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Coal Law and Regulation

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Book Review

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COAL LAW AND REGULATION. Edited by Patrick C. McGinley and Donald H. Vish. New York, N.Y.: Matthew Bender & Co. 1983. Vol. 1-5. $350.00.

INTRODUCTION

Coal is arguably the most heavily regulated American industry. The federal and state statutes and regulations controlling nearly every aspect of the industry are marked by complexity, and in many instances, a lengthy enforcement history. Attorneys representing coal companies long suffered without an authoritative and comprehensive treatise devoted to coal. However, in 1983, Matthew Bender Company filled this gap with the publication of its five-volume Coal Law and Regulation (CLR). This treatise will likely become a model for later books focusing on the regulatory burdens of a particular industry.

I. ORGANIZATION AND FORMAT

Matthew Bender enlisted seasoned practitioners in each of the chosen specialities to author the treatise. Some may allege that the roster of authors is skewed toward the industry (as opposed to environmentalist, government, or union) viewpoint. But such a claim is not warranted.[1] The public interest is more than adequately represented by lengthy articles on the Surface Mining Control and Reclamation Act of 1977 by a lawyer-mine engineer currently with the United States Department of the Interior, and by a noted environmental lawyer.

The treatise covers just about every important issue facing coal lawyers, from black lung to the Clean Air Act to abandoned mine land reclamation. The only notable omission is Interstate Commerce Commission regulation of coal rates, or lack thereof, after the Staggers Rail Act of 1980.[2] A publisher's

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[1] Not all of the authors are identified by law firm or institutional background.

[2] Pub. L. No. 96-448, 94 Stat. 1895 (1980) (codified at 49 U.S.C. § 10101 and scattered sections of Titles 11, 45 and 49 of the United States Code (Supp. V 1981)). The most vivid illustration of the deregulation impact of the Staggers Act on rail rates is the ICC June 9, 1983 decision to exempt export coal from the provisions of the Interstate Commerce Act applicable to rail carriers, Ex Parte 346 (Sub. No. 7), *on appeal sub nom.* Coal Exporters Assoc. of the United States v. ICC No. 83-1629 and consolidated case No. 83-1633 (D.C. Cir. filed Sept. 19, 1983); *see also* Western Coal

introduction to explain the selection of topics would have been welcome generally, and it could also justify omission of such an important issue as transportation.

This treatise is extremely well captioned and indexed, and most of the 104 chapters have convenient divisions of citations by state. The nine-person publisher's staff did heroic work, as did editors Patrick C. McGinley and Donald H. Vish.

The only other organizational comment is to note that the chapters in the five volumes were obviously written at different times and with different deadlines. Some sections are simply more up-to-date than others; a small flaw as treatises go because many tomes are markedly obsolete upon receipt by the attorney market. The single deficiency in the CLR rising to that level is the absence of treatment of the important December 29, 1981 amendments to the Black Lung Benefits Act of 1981.[3] Chapter 102 may have been intended to cover these amendments, but that chapter was "reserved" by the publisher and has not yet been provided to purchasers. Its absence detracts from the utility of the treatise's black lung sections.

II. VOLUME I: PRACTICE UNDER THE FEDERAL MINE SAFETY AND HEALTH ACT

This regulatory area dominates coal lawyers' practice as much as any and provides an excellent starting point for the CLR. Seven attorneys with extensive mine safety litigation experience from a prominent Washington, D.C., firm, Crowell and Moring, were enlisted as drafters, and they produced a sterling piece.

The mine safety chapters in Volume I are especially strong on clarifying several important areas of practice before the Federal Mine Safety and Health Review Commission: the distinction among a violation, citation, order and penalty; the Review Commission administrative law judge and appellate docketing system; the enforceability of United States Department of Labor interpretive bulletins; and petitions for modification of existing regulations. The description of the inner workings of the Review Commission, as well as the Solicitor's Office and Mine Safety and Health Administration of the United States Department of Labor are especially useful. Similar depictions of other government regulators would have improved other parts of the treatise as well. Also helpful is a correlation table between the sections of the Federal Coal Mine Health and Safety Act of 1969 and the recodification of that statute in the Federal Mine Safety and Health Amendments Act of 1977.

Traffic League v. United States, 719 F.2d 772 (5th Cir. 1983) (upholding ICC rule that broadly defines circumstances when rail rates will not be subject to regulation).

[3] Pub L. No. 97-119, 95 Stat. 1635 (1981).

Volume I also has a full discussion of a dramatically expanding aspect of mine safety law: discrimination[4] and miners' rights to accompany inspectors during inspection[5] to report violations, to testify, and to receive medical benefits. The chapter on civil and criminal[6] liability is also informative, particularly the citations to cases involving false entries to respirable dust sample records.

III. VOLUME 2: ENVIRONMENTAL REGULATION AND SURFACE MINING CONTROL AND REGULATION

This volume was authored mainly by Dean K. Hunt, a lawyer and mining engineer who is a ranking official with the Office of Surface Mining Reclamation and Enforcement (OSM) of the United States Department of the Interior.

Hunt traces the tortured history of the Surface Mining Control and Reclamation Act of 1977[7] (SMCRA) through two vetos by President Gerald Ford, the June 1975 failure of the 94th Congress to override the veto, the eventual passage of the bill by the 95th Congress in July 1977, and approval by President Jimmy Carter on August 3, 1977.

Chapter 41 provides a detailed and well-written overview of OSM Policy and Administration, and Chapter 42 on permitting is especially incisive. Hunt makes the necessary explanations about permitting private lands amidst superceding state programs, as well as permitting private lands under state programs followed by superceding federal programs. However, the permitting chapter could have been enhanced by a full treatment of the early stages of the first case involving administrative review of the issuance of a surface mining permit for federal lands, NRDC v. OSM.[8] This case combined nearly all threshold permitting issues, as it involved concurrent permit proceedings by OSM and by the State of Colorado pursuant to that state's approved state program for federal lands.[9] Challengers to the state approval of the mine plan

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[4] *See* Southern Ohio Coal Co. v. FMSHRC, 716 F.2d 1105 (6th Cir. 1983) (refusal to work under conditions which a miner in good faith believes are hazardous not independently protected by antidiscrimination provisions of 1969 Federal Coal Mine Health and Safety Act, prior to 1977 amendments).

[5] In 1982, the United States Court of Appeals for the District of Columbia upheld miners' representatives' right to compensation for time spent accompanying federal inspectors on "spot" inspections, as well as on regularly scheduled inspections. United Mine Workers v. FMSHRC, 671 F.2d 615 (1982), *cert. denied*, 103 S. Ct. 239 (1982).

[6] A 1980 fatal explosion at Westmoreland Coal Company's Ferrell No. 17 Mine in Boone County, West Virginia eventually led, in 1983, to one of the first convictions of a mine superintendant for criminal violations of the FMSHA. *See* United States v. Jones, No. 82-20099 (S.D. W. Va. Dec. 21, 1982), *appeal filed*, No. 83-5181L (4th Cir. June 23, 1983).

[7] Pub. L. 95-87, 91 Stat. 445 (1977).

[8] Interior Board of Surface Mining Appeals Docket No. 81-83 (recommended Decision of Judge Torbett dated June 24, 1983).

[9] SMCRA § 523, 30 U.S.C. § 1273 (Supp. V 1981).

requested additional, independent OSM findings on the application after the State of Colorado acted. The petitioners also asserted that the OSM findings, which had been made concurrently with Colorado's review of the mine plan, were factually incorrect and legally invalid. The challengers, however, were not successful. Administrative Law Judge David Torbett concluded in his July 1983 recommended decision that the record supported all actions of OSM and that the Atlantic Richfield Company permit met all SMRCA regulatory requirements.[10]

Author Hunt also ably summarizes the massive OSM regulations. However, the value of this work is diminished somewhat because the OSM rules were largely rewritten in 1983. (*See* Appendix to Volume 2). We would hope that Mr. Hunt is given the opportunity to up-date his most useful chapter.

IV. VOLUME 3: TAXATION

Volume 3 is directed to the taxation of coal transactions. It was written by John C. Coggin, III, with one section authored by Martin J. McMahon, Jr.

Because concepts of the coal property unit and economic interest in the unit underlie definitions employed by many Internal Revenue Code provisions and Treasury Regulations, they are explained in detail. There is a detailed discussion of the definitions which affect the tax consequences of depletion allowances, certain costs, abandonment losses, gains and losses on sale, exploration expenses, production payments, aggregation, and other transactions. Drawing upon legislative history and the development of the rules, the authors succinctly explain the current law and regulations.

Mr. McMahon contributed a chapter thoroughly treating costs and percentage depletion including the parties entitled to such allowances, the computation of cost depletion allowances, and treatment of the percentage allowances. He notes the IRS ruling that "gross income from the property" includes the excise tax imposed under the Black Lung Benefits Revenue Act of 1977. The rationale of this ruling is that the excise tax liability is the liability of the coal mine operator and may not be assessed on the purchaser of the coal. As the tax is the liability of the producer, its payment does not reduce gross income from the property.

Mr. Coggin devotes two chapters to expenditures for exploration and for development, explaining the tax treatment of those expenses, the treatment

[10] The United States Department of the Interior, Office of Hearings and Appeals, Board of Land Appeals will review objections to Judge Torbett's recommended decision and then decide whether to affirm or modify. By regulation, the Interior Board of Surface Mining and Reclamation Appeals was abolished and its functions were assigned to the Interior Board of Land Appeals (IBLA). 48 Fed. Reg. 22,370 (1983).

of gains after disposition of the coal property, and the allocation of expenses among different properties. He also discusses the option to deduct currently, or to defer, allowable deductions for development expenses.

Mr. Coggin additionally explores the requirements to qualify for taxation as a capital gain when coal deposits are sold, and other special tax benefits arising from disposition of coal properties. He also discusses the federal tax treatment accorded advance royalties, bonuses, and delay rentals.

V. VOLUME 4: ACQUISITION AND DEVELOPMENT

This volume addresses the ownership and conveyance of interests in coal. The chapters on the separate estates associated with private coal leases are illuminating, especially the discussion of the "Pennsylvania" rule that a lease until exhaustion of mineral resources is legally a sale of a fee simple estate.[11] The reader's only desire is perhaps to have a broader perspective that includes federal coal (Western) split estate problems. The chapter on private leasing transactions is also commendable because of the form-book language for the difficult terms it provides—complete with explanations.

Chapter 82 is entitled Federal Coal Leasing. This is a very controversial issue, putting at odds the Congress, the Reagan Administration, environmentalists, the coal industry, and in 1983, the railroads. Authors Brian E. McGee and Jack M. Merritts provide a lucid description of the convoluted history of the federal coal leasing program, tracing the program through moratoria in 1971 and 1973, the 1976 amendments,[12] and the enactment of SMCRA. Only a little fuller treatment of preference right lease applications, the "Section 3"[13] problem of the 1976 amendments, and readjustment of "pre-1976" federal coal leases, might have been desirable.

Section 3 of the Federal Coal Leasing Amendments Act of 1976 states that the Secretary of the Interior shall not issue a lease or leases under the Mineral Lands Leasing Act to any person, association, corporation, or any subsidiary, affiliate, or person controlled by or under common control with

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[11] *See* 4 COAL LAW AND REGULATION § 80.03[2], note 14 (McGinley & Vish eds. 1983).

[12] Federal Coal Leasing Amendments Act of 1976, 30 U.S.C. §§ 181-209 (1976 & Supp. IV 1980). Two major pieces of litigation affecting the federal coal leasing program are pending as of this writing. Northern Cheyenne Tribe v. Watt, No. 82-116 BLG (D. Mont. filed June 21, 1982) consolidated with National Wildlife Federation v. Burford, No. 82-117 (D. Mont. filed June 21, 1982) (legality of certain aspects of the 1982 Powder River Region coal lease sale) and Natural Resources Defense Council v. Burford, No. 82-2763 (D.D.C. filed Sept. 28, 1982) (legality of August 30, 1982 federal coal leasing regulations). After the Fort Union lease sale in September 1983, the National Wildlife Fed'n and other environmental plaintiffs obtained a preliminary injunction against issuance of leases to the successful bidders. *See* National Wildlife Fed'n v. Watt, 571 F. Supp. 1145 (D.D.C. 1983).

[13] Section 3 of the Federal Coal Leasing Amendments Act of 1976, 90 Stat. 1083 (1976) (codified in 30 U.S.C. § 201(a)(2)(A) (1976)).

such person, association, or corporation, where any such entity holds a lease or leases issued by the United States to coal deposits and has held such lease or leases for a period of ten years, when such entity is not producing coal from the lease in commercial quantities.[14] (In computing the ten-year period, the time prior to the August 4, 1976, enactment date of the 1976 amendments is not counted).

The "Section 3" prohibition on gaining additional federal mineral leases had been a major source of concern to leaseholders, and the concern deepened in March, 1980, when the Associate Solicitor of the Interior for Onshore Minerals issued an opinion interpreting the Section 3 prohibition to mean that a non-producing lessee was disqualified from acquiring *any* leaseable mineral, not just coal, under the MLLA. Energy conglomerates with coal subsidiaries holding non-producing coal leases faced the prospect of relinquishing such leases so as not to endanger their future bidding on non-coal federal minerals. Legislation to delete or soften the Section 3 prohibition was stalled in the first session of the 98th Congress.[15]

Another recurring problem for federal coal leases issued before the enactment of the 1976 Amendments is the imposition of stiffer lease terms upon readjustment of the lease at the end of the original 20 year term. If the readjustment occurs after the August 4, 1976, enactment of the FCLAA, the Department of the Interior has replaced the original lease terms with more onerous terms derived from the 1976 Amendments, from the SMCRA of 1977, and sometimes from other environmental statutes enacted since the original lease issuance.[16] By far the most significant of the new terms is the increased royalties under Section 6 of the 1976 Amendments: not less than 12 1/2% of the value of the coal for surface-mined coal and (as set by 43 C.F.R. § 3473.3-2(a)(3) (1982)) and not less than 8% of the value of the coal for underground-mined coal. Given that the orginal (pre-1976 lease terms) usually had a $.05 per ton (surface) or $.15 per ton (underground) royalty, imposition of the 1976 Amendments' royalties at adjustment is an extremely expensive revision.[17]

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[14] Exactly what constitutes "commercial quantities" for purposes of § 3 has never been clear. The term is not necessarily equivalent to the one percent of recoverable coal reserves or recoverable logical mining unit reserves defined for 30 U.S.C. § 207 "diligence" purposes in 47 Fed. Reg. 33,180 (1982) (to be codified at 43 C.F.R. § 3480.0-5(a)(7)) (on Sept. 26, 1983, 30 C.F.R. Part 211 was redesignated as 43 C.F.R. Part 3480, 48 Fed. Reg. 41,589).

[15] S. 1634, 98th Cong., 1st Sess. (1983) and H.R. 1530, 98th Cong., 1st Sess. (1983).

[16] *See e.g.*, Federal Water Pollution Control Act, 33 U.S.C. §§ 1250-1376 (Supp. V 1981) and Clean Air Act, 42 U.S.C. §§ 7401-7642 (Supp. V 1981).

[17] In Rosebud Coal Sales Co. v. Andrus, 667 F.2d 949 (10th Cir. 1982), the Tenth Circuit held that the government's attempt to readjust a federal coal lease 2 1/2 years after the expiration of the second 20 year term of the lease was tardy, outside the statutory authority of the Department of the Interior and contrary to the terms of the lease. The original pre-1976 lease terms were allowed to stand until the next readjustment. The *Rosebud* decision, 667 F.2d at 952, states that:

Many lessees have resisted imposition of new terms on readjustment, but the IBLA has upheld the DOI positions and affirmed the increase in royalty and other new terms.[18] Two cases have been appealed by unsuccessful lessees to separate United States district courts.[19] The impact of the FCLAA of 1976 on pre-August 4, 1976 leases will remain one of the most controversial dimensions of public land law.

The treatise has a brief discussion of § 2(c) of the Mineral Lands Leasing Act of 1920 (MLLA). Some additional comments on recent developments with respect to this statute are appropriate.

Section 2(c) of the Mineral Lands Leasing Act of 1920 states that no company or corporation operating a common-carrier railroad shall be given or hold a permit or lease under the MLLA for any coal deposits except for its own use for railroad purposes. There has never been a judicial construction of Section 2(c).

On December 6, 1982, Solicitor of the Interior William H. Coldiron issued an Opinion clarifying earlier Interior policy and stating that the Section 2(c) prohibition on common-carrier railroads' receiving federal coal leases applied prospectively to affiliates of common-carrier railroads.

Despite the Coldiron opinion on affiliates, the Secretary of the Interior in 1983 utilized the land exchange provisions of Section 206(a) of the Federal Land Policy and Management Act[20] to make fee conveyances of large quantities of federal coal in Wyoming and Montana to affiliates of major Western railroads. The ensuing litigation over these exchanges may lead to a pivotal case in the historic clash between the coal and railroad industries.[21]

Another 1983 development with respect to the federal coal leasing program also bears mentioning. Acting on perceived abuses of federal coal leasing bidding sales in the West, the Congress in July 1983 directed the Secretary of the Interior to appoint a Commission to "review the Depart-

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"There is no suggestion whatever that the amendment [the 1976 amendment setting the 12.5% royalty in § 7 of the MLLA] was to be retroactive and the contrary is indicated." Most readjustments of federal leases since the *Rosebud* decision have been initiated before the expiration of the preceeding term and have not presented an untimeliness issue.

[18] *See* Gulf Oil Corp. (Pittsburg & Midway Coal Mining Co.), 73 IBLA 328 (1983) (and cases cited therein). The IBLA interpretation relies heavily on a September 17, 1981, opinion of the Solicitor of the Interior (M-36939), which states that leases issued prior to August 4, 1976, and readjusted after that date must be conformed on readjustment to the Federal Coal Leasing Amendments Act of 1976. 30 U.S.C. §§ 189-209 (1976 & Supp. IV 1980).

[19] Coastal States Energy Co. v. Watt, No. 83-0730 (C.D. Utah filed June 1, 1983); FMC v. Watt, No. C83-347, (D. Wyo. filed Aug. 29, 1983).

[20] 43 U.S.C. § 1716(a) (Supp. V 1981).

[21] National Coal Ass'n v. Watt, No. 2985 (D.D.C. filed Oct. 7, 1983); National Coal Ass'n v. Watt, No. 3320 (D.D.C. filed Nov. 7, 1983). Legislation to repeal § 2(c) of the MLLA was introduced in the 97th Congress, S. 1542.

ment's coal leasing procedures to ensure receipt of fair market value. . . ." in competitive lease sales.[22] The Commission consists of five individuals, headed by David F. Linowes, who served earlier on the Commission on Fiscal Accountability of the Nation's Energy Resources. The Commission conducted public hearings on a wide range of coal leasing issues and made several recommendations to Congress on improving the Interior coal leasing program.

In additional appropriations legislation in September 1983, the Congress prohibited expenditures for the sale or lease of coal on public lands, until the Commission on Fair Market Value has submitted its report to the Congress and ninety days have subsequently elapsed.[23] Exempted from moratorium are emergency leasing as defined in 43 C.F.R. § 3425.1-4, lease modifications as defined in 43 C.F.R. § 3432, and lease exchanges as defined in 43 C.F.R. § 3435 or as specified in Pub. L. No. 96-401.[24]

VI. VOLUME 5: EMPLOYEE CLAIMS AND CONTINGENCIES

This volume focuses on the Black Lung Benefits Act, employment discrimination, and labor management disputes.

Henry L. Stephens, Jr., has provided two comprehensive chapters, 100 and 101, on the Federal Black Lung Benefits Act. Stephens thoroughly dissects the legislative history of the 1969, 1972, and 1978 black lung statutes, though, as noted, the absence of a chapter on the 1981 Amendments is a shortcoming in the treatise. Stephens possibly places too great an emphasis on the 1976 legislation, which did not pass Congress, but which did embody many of the changes that emerged in the February and March 1978 Amendments adopted by the 2d Session of the 95th Congress. Instead, a full discussion of the aftermath of the 1978 legislation, especially the "transfer" cases and resulting litigation between the coal operators and insurance industry, might have been desirable.

The Stephens Chapter 101 on the judicial construction of black lung presumptions is excellent. However, the treatise does not sufficiently explain that the black lung Part B case law emerged from a nonadversarial hearing system and should not be readily cited under Part C, the current litigation scheme. The Part B, Social Security Administration black lung cases usually involved the claimant, with or without counsel, and an administrative law judge; the agency that had denied the claim was not represented by govern-

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[22] The Commission on Fair Market Value Policy for Federal Coal Leasing was authorized in appropriations legislation. Supplemental Appropriations Act, 1983, Pub. L. No. 98-63, 97 Stat. 301, 328-29 (1983). A Notification of Commission Establishment was announced in 48 Fed. Reg. 37537 (August 18, 1983).

[23] Pub. L. No. 98-146, 97 Stat. 937 (1983).

[24] *Id.*

ment counsel, and the Social Security Administration rarely offered medical experts to testify against the claimant. Thus, the evidence that formed the records for the hundreds of Part B Court of Appeals decisions lacked both real cross-examination of the claimant and the probative medical reports an employer or insurance carrier normally tenders in litigation. Moreover, the fact that only denied claimants took the Social Security Administration to court (the government would not appeal its own approval of a claim) stretched the statute in only one direction—toward more entitlement.

Omitted in the black lung chapters, though perhaps assigned to the reserved chapter 102, is a discussion of the United States Department of Labor "interim presumption," mandated by the March 1978 Amendments.[25] It was largely this set of presumptions, in conjunction with the amendment limiting use of X-ray re-readings in Trust Fund claims,[26] that placed thousands of new claims on the rolls of the Black Lung Disability Trust Fund. This burden, in turn, necessitated restrictive amendments and an increase in the excise tax on coal (which finances the Trust Fund) in the December 1981 black lung legislation.

The remainder of Volume 5 consists of strong articles by Gordon W. Schmidt (Chapter 103, Employment Discrimination) and Anthony J. Polito (Chapter 104, Labor-Management Disputes; Strikes). The only comment the reviewer has is that the labor segment might have been strengthened by a description of coal contract negotiating in the Eastern and Western United States, as well as some analysis of the lead case on employer withdrawal from a bargaining group when a negotiation impasse is reached, *Charles D. Bonnano Linen Service, Inc. v. NLRB.*[27]

CONCLUSION

The Coal Law and Regulation treatise sets a benchmark for similar treatises addressing regulation of a particular industry. It is a high mark. The talent of the authors is manifested in the thoroughness and clarity of each chapter. No attorney who deems himself a "coal lawyer" should practice without these volumes.

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[25] *See* Solomons, *A Critical Analysis of the Legislative History Surrounding the Black Lung Interim Presumption and A Survey of Its Unresolved Issues*, 83 W. VA. L. REV. 869 (1981).

[26] 30 U.S.C. § 923(b) (Supp. IV 1980). For a summary of the entire black lung program through early 1983, see Lopatto, *The Federal Black Lung Program: A 1983 Primer*, 85 W. VA. L. REV. 677 (1983).

[27] NLRB v. Charles D. Bonanno Linen Service, Inc., 454 U.S. 404 (1982). The Supreme Court held that a bargaining impasse did not justify petitioner's unilateral withdrawal from a multi-employer bargaining unit and that the employer could be ordered to sign and implement the contract agreed upon after it had withdrawn.