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COOPERATIVE FEDERALISM UNDER THE SURFACE MINING CONTROL AND RECLAMATION ACT: IS THIS ANY WAY TO RUN A GOVERNMENT?

MARK SQUILLACE*

One of the hallmarks of the environmental legislation passed by Congress in the 1970s was its increased reliance on a regulatory framework that has come to be known as "cooperative federalism." Under the cooperative federalism model, the states are given the opportunity to assume all or part of the responsibility for a regulatory program if they submit to the appropriate federal agency a program that satisfies certain standards set down by Congress or agency implementing regulations. As an incentive to encourage states to accept such responsibility, these statutes typically provide for partial federal funding of the program. States may, of course, refuse to accept responsibility, in which case the federal government assumes regulatory control in that state.

To varying degrees, virtually all of the major regulatory laws in the environmental field employ this scheme. Under the Clean Air Act, for example, ambient air quality standards may be achieved through state implementation plans. The Clean Water Act authorizes point source discharges of dredge and fill materials and other pollutants to be regulated through a state program. The Resource Conservation and Recovery Act provides for state development of hazardous waste management plans. The Safe Drinking Water Act affords the states the opportunity to assume primary enforcement responsibility.

While state participation or control has become commonplace in environmental legislation, the broad delegation of control to the states, mandated by the Surface Mining Control and Reclamation Act of 1977, is unparalleled. The Surface Mining Act thus offers an excellent tool for the study of the performance of the cooperative federalism model. This Article offers some insights into the successes and failures of cooperative federalism under the federal Surface Mining Act and compares that record with the results that might be expected from the most obvious alternative to cooperative federalism—direct federal regulation. It is the opinion of the author that cooperative federalism fails in its most important objective of achieving state and federal cooperation. Furthermore, direct federal regulation offers the more efficient and effective method of achieving regulatory goals, while


2 33 U.S.C. §§ 1342(b), 1344(g) (1982).
at the same time affording the states an opportunity to perform a substantial role in assuring the integrity of the regulatory process.

I. HISTORY AND FRAMEWORK OF THE SURFACE MINING ACT

By the early 1970s Congress had become increasingly aware of the failure on the part of a number of states to impose adequate regulatory standards on surface coal mining operations. Landscapes devastated by coal mining operations, and abandoned without any effort at reclamation, presented a threat to the nation's land resources that Congress simply could not ignore. A small number of members of Congress, led by Congressman Ken Hechler of West Virginia and a cadre of citizen organizations from the Appalachian states of West Virginia and Tennessee, supported an outright ban on strip mining. Surface mining, however, had become an increasingly popular method of coal extraction. By the 1970s surface mining had overtaken underground mining as the predominant method of coal production. Moreover, demonstration projects and emerging regulatory standards established by a handful of states had shown that coal could be surface mined without causing long-term environmental damage. Such realities explain the prevailing sentiment in Congress, led by the law's chief architect, Congressman Morris Udall of Arizona, in favor of a regulatory program that would insure that future mining operations were conducted in a manner consistent with environmental values.

The original bill, from which the federal Surface Mining Act was molded, envisioned a primarily federal program for regulating mining activities under the model of the Mine Enforcement Safety Act (now the Mine Safety and Health Act). While many of the ideas from the Mine Safety Act were retained, later versions of the proposed law were redrafted to incorporate the cooperative federalism concept. Bills following this model were passed by wide majorities in both houses of Congress in 1974 and 1975, though both bills were ultimately vetoed by President Ford. The Surface Mining Control and Reclamation Act ("Act" or "Surface Mining Act") was again passed by the Congress in 1977, in much the same form as the 1975 bill. On August 3, 1977, President Carter fulfilled a campaign promise by signing the bill into law.

The Surface Mining Act established the Office of Surface Mining Reclamation and Enforcement ("OSM" or "Office of Surface Mining") within the Department

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6 The evidence before the Congress showed that nearly two-thirds of the land strip mined and needing reclamation by 1974 was not subject to any reclamation standards. H. R. REP. No. 218, 95th Cong., 1st Sess. 76, reprinted in 1977 U.S. CODE CONG. & AD. NEWS 614.
7 Id. at 72, reprinted in 1977 U.S. CODE CONG. & AD. NEWS 610.
8 Id. at 98-100, 102.
10 For a more comprehensive review of the legislative history of the Surface Mining Act, see Dunlap, An Analysis of the Legislative History of the Surface Mining Control and Reclamation Act of 1975, 21 ROCKY MTN. MIN. L. INST. 11 (1975).
of the Interior to carry out the requirements of the law. One of OSM’s chief responsibilities is the promulgation of regulations to govern the administration of the Act.11 These regulations establish standards and procedures to which all state and federal programs must adhere. In those states that obtain approval to administer their own program, OSM assumes an “oversight” role. The purpose of this “oversight” responsibility is to assure that the state complies with the Act’s requirements.12 If a state fails to obtain federal approval to administer its own program, or if a state fails to administer its program in accordance with the requirements of the Act, then OSM performs the regulatory responsibilities for that state.13

The cooperative federalism scheme adopted in the Surface Mining Act is comprehensive, encompassing all aspects of permitting, bonding, and enforcement of performance standards for all surface coal mines and underground mines with surface impacts. Section 503 of the Act provides that any state “which wishes to assume exclusive jurisdiction over the regulation of surface coal mining and reclamation operations [within its borders] . . . shall submit to the Secretary . . . a State program which demonstrates that such State has the capability of carrying out the provisions of this Act. . . .”14

14 30 U.S.C. § 1253(a) (1982) (emphasis added). Specifically, the Act requires the States to demonstrate that they have met seven conditions:

(1) State law which provides for the regulation of surface coal mining and reclamation operations in accordance with the requirements of this [Act]; (2) a State law which provides sanctions for violations of State laws, regulations, or conditions of permits concerning surface coal mining and reclamation operations, which sanctions shall meet the minimum requirements of this [Act] . . . ; (3) a State regulatory authority with sufficient administrative and technical personnel and sufficient funding to enable the State to regulate surface coal mining and reclamation operations in accordance with the requirements of this Act; (4) a State law which provides for the effective implementation, maintenance, and enforcement of a permit system, meeting the requirements of this title for the regulation of surface coal mining and reclamation operations for coal on lands within the state; (5) establishment of a process for designating lands unsuitable for surface coal mining in accordance with Section 522 [30 U.S.C. 1272] provided that the designation of federal lands unsuitable for mining shall be performed exclusively by the Secretary after consultation with the State; (6) establishment for the purposes of avoiding duplication, of a process for coordinating the review and issuance of permits for surface coal mining and reclamation operations with any other Federal or State permit process applicable to the proposed operations; and (7) rules and regulations consistent with regulations issued by the Secretary pursuant to this [Act].

Pursuant to this authority the Secretary has required that state programs contain provisions that are in accordance with the technical permitting and performance standards set forth in the law, and consistent with the detailed federal rules that were promulgated to implement and flesh out these requirements. The Secretary’s authority to promulgate substantive rules that flesh out the specific requirements of the law was sustained by the Court of Appeals for the District of Columbia Circuit. In re Permanent Surface Mining Regulation Litig., 653 F.2d 514 (D.C. Cir.), cert. denied, 454 U.S. 822 (1981). See infra note 34 and accompanying text.
In addition, states with approved regulatory programs may administer an abandoned mine land program in accordance with Title IV of the Act. Under this program, states are allocated a portion of the monies collected through a fee imposed on each ton of mined coal. States are also authorized to regulate mining on federal lands, although an attempt by former Secretary of the Interior James Watt to delegate wholesale authority for the regulation of mining on federal lands to the states was struck down by the federal district court for the District of Columbia.

In order to assure that the states administer their programs in accordance with the requirements of the Act, the Secretary retains an oversight responsibility. The Act makes clear that, among other things, the Secretary retains the responsibility to conduct inspections and take enforcement action directly against a coal company where the state fails, after notice, to take appropriate action on its own. Further, where there is a complete breakdown in a state's administration of all or part of its approved program, the Secretary must hold a public hearing, and if necessary, assume responsibility over all or part of that program.

Unfortunately, the Secretary has failed to promulgate regulations to detail the circumstances whereby he will exercise his authority to assume control over all or part of a state program. Such regulations would go a long way toward apprising the states, industry, and private citizens of the kinds of activities that might trigger federal action.

As an incentive to encourage states to accept responsibility for the administration of their programs, the Act provides for annual grants not to exceed eighty percent of the total costs for administering the program in the first year; sixty percent of the total costs incurred in the second year; and fifty percent for the costs incurred in each succeeding year. In addition, states with approved programs are permitted to recoup fifty percent of the Abandoned Mined Land Fund monies that...
are contributed by operators in their states. In all, thirty-four states, including every state with significant coal reserves, submitted programs to the Secretary that ultimately were approved. Federal programs were adopted in a handful of states with limited coal reserves, including several states with no current mining activities.

II. LITIGATION UNDER THE SURFACE MINING ACT

There has been substantial litigation over various requirements of the Surface Mining Act, and a summary of all of that litigation is beyond the scope of this Article. Several cases, however, bear directly or indirectly on the Act's cooperative federalism scheme, and accordingly, they merit a brief review.

Of particular significance are the Supreme Court's decisions in the companion cases of *Hodel v. Virginia Surface Mining and Reclamation Association* and *Hodel v. Indiana.* In these cases, the Court addressed appeals by the federal government from two district court opinions that had found the federal Surface Mining Act unconstitutional on a variety of grounds. Of particular concern was the holding by the district courts that the Act violated the tenth amendment. In both of these cases the district courts had relied on the Supreme Court's holding in *National League of Cities v. Usery.* In *National League of Cities,* the Court struck down certain aspects of the Fair Labor Standards Act which required the states to accept minimum wage and maximum hour standards for state and local government employees. The Court had found that the Fair Labor Standards Act was within the scope of congressional power under the commerce clause, but that it nonetheless violated the tenth amendment because it affected the states as states in a matter concerning attributes of state sovereignty, and because it directly impaired the ability of the states to structure integral operations in areas of traditional state sovereignty.

Relying on this holding, the district courts had found that certain aspects of the Surface Mining Act, notably the steep slope and prime farmland standards,
imposed a similar burden on the states because they interfered with the state's traditional governmental function of regulating land use.

Had the statute required the states to adopt programs to implement the federal standards, one suspects that the Court might have accepted the district courts' conclusion. But the Court reversed, and in so doing, expressly sanctioned the cooperative federalism model:

Moreover, the states are not compelled to enforce the steep slope standards, to expend any state funds or to participate in the federal regulatory program in any 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 compelling them to enact and enforce a federal regulatory program. . . . The most that can be said is that 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.

Whatever the wisdom of the cooperative federalism model, it is at least clear, after the Hodel cases, that it passes constitutional muster.

A second decision worthy of note is a small but significant part of a larger case that was commenced in 1979. Permanent Surface Mining Regulation Litigation involves a host of challenges filed by states, industry groups, and citizen and environmental organizations to the substantive regulations first promulgated by the Department of the Interior on March 13, 1979. Those rules have undergone a major revision, and a second round of that litigation is currently pending in the District Court for the District of Columbia. This discussion will address only one opinion of the Court of Appeals for the District of Columbia Circuit. Permanent Surface Mining Regulation Litigation involved an interlocutory appeal filed by the Peabody Coal Company which upheld the Secretary's authority to promulgate substantive permitting regulations that went beyond the specific requirements of the Act. A three judge panel of the court ruled 2-1 in favor of Peabody. Rehear-
ing en banc was granted, and the decision of the three judge panel was reversed. The Court explained the scope of the Secretary’s authority as follows:

We hold that the Act does grant the Secretary rulemaking power enabling him to specify by regulation criteria necessary for approval of a proposed state program. We hold that the Act’s explicit listings of information required of permit applicants are not exhaustive and do not preclude the Secretary from requiring States to secure additional information needed to ensure compliance with the Act.9

The court’s en banc decision is supported by the legislative history of the Act,40 and is consistent with the notion that agencies are better situated than the Congress to establish detailed technical standards in highly complex areas.41 Nonetheless, by affirming the Secretary’s authority to “flesh out” the Act’s substantive requirements, the Court has greatly complicated the administration of the cooperative federalism system established by the Act. Not only must the Secretary oversee and assure a state’s adherence to statutory standards, he must determine if the state administers its program consistent with the requirements of highly detailed regulations.

The Secretary’s task is further burdened by the remarkable history of the federal strip mining regulations, which have changed so often that they call to mind the Supreme Court’s description of the parties involved in Orloff v. Willoughby,42 who changed positions “as nimbly as if dancing a quadrille.” The constant flux in the federal rules wrecks havoc with the state programs which must, of course, be “consistent with” those rules. This federal rules “moving target” has confused states, industry, and citizens alike.43

A third case of importance to the operation of cooperative federalism under the Surface Mining Act is Sierra Club v. Watt.44 Sierra Club involved a challenge to a regulation promulgated by Secretary Watt shortly after he assumed authority

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9 In re Permanent Surface Mining Regulation Litig., 653 F.2d at 527.
40 H.R. REP. No. 95-218, 95th Cong., 1st Sess. 85 (1977). The Report states in relevant part: The committee believes that it has struck a balance between legislation which merely frames performance standards in terms of general objectives and standards which are cast in terms more detailed than those generally found in regulatory legislation. In choosing a middle path, the committee is mindful of the past failures on the State level and thus bases its approval of H.R. 2 on the expectation that Federal regulations promulgated under the act will fully implement the environmental performance standards. Obviously, the mere reproduction of the statutory environmental performance standards in the regulations would be inadequate.
41 Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, 462 U.S. 87 (1983) “[A] reviewing court must remember that the [Nuclear Regulatory] Commission is making predictions within its area of special expertise, at the frontiers of science. When examining this kind of scientific determination, as opposed to simple finding of fact, a reviewing court must generally be at its most deferential.”
43 The Act and regulations afford sufficient flexibility to allow states to adopt provisions different from those contained in the federal rules. State programs must, however, be consistent with the federal rules. Accordingly, a reasonable degree of uniformity might be expected if the Secretary is able to refrain from further revising the federal rules.
over the Department of the Interior. The stated purpose of this rule was to afford the states additional flexibility in establishing standards for their state programs.\textsuperscript{43} The Act requires state programs to contain provisions that are "in accordance with" the requirements of the Act, and "consistent with" the requirements of the federal regulations.\textsuperscript{46}

In 1979, Interior Secretary Andrus had defined both phrases to mean that state programs had to contain provisions that were "no less stringent than" the requirements of the federal law and regulations.\textsuperscript{47} The result was that few states adopted programs that varied substantially from the federal rules, and no major challenges were brought against any of the sixteen programs that were approved by Secretary Andrus. As part of his effort to ease the regulatory burden imposed by the federal rules, Secretary Watt revised the definition of "consistent with" to mean "no less effective than the Secretary's regulations in meeting the requirements of the Act."\textsuperscript{48} The plain intent behind this rule change was to encourage states to adopt their own methods for achieving the results dictated by the Act.

The plaintiffs in \textit{Sierra Club} challenged the rule on the grounds that it violated one of the chief purposes of the law—to assure the establishment of uniform national standards so that competition among the various states for coal development could not be used as an excuse to lower environmental standards.\textsuperscript{49} The court sustained the new rules, holding simply that the plaintiffs had not demonstrated that they were arbitrary and capricious, or otherwise inconsistent with the law.

While economists might applaud the freedom of the states to choose the methods best suited to their needs, the Secretary’s revised rule invites chaos. Federal regulators, who must oversee the state programs and assure compliance with the detailed standards of the federal law and regulations, must now base their evaluations on the performance of a myriad of unique state methods that have been determined to be "no less effective than" the federal rules. Even assuming that the federal officials will eventually gain expertise with regard to the differing state provisions, it is unlikely that they will be able to assess a state’s performance as efficiently, or with the same degree of certainty, as they would if states followed more uniform standards.

The Secretary approved eleven programs under the "no less effective than" criterion, and many of these programs contained provisions that were markedly different from the federal rules. Major challenges were filed against eight of those eleven programs, most based on claims that the unique state methods that had been adopted and approved were less effective than the methods established by

\textsuperscript{43} 30 C.F.R. § 730.5(b) (1983).
\textsuperscript{44} 30 U.S.C. § 1253(a)(1),(7) (1972).
\textsuperscript{48} 30 C.F.R. § 730.5(b) (1983).
\textsuperscript{49} 30 U.S.C. § 1201(g) (1982).
the federal rules. The proliferation of these cases highlights the confusion that has been caused by the new standards and offers further evidence of the burdens the new standards have imposed on the federal agency in ascertaining state compliance with federal standards.

III. REGULATORY CHOICES

The New Federalism of the Reagan Administration has brought an increased public awareness of states' rights and a perceived need to limit the influence of the federal government in state and local decision making. Long before the New Federalism, however, Congress has been sensitive to the charges that federal bureaucracies unduly interfere with state and local prerogatives, and are inefficient and ineffective distributors of the public wealth. Nonetheless, when faced with the failure of the states to address what Congress finds to be fundamental problems, as has so often been the case in the environmental area, some degree of federal intrusion is necessary. Indeed, federal action may be the only feasible way to assure regulation of costly environmental problems as the states, on their own, may find it economically difficult to impose restraints that their neighboring competitor states are unwilling to impose. Section 101(g) of the federal Surface Mining Act recognizes this fundamental conflict, expressing Congress' finding that "[national] surface mining and reclamation standards are essential in order to insure that competition in interstate commerce among sellers of coal produced in different states will not be used to undermine the ability of the several states to improve and maintain adequate standards within their borders. . . ."\[51\]

In the environmental area, the commerce clause normally affords sufficient breadth to assure federal authority to act. In the Virginia Surface Mining and Indiana cases discussed above, the Supreme Court expressly upheld the Surface Mining Act against a commerce clause challenge.\[52\] Having been assured of its authority, however, Congress must still choose the means whereby it will exercise that authority. As has been suggested, it seems unlikely that Congress could direct the states to address the environmental problems that it identifies. Such a requirement would most likely run afoul of constraints imposed by the tenth amendment, as interpreted by the Supreme Court.\[53\] Congress is thus left with the following two


51 30 U.S.C. § 1201(g) (1982). Professor Richard Stewart describes this phenomenon as the "commons" problem, analogizing to the polemic posed in Garret Hardin's classic essay: The Tragedy of the Commons, 162 SCIENCE 1243 (1968). Stewart, Pyramids of Sacrifice? Problems of Federalism in Mandatory State Implementation of National Environmental Policy, 86 YALE L.J. 1196, 1211-16 (1977). As stated by Professor Stewart, "A state that encourages economic development at the expense of environmental quality may inflict economic loss (in the form of industrial migration or decreased economic growth) on other states that prefer a higher level of environmental quality." Id. at 1215-16.

52 Hodel, 452 U.S. at 283.

53 National League of Cities, 426 U.S. 833. See also Train, 429 U.S. 1036.
options: it may choose to regulate the problem directly, or it may provide inducements to the states to accept regulatory responsibility subject to federal standards. The latter option is labelled cooperative federalism. In recent years, when addressing environmental matters, Congress has most often chosen the cooperative federalism scheme. The Surface Mining Act was no exception to this pattern. In some circumstances, particularly where the local problem to be addressed is unique, the cooperative federalism approach may make a good deal of sense. In the surface mining area, however, cooperative federalism serves only to complicate the implementation and enforcement of what should be uniform standards that all coal operators must meet. The remainder of this Article explores the basis for this conclusion, and offers support from the experience gained by OSM over the past several years.

A. The Problems With Cooperative Federalism Under the Surface Mining Act

The primary impetus behind the enactment of federal surface mining legislation was the apparent breakdown of strip mining regulation at the state level. The House Report describes this breakdown as follows: "For a number of predictable reasons—including insufficient funding and the tendency of state agencies to be protective of local industry—state enforcement has in the past often fallen short of the vigor necessary to assure adequate protection of the environment." Despite their apparent shortcomings, Congress believed that the states could be brought into line by establishing strict standards for state programs, and by assuring "limited federal oversight roles as well as increased opportunity for citizens to participate in the enforcement program."

Much political debate has ensued over the success of the states in meeting the goals, as well as over OSM's success in keeping the states in line. Assuming that the problems with state regulation have been or can be overcome, a fundamental question remains as to whether the cooperative federalism model itself is sound. Viewed from the perspective of Congress' desire that the states take the lead in the regulation of mining activities, the cooperative federalism program under the Surface Mining Act has been a smashing success. Every state with significant coal reserves, and some with rather insignificant reserves, has taken on the regulatory

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54 For example, under the Clean Air Act, states adopt state implementation plans to establish a plan for meeting national ambient air quality standards. The strategy chosen to meet these standards may vary widely from state to state, depending on the quality of the ambient air in the state and the number and size of the emitting sources. Thus, such a problem can be readily distinguished from the regulation of surface mining operations, where the concern is not with any ambient air or water quality standards, but rather with controlling emissions from a particular site in accordance with relatively uniform standards.
56 Id.
57 See, e.g., Hearings Before the House Comm. on Interior & Insular Affairs, No. 98-17 (1983); No. 97-35 (1982).
responsibility for mining. Serious questions remain, however, as to whether cooperative federalism has hindered the accomplishment of the more fundamental goal of strict regulation of mining activities. To a certain extent the effectiveness of the program in achieving the statute's goals is a subjective test, and there are surely arguments that can be made on either side of this issue, as the oversight hearings before Congressman Udall's committee attest. Nevertheless, fundamental flaws have been exposed during the implementation of the program that cannot be attributed solely to the inefficiencies of the bureaucratic system.

An initial problem stemmed from the fact that virtually all of the coal mining states east of the Mississippi River (with the exception of West Virginia) encountered substantial delays in establishing permanent regulatory programs. Congress had mandated that any state that wanted to assume responsibility for regulating mining submit a program to the Secretary no later than February 3, 1979. The Secretary was required to make a decision on all such programs by August 3, 1979. If a state failed to obtain approval during the first round, the state was permitted a second chance before any federal program was imposed. Under the statute, however, final decision on all programs were to be made no later than December 3, 1979.

For a variety of reasons, these statutory deadlines were not met. First, the Secretary was unable to promulgate final regulatory standards for the state programs until March 3, 1979. Because of this failure the states were given a short reprieve by the federal district court for the District of Columbia. Subsequently, many states took advantage of a provision in the Act that prohibited imposition of a federal program in a state if the state was precluded from submitting such a program by a court of competent jurisdiction. Industry, working in cooperation with the states, happily brought cases in friendly state courts in eight of the major coal producing states, and obtained such injunctions. As a result of this and other delays in final decisions by the Secretary, many state programs were not approved until late 1982, nearly three years after the statutory deadline.

While one can hardly ignore the harm caused by the substantial delays that were encountered in implementing a permanent regulatory program, those delays have finally been overcome, and it might reasonably be argued that the delays in themselves ought not be used as an excuse to sound the death knell for cooperative

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58 See supra note 24.
59 See supra note 57. Recently, Congressman Udall, citing serious deficiencies in the federal oversight program, asked the General Accounting Office to undertake an intensive review of OSM's activities. 15 Env't Rep. (BNA) 721, Current Developments (1984).
federalism. Unfortunately, the subsequent history of the implementation of the Act provides little basis for a more favorable prognosis.

Following approval of the various state programs, the Secretary is required by regulation to conduct annual reviews of the state programs to ascertain state compliance with the statutory standards.\textsuperscript{6} The Secretary experienced considerable delay in preparing these reports, and when the initial reports were finally prepared, they lacked much critical information. Congressional pressure has led to improved reports, so that it is now possible to obtain a better view of the performance of the various states in implementing their programs. These reports identify substantial problems in virtually all states.\textsuperscript{6} Obviously, many problems can be expected to be worked out over time. Other problems, however, will almost certainly remain, owing in part to the undeniable strain that has developed between the state and federal regulatory agencies. Much of this strain can only be attributed to cooperative federalism.

The problem lies in the nature of the beast. The initial stage of administration of a cooperative federalism program, such as that envisioned under the federal Surface Mining Act, is the development of the state programs. At the outset of this process the states will almost certainly lack the technical and legal expertise to appreciate the extent of their responsibilities. When informed of those responsibilities by the federal government, the states are likely to resist what they will perceive as a radical departure from their current program. Inevitably, then, this first encounter will result in a negative experience for both the federal government and the state, and an inauspicious beginning for the cooperative federalism program.\textsuperscript{65}

Once a state program is approved, the state assumes primary regulatory responsibility. Not surprisingly, the states would prefer to be left alone after they assume primacy. They believe that they are performing their responsibility more than adequately (and certainly by past standards, there has been a vast improvement from


\textsuperscript{6} For example, the annual report for Virginia, published in September 1984 identifies nine "significant" problems with the state administration of its program. A number of these problems have been identified in previous reports but have yet to be corrected. Among the problems identified by OSM are: (1) a forty-five percent rate of "inappropriate" responses to notices from OSM of probable violations at a particular mine site; (2) unlawful acceptance of coal haul roads as "public roads" such that the regulatory standards are not applied to these roads; and (3) numerous deficiencies in the permit review process. See OSM, ANNUAL EVALUATION REPORT, VIRGINIA PERMANENT PROGRAM (1984). Other problems of similar significance have been identified in every annual report issued by OSM. As with Virginia, many problems in other states are of a continuing nature, and OSM has had little success in convincing the states to alter their practices, especially when the states disagree with the federal requirements.

\textsuperscript{65} This conclusion was confirmed in a telephone interview on December 18, 1984 with Suellen T. Keiner, former Assistant Solicitor for Governmental Relations, Division of Surface Mining, Department of the Interior. Ms. Keiner was actively involved in the initial contacts with the states regarding their program responsibilities.
past practices), and they resent any federal intrusion. By law, however, OSM must exercise oversight authority. Inevitably it will find something about the state’s performance to which it might object. Yet the federal agency is sensitive to criticism received from the states and is reluctant to intervene in any but the most serious cases. The supposed “cooperation” envisioned by the Congress is thus reduced to undisguised tension, that can lead only to one of the two following results: Confrontation between the state and federal governments, or backsliding from the congressional mandate.

A case illustrative of the problem involves the state of Colorado. The Colorado Division of Mined Land Reclamation takes the position that state inspectors should have discretion to cite a coal operator for an observed violation of the law.\(^6\) Colorado believes that many factors need to be considered before citing an operator, and that often compliance with the Act’s standards can best be achieved by avoiding a confrontation with the operator that inevitably results from the issuance of a citation. The federal law, however, establishes a policy of mandatory enforcement. When an inspector observes a violation he or she must cite the operator. Discretion may be exercised only when considering whether or not to assess a civil penalty.\(^6\)\(^7\)

To Colorado’s credit, it has been forthright with OSM regarding its policy. Various citizen groups have criticized OSM for failing to enforce the federal standard in Colorado.\(^6\) OSM, it seems, wishes that the state were less frank about its policy so that it could simply ignore it. Colorado refuses to cooperate, however, and OSM finds itself forced into the position it so much wants to avoid: it must either take action against the state or ignore the specific mandate of the law. To date, OSM has chosen the latter course, but it is perhaps only a matter of time before citizens force OSM into the confrontation.

An even more serious problem arises once OSM reaches the next, previously unthinkable, step in the confrontation process: assuming authority over a state program because of the state’s failure to comply with federal standards. Consider, for example, this all too possible scenario. The state of Kentucky, which has thousand of mines within its borders, fails to meet its schedule for approving permits for all operations in the state.\(^7\) What options are available to the federal government? Obviously, OSM can talk with the state and seek assurances that the state will improve its performance. Beyond this step, the federal options, though theoretically powerful, are as a practical matter very limited. The response mandated by the statute is for the federal agency to conduct a public hearing to ascertain the state’s compliance with the terms of its program.\(^7\)\(^0\) If the Secretary finds that

\(^6\) 30 U.S.C. §§ 1268(a); 1271(a)(2), (3) (1982).
\(^6\) Letter from James Lyon of the Environmental Policy Institute to Lyle Reed, Acting Director, OSM (April 19, 1984).
\(^6\) Indeed, one of the most significant problems with the Kentucky program is the state’s failure to approve permits for ongoing mining operations in a timely manner.
\(^7\) 30 U.S.C. § 1271(b) (1982).
the state is not meeting its obligations, his only option is to assume responsibility for that part of the program which the state has failed to meet. But, as Kentucky is well aware, the federal agency is ill-equipped to assume permitting responsibility for the approximately 7,000 miles in Kentucky. Moreover, should the federal government decide to do so, it will encounter significant delays (and possibly some resistance) in obtaining additional funding from Congress to carry out this responsibility. If it obtains the necessary money and attempts to handle permitting in Kentucky, it may likely face a new plan from Kentucky to upgrade its system and again take over responsibility for permitting. The Secretary is required to duly consider such a plan and if it meets the requirements of the law, approve it. In the event that the plan is approved, the Secretary’s newly hired Kentucky workforce will have to be laid off, having accomplished nothing but the expenditure of federal dollars.

OSM’s past experience in assuming responsibility over state programs supports the rather alarming scenario hypothesized above. In October 1984, OSM was forced to assume control over the Tennessee surface mining program following a complete breakdown of the state system. After some prodding from local citizen groups, including the filing of a notice of intent to sue the state and federal agencies, the Secretary held a public hearing in Tennessee in accordance with the requirements of Section 521(b) of the Act. The state made a lengthy presentation explaining how it would improve its program. However, the Secretary decided that he would have to assume at least partial responsibility for the administration of the Tennessee program. The state, apparently spent by the whole process, decided to relinquish its regulatory efforts and turn the entire responsibility over to the Secretary. Tennessee has announced, however, that it hopes to be back with a new program in 1986.

Kentucky alone employs 379 people to administer its surface mining program. This is more than one-third of OSM’s total workforce of 954 people. Furthermore, the cost of administering the Kentucky program in fiscal year 1984 was well over eighteen million dollars. (OSM awarded Kentucky a $9,286,238.00 grant in fiscal year 1984, which is supposed to represent 50% of the total cost of the program.) See Letter from Carl C. Close, Office of Surface Mining to Mark Squillace (Nov. 16, 1984) [hereinafter cited as CLOSE LETTER]. It seems highly unlikely that OSM could easily assume the burdens of a major program such as that of the State of Kentucky.


Annual report prepared by OSM on the Tennessee program showed massive breakdowns in all areas of the state’s responsibilities. See OSM, ANNUAL EVALUATION REPORT, TENNESSEE PERMANENT PROGRAM (1983).

A Notice of Intent to Sue the Secretary of Interior and other federal and state officials, for their failure to assure proper implementation of the Tennessee program, was filed by the Sierra Club and Legal Environmental Assistance Foundation on October 24, 1983. 30 U.S.C. § 1271(b) (1982).


Not surprisingly, the Secretary lacked the resources to assume such responsibility and has had to approach Congress for a supplemental appropriation. To cover its regulatory responsibilities in Tennessee during the interim, OSM has had to substitute staff from other offices, thus severely undermining its entire oversight program.

OSM has encountered a similar problem in Oklahoma. That state received final approval to administer a permanent regulatory program on January 19, 1981. Shortly thereafter, on February 12, 1981 the Oklahoma legislature voted to repeal the regulations that formed the very core of the program. After much cajoling but no formal action on the part of OSM, Oklahoma finally relented and reinstated its rules. More than a year had elapsed during which time neither the state nor federal agencies made any effort to enforce the federal regulatory requirements. The problems with the program were compounded when lack of enforcement in Oklahoma became so pronounced that a coal company in the state filed a citizen complaint against a competitor because of its blatant disregard of the law. The complaining company was concerned that the state's failure to enforce the program was making a mockery of its own good faith efforts to comply with the law, resulting in a serious competitive disadvantage to those coal companies acting in good faith. When a federal inspector finally visited the site in dispute to determine the validity of the complaint, he identified 141 violations of the Oklahoma program. As with Tennessee, OSM has now assumed primary responsibility for implementing the Oklahoma program, although the state has been allowed to retain a certain degree of authority. This has resulted in a further strain on OSM's resources. There are strong indications that Oklahoma will seek to regain full responsibility in the coming months.

Aside from undermining the environmental goals of the Act, the cooperative federalism model cannot possibly operate both efficiently and effectively. Substantial resources at both the state and federal levels have been expended to establish

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80 OSM held an informal conference with the state on October 14, 1981, more than eight months after it became aware of the problem. Subsequently, on November 19, 1981, a public hearing was held. Oklahoma promulgated emergency rules on December 14, 1984, which were approved by OSM on April 2, 1984. For a more complete history of these proceedings, see 49 Fed. Reg. 14,674 (1984).
81 A citizen complaint was filed with the federal Office of Surface Mining by the Cherokee Coal Company against a mine operated by the Turner Brothers on December 27, 1983. Following a federal inspection of the mine, OSM notified the state that it had identified 141 violations of the Oklahoma program.
83 The failures of the Tennessee and Oklahoma programs have been costly in economic as well as environmental terms. Since 1978, the federal government has expended nearly ten million dollars to assist these two states in the administration and enforcement of their programs. See Close Letter supra note 71: $6,769,402.00 granted to Tennessee and $2,722,515.00 granted to Oklahoma between 1978 and 1984. An additional half million dollars was spent in assisting these two states in developing their programs.
twenty-seven separate state programs. OSM has had to assume that its role would be limited to overseeing state programs. Obviously, the agency could establish a back-up force to deal with problems in individual states, but it is virtually impossible to predict with any degree of certainty how long or how serious the problems are going to be. For example, should OSM have to assume responsibility for the Kentucky surface mining program and the 7,000 mining operations in Kentucky, it probably would have to increase its entire staff by 300 to 400 persons. At any time, however, the state might seek to resume its authority, thus prompting massive federal layoffs and reassignments. Much of the training that such skilled employees need will surely be lost in the shifting of personnel. Moreover, such drastic fluctuations in staff cannot reasonably be justified within the constraints of the federal budget.

B. The Alternative: Direct Federal Regulation

Currently, OSM exercises primary regulatory responsibility over mining activities in eleven states. Of these, only Tennessee and Oklahoma have mining activities so significant as to afford a useful comparison between cooperative federalism and direct federal regulation. However, as discussed previously, OSM has only recently assumed responsibility for mining in these two states. Nevertheless, one would not expect much criticism of the programs themselves because they essentially track the federal rules, incorporating most of their requirements by reference. The resulting uniformity offers a distinct advantage in that federal agency personnel can operate more efficiently and effectively. Moreover, because there are no significant differences between the state and federal standards, it is very unlikely that the agency will face litigation over the separate federal programs, as it has so frequently faced over the state programs. Indeed, to date, no federal program has been challenged. More uniform rules might also be expected to better implement the congressional policy of insuring that "competition in interstate commerce among sellers of coal in different states will not be used to undermine the ability of the several states to improve and maintain adequate standards on coal mining operations within their borders."

A total of $9,675,162.00 has been expended thus far to assist the states in the development of state programs. See Close Letter, supra note 71; see also 30 U.S.C. § 1295(a).

See supra note 71. Kentucky currently employs approximately 379 persons to administer its program, and has an annual budget of more than eighteen million dollars. Thus OSM would most likely have to increase its staff by nearly 40% to assume regulatory responsibility in just one state—Kentucky.

One can argue that the diseconomies identified are less serious than one might believe because of the potential for transfer of employees from the state to federal level, or federal to state. Unfortunately, this equation appears to work in only one direction. Federal employees are paid a substantially higher wage than their state counterparts. Once they attain a federal position, the employees are likely to seek to remain in the federal system either through a transfer to another agency or to another position within the OSM.


See supra text accompanying notes 49-50.

Although it may be difficult to draw firm conclusions from OSM's limited experience in implementing permanent regulatory programs for the states, some sense of its ability to administer a national regulatory program can be gleaned from its experience during the so-called interim regulatory program. During the deliberations on the Act, Congress realized that considerable time would elapse before the permanent regulatory program it had chartered could be implemented. To fill the gap between the time the law was passed and the time the permanent programs became effective in the states, Congress provided for an interim program.\footnote{30 U.S.C. § 1252 (1982).} The interim program was limited to the enforcement of various performance standards and did not include any of the detailed permitting or bonding requirements included in the permanent program. Further, inspection frequency was set at twice per year rather than monthly, as required by the permanent program. The interim program was, however, a truly national program, implemented and enforced solely by the federal government.\footnote{During this interim period, states were expected to exercise concurrent authority as provided for under existing state laws. \textit{Id.} States could receive federal funding if they agreed to enforce the Act's standards. \textit{Id.} § 1252(e)(4).}

To be sure, there was considerable tension between OSM and the states during the interim program period. Much of this tension, however, can be attributed to the sudden imposition of new regulatory standards that in many instances went far beyond the existing requirements of the states. On the other side, various environmental organizations complained that OSM was not meeting its semiannual inspection mandate.\footnote{See Settlement Agreement, \textit{Council of Southern Mountains v. Andrus}, No. 79-1521, cited in 90 \textit{INTERIOR DEC.} 496, 501 (1983).} On the whole, however, OSM's performance during the interim program was perhaps its greatest success. Thousands of enforcement actions were taken by OSM and hundreds of thousands of dollars in penalties were assessed and collected. Though many of these actions were challenged, few resulted in a reversal of the agency's action. A review of the surface mining cases published in the Interior Decisions for the years 1979 through 1981, the principal period of the interim program, supports the conclusion that, on the whole, OSM was neither over- nor under-zealous in enforcing the law.\footnote{Though citizens had the right to file complaints and to challenge federal enforcement decisions, very few such complaints were filed. This is true despite the fact that hundreds of complaints were filed with OSM. Regarding cases filed by industry, the vast majority of appeals (well over 80\%) were ultimately decided in OSM's favor. See Volumes 86, 87 and 88, \textit{Interior Dec.} (1979-81).}

Certainly, OSM's performance during the interim program does not offer positive proof that it would succeed in implementing a national permanent program. It does demonstrate, however, that the agency can operate effectively on the national level. Moreover, there are several clear advantages to direct federal regulation of mining activities that lend further strength to the argument that a national regulatory program could succeed. Only one agency and one level of government would be involved directly in the regulatory process, thus limiting bureaucratic...
inefficiencies. There would be little duplication of effort between state and federal agencies. Technical resources could be used more efficiently. This last assertion is perhaps best explained by example.

Among the many detailed provisions contained in the federal act and regulations is a requirement that a coal operator seeking a permit determine the "probable hydrologic consequences of the mining and reclamation operations, both on and off the mine site, . . . so that an assessment can be made by the regulatory authority of the probable cumulative impacts of all anticipated mining in the area upon the hydrology. . . ."94

Impacts on the hydrologic system are among the most serious coal mining externalities. Mining operations often interrupt aquifers and other hydrologic systems and can drastically alter the quantity and quality of water supplies. Water discharges from a mining operation also pose significant environmental problems. Thus one of the most important and difficult tasks facing the regulatory agency is ascertaining the hydrologic impact from a proposed mining operation. Often the task is complicated by other existing or proposed mining operations in the area and, frequently, the impacts will cut across state lines.

Obviously, all affected parties would benefit if a data base containing information from the various existing and proposed mine sites throughout the country were collected and analyzed through a single entity. More importantly, the cost of hiring the experts needed to analyze this information cannot readily be borne by each state.

Currently, hydrologic problems are addressed simplistically, if at all. Few would dispute that the "probable hydrologic consequences" and "cumulative hydrologic impact" analyses required by the Act are honored most often in the breach.95 Practical realities of the cooperative federalism scheme make that result seemingly inevitable.

While hydrologic problems probably present the most thorny technical problem for the regulatory agencies, a similar argument can be made with respect to soil resources, revegetation, the special problems of prime farmland reconstruction, and a host of other technical matters. Some of these problems are indeed limited to certain regions of the country. But there is sufficient flexibility in the regulatory system to accommodate and respond to these differences, while at the same time assuring uniformity in those areas of the country where the same kind of conditions exist.96

95 See, e.g., OSM, EVALUATION REPORT, supra note 64, at 128.
96 Proponents of state control argue that national standards frequently fail to account for the distinct differences between mining operations in various regions of the country. An oft-cited example is the federal regulatory requirement for sedimentation ponds which, it is argued, may be appropriate in the steep-sloped and heavy rainfall areas of the eastern coal fields but unnecessary in the arid West.
A system of direct federal regulation would allow for the establishment of a national data base on a wide range of technical matters. Qualified personnel would be more affordable because much duplication of effort would be eliminated. Ultimately, the success or failure of a direct federal regulatory system may depend on how well it is managed. But unlike the cooperative federalism scheme, direct federal regulation offers at least the prospect for sophisticated technical resource review.

A key problem with the direct federal regulation model lies in the danger inherent in centralization of the bureaucracy in Washington, with little sensitivity to local needs and conditions. Congress was particularly concerned about this problem and established as one of the fundamental purposes of the law that "because of the diversity in terrain, climate, biologic, chemical and other physical conditions in areas subject to mining operations, the primary governmental responsibility for developing, authorizing, issuing, and enforcing regulations for surface mining and reclamation operations subject to this Act should rest with the States."97

Conceding, however, that surface mining problems are often localized, it does not necessarily follow that regulatory responsibility is better left to the states. Indeed, particular physical conditions do not respect state boundaries, and conditions can vary widely within any given state.98 Properly managed regional offices might develop expertise in dealing with local problems, and indeed, the limited OSM field personnel have worked toward this goal.

Certainly there are other reasons for looking askance at direct federal regulation. In his article on federalism problems in national environmental policy, Professor Stewart describes three reasons: (1) diseconomies of scale; (2) impairment of self-determination; and (3) national ideals as "pyramids of sacrifice."99 The first of these is obvious. A large government may, in the interest of uniformity, impose burdens on activities in certain areas that are not justified. As has been noted,
however, problems that arise in the mining area are not so localized that they cannot be accounted for under a national regulatory scheme. Still, the size of the bureaucracy may itself be too unwieldy to operate efficiently. While some degree of inefficiency might be expected from the larger federal bureaucracy, it seems unlikely that the inefficiencies would approach those evident under the current dual regulatory system.

Second, the impairment of self-determination, the ability of the state and local governments to determine for themselves the extent to which they are willing and able to cope with environmental degradation is a real and ongoing concern under our federal system of government. Self-determination, however, must give way where Congress confronts a problem of national concern. The "tragedy of the commons" described so eloquently by Garret Hardin in his classic essay of that title, and impacts from the interstate spillover of mining activities, leave little doubt that environmental problems from strip mining operations are problems that must be addressed at the national level.

The last and most troublesome problem raised by Professor Stewart is also the most nebulous. Stewart compares the local impact of national environmental policies with the social impacts of third world development described by Peter Berger in *Pyramids of Sacrifice*. Stewart discusses Berger's condemnation of the fact that development in the third world often imposes untold sacrifices on the supposed beneficiaries of the development—the general populace. So too, national environmental policies can impose undue hardships on local communities. Is it right, Stewart asks, that the federal government should impose strict regulatory requirements on mining operations so that mines are forced to shut down and leave people without work? Should the state be permitted to sacrificed its land and water resources for what it perceives to be a greater public good? These are important philosophical and political questions. Ultimately, however, it is for the Congress to balance the competing interests and establish the minimum standards that all operators must meet. The Congress has done that under the Surface Mining Act. Perhaps the minmum standards are too strict, too lenient, or too inflexible to allow for adequate innovation. Perhaps the discretion granted the Office of Surface Min-

100 See supra note 96.
101 The federal government currently expends nearly forty million dollars per year to assist the states in administering their programs ($38.139 million in FY 84). This amount represents approximately one-half of the expenditures for state program administration, the other half coming directly from the states. In addition, OSM employs nearly 1,000 persons, most of whom are engaged primarily in the review of state performance. See Close Letter, supra note 71. Much of this duplication could be eliminated through direct federal regulation.

Even assuming substantial diseconomies in the scale of a larger federal regulatory effort, it is inconceivable that they would even approach the cost of the present duplication of effort. Moreover, the duplication under the cooperative federalism scheme does not serve the goal of better regulations; on the contrary, it undermines sound regulatory policy. See supra text accompanying notes 65-82.

102 Hardin, supra note 51.
103 Stewart, supra note 51, at 1221-22.
ing to "flesh out" the statutory standards is too great. But such adjustments can be made by the legislature as it gains experience in dealing with difficult environmental problems such as those presented by strip mining. They ought not be made under the guise of local autonomy.

One might well question whether a large federal agency necessary to regulate mining throughout the country can operate efficiently, particularly given the politicization that has characterized OSM's brief history. These, however, are management problems that might be addressed, in large part, by simply depoliticizing the office and insisting on sound, professional managers with experience in mining. They are not valid criticisms of direct federal regulation per se.

Direct federal regulation will not likely resolve the tension between the state and federal government, but it would at least depersonalize it and perhaps result in a more rational evaluation of the agency's performance. Given the fundamental flaws of the cooperative federalism system, the obvious advantages of direct regulation make it at least worth a try.

C. Rational Choices For State Decision Makers

Having considered the relative merits of the two principal choices for federal regulation of strip mining, a final question haunts the program established under the Surface Mining Act. Why would a state choose to accept responsibility for the regulation of mining with all of the limitations imposed by the Surface Mining Act, including the provision for state matching funds, when it may opt for a no cost program administered by the federal government? The answer apparently lies in the debate over states' rights, and the sense of many state agencies that they alone understand their industry well enough to provide proper regulation. No doubt, there is also a sense of taking responsibility for controlling environmental problems within their state borders.

Without arguing these points, it is apparent that the continuing federal presence maintained by the federal oversight responsibility can only serve to frustrate the states in accomplishing their own goals. States might thus do well to consider the advantages of accepting a federal regulatory program. The states need not leave the field entirely to OSM. They might, for example, establish their own limited

104 No doubt there is considerable pressure on the state from local industry as well, which has come to expect more lax enforcement from the states than it is likely to receive from the federal government. Moreover, the states are likely concerned that they will lose their fifty percent share of the Abandoned Mined Land Fund money to which they are only entitled if they have an approved regulatory program. The state may, however, obtain money directly from the Secretary to address abandoned mined lands problems, and one suspects that with the proper amount of political pressure sufficient funding for all necessary abandoned lands projects would be forthcoming. See 30 U.S.C. § 1232(g) (1982). Moreover, the Act sets forth priorities for use of the fund money, and if the Secretary refuses to allocate funds to states that have problems of a higher priority than other states in which funds are being expended, the Secretary's refusal might be subject to a legal challenge. See 30 U.S.C. § 1233 (1982).
oversight of the administration of the federal program. If properly conceived, such an oversight agency might perform a useful role while avoiding the massive diseconomies of the federal oversight program. Alternatively, an ad hoc group of interested persons might be established to regularly review the federal government’s actions. Regular meetings might be convened with OSM officials to assure that state concerns were not ignored. Perhaps the state would not have real control over its program; but it does not now have “real” control under the cooperative federalism system. Moreover, the political and practical pressures that the state would be able to bring to bear against the federal government should be sufficient to hold OSM in check. Of further benefit to the states, when problems arise with the administration of the program, as they surely will, is that it is the federal government and not the states that will bear the brunt of public criticism.

CONCLUSION

The cooperative federalism model as implemented under the federal Surface Mining Act promotes an inefficient and ineffective regulatory scheme that has resulted in increased tensions between state and federal governments and less effective enforcement of the law. Nonetheless, there is room within the model for the states to participate in a federally administered program, while still assuring sound regulation of environmental problems. The states would thus be relieved of the burden of regulation, but could retain, if they so desired, their own limited oversight. The states would do well to consider this option, before acquiescing in the thankless role established for them under the Surface Mining Act.