are sufficiently high.

4. Cooperative. The Report is extremly evasive in the clear identity of this centralized approach to policy.

> According to this approach, the interest of the state, province or region are (is) not primary considerations in determining energy policy. Regional welfare is equated with national welfare . . . . This approach is usually advocated in areas which have had little experience with the effects of a large scale resource extraction industry.

Of course, the Report states these policy groupings toward its own end:

> [T]he possibility that Canada and the United States may now be approaching a situation in which latent regionalism will reassert itself merits examination. . . .

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65. Langley, *Montana's Coal a U.S. Asset*, The Billings Gazette, July 25, 1974 (Report of Statement by D. E. Faver, FEA Regional Administrator at Helena).

66. McKinsey & Hayes, *supra* note 2, at 2.

67. *Id.* at 7.

> [I]f Montanans and Albertans concede that efforts to preserve their autonomy are futile, the federal structure may atrophy further and the system survive in form only. . . .[67]

In fact, using the resources of the American constitutional system at its command, Montana has advanced the cause of autonomy to an extent that raises a question not of survival of the states, but of damage to the national interest over which Congress was given jurisdiction under article II, section 8, of the Constitution.

IV. THE PROBLEM TODAY: THE MONTANA SIEGE.

In conjunction with a rather thorough attempt to subordinate the interstate commerce in Montana coal to its local interests, which at least in part are legitimate, the Montana congressional delegation has mounted an attack upon the national policy of Congress in preserving the coal resources for the use of the nation and interstate commerce.[68]

This two-pronged attack in both state and federal legislative levels would have probably succeeded already, except that a coalition of ranching and environmental interests in Montana[69] has in effect parted company behind two different approaches to changing the congressional policy as to the federally owned coal reserves of the Northern Plains.[70] As pointed out by the Government Research Bureau, the success of the state in imposing local will upon the interstate commerce in coal has resulted from a coalition of two groups, the ranchers and the recent immigrants to the Big Sky.[71]

An additional useful factor in a federal system for imposing local policy over a common policy such as interstate commerce, is the use of a state's congressional delegation.[72] There is no doubt that the active sponsorship of both Montana Senators and Representatives has been behind the two pieces of legislation affecting the coal industry in the Northern Plains: Senate Bill 425 by Sen. Henry Jackson (D-Washington) and House Resolution 11500 by Rep. Morris Udall (D-Arizona) and others. At this writing, these two bills are in the process of merger before a joint conference committee.[73]

The key provisions to be considered in a quasi-political article

68. *Id.* at 2, 6; S. REP. No., 93-402, 93d Cong., 1st Sess. 47-48 (1973); H.R. REP. No. 93-1072, 93d Cong., 2d Sess. 111-13 (1974); Draft, *supra* note 4; *see* views of Mr. Melcher, 120 CONG. REC. 6757-58 (daily ed. July 18, 1974); Dingell Amendment, 120 CONG. REC. 6829-30 (daily ed. July 22, 1974); Mansfield Amendment S.425, 119 CONG. REC. 18769-78 (daily ed. Oct. 8, 1973).

69. McKinsey & Hayes, *supra* note 2, at 3.

70. The Billings Gazette, Dec. 17, 1973. *See* Draft, *supra* note 4, at § 709.

71. McKinsey & Hayes, *supra* note 2, at 3.

72. S. REP. No. 93-402, 93d Cong., 1st Sess., 47-48 (1973); H.R. REP. No. 93-1072, 93d Cong., 2d Sess. 111-13 (1974); Draft, *supra* note 4.

73. *Id.*

such as this are the so-called Mansfield Amendment to S.425 and the so-called Melcher Amendment to HR 11500. The first entered the action from the Senate floor October 8, 1973.[74] The second entered action during House Interior Committee amendments, in the committee bill reported out July 25, 1974.[75]

The floor amendment by Mike Mansfield (D-Montana) clearly reflects the influence of the new electorate in Montana and other Western states. In effect, it prohibits mining of about 46 per cent of all federally-owned coal in the West, or some 37 billion tons[76] where the mineral interest was reserved during enactment of the Coal Leasing Act of 1909 and 1910.[77] This coal was reserved for the express purpose of allowing homesteading of the surface to continue, but clearly subject to the right of the federal government to develop the mineral by lease for the benefit of the entire nation.[78]

The Mansfield Amendment not only reverses the legal priority of interests, but goes completely in favor of the preservation of the economic and social ecosystem now built around cattle grazing and irrigated farming.[79] The test of the extremity of the Amendment proposed by Senator Mansfield is that it is opposed by significant organizations of ranchers in Montana and Wyoming.[80]

On the other hand, a different attack upon federal mineral policy was engineered by Rep. John Melcher (D-Montana) during committee hearings upon HR 11500. In an exercise of surface owner's rights the bill came to the floor with a requirement that any severed coal interest in coal, private, homestead or grazing lease or other federal permit, required written consent of the surface holder before surface mining can commence.[81] The effect is to hand a dollar value in the coal to the surface owner, in clear effect balkanizing an important item of interstate commerce back to a numerous and widespread minority.

It is not surprising that significant local sentiment in Montana has swung behind the Melcher approach.[82] As the University Bureau noted:

> [I]n effect, it is a coalition of groups and individuals both from within and outside the state of Montana that emphasizes

74. McKinsey & Hayes, *supra* note 2, at 2,6. *See* 120 CONG. REC. H. 6757-58 (daily ed. July 18, 1974); Mansfield Amendment, S. 425, 119 CONG. REC. S. 18769-18778 (daily ed. Oct. 8, 1973).

75. 120 CONG. REC. 7154-55 (daily ed. July 25, 1974).

76. NAT'L COAL ASSOC., CONFEREES TO CONSIDER MANSFIELD MODIFICATION 1 (Coal News No. 4231 Sept. 20, 1974).

77. 30 U.S.C. §§ 81, 83-85 (1970). *See* 119 CONG. REC. 18772 (daily ed. Oct. 8, 1973) (Views of Sen. McClure).

78. *Id.; see also* 45 CONG. REC. 6041 (1910).

79. Langley, *supra* note 65.

80. 119 CONG. REC. 18774 (daily ed. Oct. 8, 1973).

81. S. REP. No. 93-402, 93d Cong., 1st Sess. 47-48 (1973); H.R. REP. No. 93-1072, 93d Cong., 2d Sess. 111-13 (1974); Draft, *supra* note 4.

82. The Billings Gazette, *supra* note 62. *See* Draft, *supra* note 4, at § 709.

> environmental protection. However, this coalition may be incapable of resisting the force of economic incentives within the state. The balance will shift if the industrialization associated with coal development promotes a different kind of immigration into the state.[83]

The sentiment behind the Melcher approach may not even await such a drastic shift, which is probably overrated, anyway, in view of the mechanization involved in modern coal mining and construction.

The underlying economic factor has already asserted itself. The 1973 budget of the state was clearly balanced by imposition of the highest severance tax in the nation.[84] Only the local Sierra Club complained. Further, a protective Coal Production Act was passed concurrently with the Strip Mine Act of 1973,[85] but with much less fanfare.[86] It gives the State Land Commissioner the power to assure mining of all economically mineable coal. This forces the largest utility in the state to mine a lower seam in its current operation.[87] It also, of course, bolsters the state budget.

This is as far as the author will go. No predictions are offered on the outcome in Montana. That must await the extremely complex problems thrust upon a new state bureaucracy under the sometimes conflicting and always overlapping requirements of its Strip Mine Law of 1973,[88] the Coal Production Act of 1973,[89] and its Mine Siting Act of 1974.[90] And it awaits inevitably the outcome of some as yet unframed litigation. The outcome in Congress will probably have occurred by publication. The results upon interstate commerce in coal will then be a mad period of new-born federal enforcement, state legislation, state rule-making and administration of permits.[91]

Montana is a good, well-rounded example of the problems of articulating conflicting interests under the compartmentalized system of the United States Constitution. Because of the clear play of conflicting interests in Montana, and the vigor and enthusiasm with which local interests were asserted over a major item of interstate commerce, it becomes a good vehicle for illustrating for lawyers the primeval genesis of another possible landmark constitutional

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83. McKinsey & Hayes, *supra* note 2, at 3.

84. Holmes, *Three Key Pieces Bring State Budget in Balance*, Great Falls Tribune, Mar. 21, 1973. (Reports imposition of severance tax on coal for $9.3 million in revenue for biennium).

85. MONT. REV. CODES ANN. § 50-103 *et seq.*, 50-1042, 50-1401 *et seq.*, 84-1302 *et seq.* (Supp. 1974) ; The Montana Standard, *supra*, note 21.

86. The Montana Standard, *supra* note 21.

87. *Id.*

88. MONT. REV. CODES ANN. §§ 50-103 *et seq.*, 50-1401 *et seq.*, 84-1302 *et seq.* (Supp. 1974).

89. *Id.*

90. *Id.*

91. Draft, *supra* note 4, at §§ 502 (Interim and State programs), 506 (permits), 513 (public hearings), 514 (Decisions and Appeals), 520 (citizen suits), 523 (judicial review).

confrontation for the courts. For, although neglected by Montana University political scientists, the Constitutional sanction being hazarded is clear. A state must observe more than due process in legislation, it must steer clear of improper limitation on federal interests.[92]

Assuming validity of much of the substance of work required at the coal mine operator's cost under its reclamation statute,[93] Montana and other state laws must merely stay clear of imposing regulations having no reasonable relation to the end of land restoration[94] imposition of assessments going beyond legitimate supervision.[95] But beyond that, there is a clear Constitutional mandate to protect a national interest in the coal.[96] The doctrine of pre-emption is alive, in proper areas.[97] However, whether Congress leaves much of it alive as to the coal on the Northern Plains is open to question under the concepts of "dual federation" being fostered in current congressional legislation on environmental subjects.[98]

This is perhaps the most confusing factor in observing the underlying Constitutional conflicts-of-interests, or in predicting any outcome on the mineral assets of the Northern Plains. All of these acts give considerable lip service to states' rights, and at least allow states to share in enforcement activities by way of implementation plans, National Pollutional Discharge Elimination System permits, and the like. A vague duplicity, at least our direct enforcement statutes, is saved to the states by allowing "more stringent" state laws to stand.[99]

But the utter confusion of administration fostered by this system cannot be imagined by a lawyer not intimately concerned with it almost daily. After two years, it is becoming clear that the vacated water permit program will miss its legislated goal.[100] More than 100 lawsuits on key aspects of the dual jurisdiction under the

92. *E.g.*, Chicago, Rock Island v. Hardin, 274 F. Supp. 294 (W.D. Ark. 1967); American Smelting v. Contra Costa County, 77 Cal. Rptr. 570, 27 Cal. App. 2d 437 (1969) *appeal dismissed*, 396 U.S. 273, *rehearing denied*, 397 U.S. 958 (1969).

93. Cities Service Gas v. Peerless Oil, 340 U.S. 179 (1950) (local interest must outweigh national interest in preventing restriction of commrce).

94. *E.g.*, Chicago, Rock Island v. Hardin, 274 F. Supp. 294 (W.D. Ark. 1967); American Smelting v. Contra Costa County, 77 Cal. Rptr. 570, 27 Cal. App. 2d 437 (1969) *appeal dismissed*, 396 U.S. 273, *rehearing denied*, 397 U.S. 958 (1969).

95. Panhandle Eastern Pipeline v. Badeles, 183 Kan. 803, 332 P.2d 568 (1958).

96. Burbank v. Lockheed Air Terminal, 318 F. Supp. 914, *aff'd* 457 F.2d 667, *aff'd* 411 U.S. 624 (1973) (City Prohibition on jet flights at night pre-empted by F.A.A. control of flights); Alleghany Airlines v. Cedarhurst, 132 F. Supp. 871, *aff'd* 238 F.2d 812 (2d Cir. 1955).

97. *Id.*

98. 42 U.S.C. § 1857(m) (federal enforcement), 1857(p) (retention of state authority) (1970); 33 U.S.C. §§ 1319 (federal enforcement), 1370 (state authority), 1342 (federal and state permits) (1970).

99. *Id.*

100. U.S. ENVIRONMENTAL PROTECTION AGENCY, WATER QUALITY STRATEGY PAPER, pt. IB, IIB (Mar. 15, 1974).

Federal Water Pollution Control Act are underway.[101] The program is an admitted nightmare to administer.[102]

Passing to the coming congressional coal surface mining legislation, the administrative problems of "dual federalism" are compounded by requiring the industry to shut down in 30 months under a more complex permit program. It is fair to conclude that there will be the same state of delay on coal mining permits under the new bill as the Federal Environmental Protection Agency and state programs have demonstrated under the Federal Water Pollution Control Act.[103] Further, the proposed congressional bill sets up an elaborate system of administrative review, third-party appellate rights, citizens' suits, and permits judicial review in such a way as to allow every policy issue to be litigated, even if coal operators are in compliance with administrative rules.[104]

V. THE PROBLEM AND THE OUTCOME.

It is a long thesis to explain but simple to state. In the face of determined efforts by Montana to subject the interstate commerce in coal fuel to local interests in mine control, Congress has not come to the rescue of the besieged coal industry. Instead, it has chosen to confound its duty under the Interstate Commerce clause to prevent paralysis of a main source of utility fuel, as important perhaps as the interstate traffic of aircraft, it was willing to regulate in *Burbank*.[105]

So, because of the special passions raised by coal,[106] the coal volunteers of interstate commerce stand besieged. Congress, like General Sam Houston, camps afar off, viewing its own Battle of the Alamo. Despite the reluctance of Congress to move in the face of environmental publicity, the history of the future in Montana is likely to be the following:

1. The Alamo will fall. Even if the mining of coal is foreclosed under federal leases, or if it is arbitrarily withdrawn by private surface holders or holders of federal surface rights, some significant burdens will remain upon the interstate commerce in coal through Montana. These will be through high costs of reclamation and deeper stripping (legally required, mind you!), extra taxes, and interference with long term plans indicated in this article. However, Con-

101. BUREAU OF NAT'L AFFAIRS, *supra* note 12.
102. Quarles, *Expectations vs. Achievements: Some Reflections on the Water Act*, Midwest Research Institute 11-17 (Jan. 17, 1974).
103. Draft, *supra* note 4 at §§ 506, 518.
104. *Id.* §§ 514, 526.
105. NAT'L COAL ASSOC., BITUMINOUS COAL DATA 1973 COAL MARKETS AND STOCKS 75-91 (1974).
106. *E.g.*, Wehling, *Urges Total Ban on Strip Mining*, St. Louis Dispatch, April 24, 1974 (Report on speeches by Ed Dobson for Friends of the Earth).

gress has beclouded any issue of pre-emption by the framework of legislation discussed here. It may be that the federal law temporarily pre-empts some state permits under the Federal Water Pollution Control Act of 1972.[107] And it may be that state enforcement is pre-empted under current federal surface mining legislation.[108] Therefore, Montana will levy both tax and limitation on coal for power outside Montana.

2. However, the Montana-type interests and the new tribes behind them, will go down at some fateful San Jacinto yet to be taken by Congress. For as events unfold, Congress will be forced again to rationalize the conflicts in policy and interest described above, for reasons both of interstate commerce, and the management of the public domain in the West—including its leasable coal.

(a) The public domain was "checkerboarded" during the homesteading period of our history, between railroads, homesteaders and federal lands. Coal was often retained. Consequently, the only entity in the past which could amass economic, mineable reserves were the private mineral owners who could lease or purchase under state or federal law.

(b) Any law, such as the proposed Mansfield or Melcher Amendments discussed here, which interferes with this private acquisition runs the risk of destroying economic mining. Until it exercises its condemnation powers, the federal government cannot amass economic coal reserves ,as it can offshore oil. The Department of Interior has unveiled the "Energy Minerals Allocation Recommendation System," its proposed program for putting coal leasing upon a competitive basis.[109] EMARS is, however, dead before it starts.[110] Already speculators in the Northern Plains have shifted their action into amassing and selling surface rights as "the only way in the future to control federal coal."[111] From this tangle, we venture EMARS will not elicit true competitive bids, but will only reflect the unpredictable power to get non-competitive control of the surface. Ultimately, there must emerge a massive federal mineral law.

This federal law, ending the Montana-type skirmishing, will have to base federal coal leases upon "logical mining units," instead of

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107. 33 U.S.C. 1342(b) (Supp. II, 1972) ("the Governor of each state *desiring to administer its own program* . . . may submit to the Administrator a full and complete description of the program . . .") (emphasis added).

108. Draft, *supra* note 4, at § 502(d) ("the Secretary shall implement a Federal enforcement program *which shall remain in effect in each State . . . until the State program* has been accepted . . .") (emphasis added).

109. DEP'T OF INTERIOR, ISSUANCE OF PROSPECTING PERMITS FOR COAL, Order No. 2952 (Feb. 13, 1973); BUREAU OF LAND MANAGEMENT, DEP'T OF INTERIOR, I *Draft*: DES-74 ENVIRONMENTAL IMPACT STATEMENT, PROPOSED FEDERAL COAL LEASING PROGRAM, 1-12 (undated).

110. *Id.* at 4 n.100 (Federal leases to be allocated by location on basis of needs on a one year and four year schedule only. See *id.* at 12 as to the effect of the "crazy quilt pattern").

111. Private letter.

section survey boundaries.[112] EMARS, to allow competitive bidding, must make provision for federal condemnation of coal or surface rights as necessary to farming such a marketable "logical mining unit." Further, the operating and reclamation requirements of the federal lease must be established prior to any public auction of the coal, and must be free of future changes by the states involved. This is not true now, and the Battle of the Alamo draws to its close, with Montana now demanding the right to veto federal coal programs.[113]

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112. Remarks by David Bernard, *The Coal Lawyers Conference*, Sept. 19-21, 1974, St. Charles, Ill. (address entitled What is EMARS? What is the Future of Federal Coal Leasing?).

113. Clawson, *Judge Opens Coal Hearing*, The Billings Gazette, Oct. 1, 1974 (Report of Gov. Thomas Judge's argument for a state self-determination clause in FEA "Project Independence" Billings, Mont.).