SURFACE MINING—PART II

HEARING

BEFORE THE

SUBCOMMITTEE ON ENERGY AND MINERAL RESOURCES

OF THE

COMMITTEE ON RESOURCES HOUSE OF REPRESENTATIVES

ONE HUNDRED FOURTH CONGRESS

FIRST SESSION

ON

H.R. 2372

To amend the Surface Mining Control and Reclamation Act of 1977 to minimize duplication in regulatory programs and to give States exclusive responsibility under approved States program for permitting and enforcement of the provisions of that Act with respect to surface coal mining and reclamation operations, and for other purposes.

NOVEMBER 9, 1995—WASHINGTON, DC

Serial No. 104–53

Printed for the use of the Committee on Resources

U.S. GOVERNMENT PRINTING OFFICE

23–172 CC WASHINGTON : 1996

For sale by the U.S. Government Printing Office
Superintendent of Documents, Congressional Sales Office, Washington, DC 20402
ISBN 0-16-052476-8

COMMITTEE ON RESOURCES

DON YOUNG, Alaska, *Chairman*

W.J. (BILLY) TAUZIN, Louisiana
JAMES V. HANSEN, Utah
JIM SAXTON, New Jersey
ELTON GALLEGLY, California
JOHN J. DUNCAN, JR., Tennessee
JOEL HEFLEY, Colorado
JOHN T. DOOLITTLE, California
WAYNE ALLARD, Colorado
WAYNE T. GILCHREST, Maryland
KEN CALVERT, California
RICHARD W. POMBO, California
PETER G. TORKILDSEN, Massachusetts
J.D. HAYWORTH, Arizona
FRANK A. CREMEANS, Ohio
BARBARA CUBIN, Wyoming
WES COOLEY, Oregon
HELEN CHENOWETH, Idaho
LINDA SMITH, Washington
GEORGE P. RADANOVICH, California
WALTER B. JONES, JR., North Carolina
WILLIAM M. (MAC) THORNBERRY, Texas
RICHARD (DOC) HASTINGS, Washington
JACK METCALF, Washington
JAMES B. LONGLEY, JR., Maine
JOHN B. SHADEGG, Arizona
JOHN E. ENSIGN, Nevada

GEORGE MILLER, California
EDWARD J. MARKEY, Massachusetts
NICK J. RAHALL II, West Virginia
BRUCE F. VENTO, Minnesota
DALE E. KILDEE, Michigan
PAT WILLIAMS, Montana
SAM GEJDENSON, Connecticut
BILL RICHARDSON, New Mexico
PETER A. DEFAZIO, Oregon
ENI F.H. FALEOMAVAEGA, American Samoa
TIM JOHNSON, South Dakota
NEIL ABERCROMBIE, Hawaii
GERRY E. STUDDS, Massachusetts
SOLOMON P. ORTIZ, Texas
OWEN B. PICKETT, Virginia
FRANK PALLONE, JR., New Jersey
CALVIN M. DOOLEY, California
CARLOS A. ROMERO-BARCELO, Puerto Rico
MAURICE D. HINCHEY, New York
ROBERT A. UNDERWOOD, Guam
SAM FARR, California
PATRICK J. KENNEDY, Rhode Island

DANIEL VAL KISH, *Chief of Staff*
DAVID DYE, *Chief Counsel*
CHRISTINE KENNEDY, *Chief Clerk/Administrator*
JOHN LAWRENCE, *Democratic Staff Director*

SUBCOMMITTEE ON ENERGY AND MINERAL RESOURCES

KEN CALVERT, California, *Chairman*

W.J. (BILLY) TAUZIN, Louisiana
JOHN J. DUNCAN, JR., Tennessee
JOEL HEFLEY, Colorado
J.D. HAYWORTH, Arizona
FRANK A. CREMEANS, Ohio
BARBARA CUBIN, Wyoming
HELEN CHENOWETH, Idaho
WILLIAM M. (MAC) THORNBERRY, Texas

NEIL ABERCROMBIE, Hawaii
NICK J. RAHALL II, West Virginia
BILL RICHARDSON, New Mexico
SOLOMON P. ORTIZ, Texas
CALVIN M. DOOLEY, California
_____
_____

WILLIAM CONDIT, *Staff Director*
SHARLA BICKLEY, *Professional Staff*
LIZ BRIMBAUM, *Democratic Counsel*

CONTENTS

SURFACE MINING—PART II

THURSDAY, NOVEMBER 9, 1995

HOUSE OF REPRESENTATIVES, SUBCOMMITTEE ON ENERGY AND MINERAL RESOURCES, COMMITTEE ON RESOURCES,
Washington, DC.

The subcommittee met, pursuant to call, at 9:52, in room 1324, Longworth House Office Building, Hon. Ken Calvert (chairman of the subcommittee) presiding.

STATEMENT OF HON. KEN CALVERT, A U.S. REPRESENTATIVE FROM CALIFORNIA AND SUBCOMMITTEE CHAIRMAN

Mr. CALVERT. The subcommittee on Energy and Mineral Resources will come to order.

The subcommittee meets today to hear testimony on H.R. 2372, a bill introduced by our colleague on the subcommittee from Wyoming, Barbara Cubin, and from Ohio, Frank Cremeans.

H.R. 2372 would amend the Surface Mining Control and Reclamation Act of 1977 to minimize duplication in regulatory programs, and to give States exclusive responsibility under approved State programs for permitting enforcement of the provisions of that act, with respect to surface coal mining operations and for other purposes.

The gentleman from West Virginia, Nick Rahall, was a freshman member of the committee when SMCRA was enacted in August 1977. I understand that Mr. Rahall was a member of the conference committee which worked out its terms with the other body before sending the bill to President Carter for signature.

Coming from a State with a long coal mining heritage, but not a lot of hard rock mining though, I don't think, in West Virginia, I appreciate the firsthand viewpoint of our colleague from across the aisle to bring on the issue of protecting the coal field environment and its citizens. But as we learned at our oversight hearing on the issue last June, the Congress clearly intended to provide State primacy under SMCRA, with a limited Federal oversight role, at least after State programs got up and running to the satisfaction of the feds.

I applaud the sponsors of this bill for following up on the oversight hearings by introducing this legislation. I am a co-sponsor myself, not because California has coal mining, but because the concept of State enforcement of this Federal law is good government, pure and simple.

Ladies and gentlemen, empowerment of State governments, which by definition are more responsible for local needs, is what the agenda of the 104th Congress is all about. Since the hearing

in June, the appropriation bill for the Interior Department and the Office of Surface Mining has sloughed through the other body and through two conferences with the Senate as well. Yes, there are a lot of controversial items remaining in the spending bill, but it appears everyone, including the administration, agrees that funding of Federal inspectors in States with primacy programs was a logical place to cut scarce dollars.

I see this bill as a good legislative start to back up the reduced funding OSM can expect to receive not just for this year, but for the foreseeable future as well. But I want to emphasize again, we are nct talking about rolling back the environmental standards of the act.

I strongly doubt that any of the co-sponsors or Mrs. Cubin, for that matter, would sign on to this effort if it were case, and I know that we do have a Democratic co-sponsor from West Virginia. Unfortunately, it is not our subcommittee colleague, Nick Rahall, but rather his colleague from Wheeling, Alan Mollohan.

I hope to persuade Mr. Rahall as to the State's ability to inspect coal operations and enforce the law within its borders, and he will join us to empower Governor Caperton's Department of Environmental Regulation to do just that.

Before I turn this over to the other members of the subcommittee for any opening statements that they may have, let me first welcome our witnesses and thank them for traveling here to present their views. I thank Illinois and Utah for sending witnesses to today's hearing to tell the story of State primacy, and of course, Bob Uram of OSM for giving the administration's viewpoint on this bill.

Welcome to our witnesses from the coal fields of West Virginia and Kentucky, as well, and to our coal industry folks, too.

With that, the gentleman from Hawaii.

STATEMENT OF HON. NEIL ABERCROMBIE, A U.S. REPRESENTATIVE FROM HAWAII

Mr. ABERCROMBIE. Thank you, Mr. Chairman. Today, we are meeting to hear testimony on legislation introduced by our colleague, Representative Cubin from Wyoming.

This bill, H.R. 2372, would amend the Surface Mining Control and Reclamation Act which you have heard, and which you have also heard is obviously near and dear to the heart of another colleague, Representative Rahall from West Virginia. Two representatives, both from major coal producing States with significantly different perspectives on the bill before us.

I, on the other hand, am from Hawaii, which is not a major coal-producing State. This, I think, Mr. Chairman, represents one of the positive aspects of our form of government. I, have no axe to grind in this matter. Quite the opposite, speaking from a consumer point of view, speaking as someone who has responsibility in this area, I can tell you that coming from a State which is utterly dependent upon fossil fuel for its existence, that we are very, very interested, not just as a State, I can assure you, but as an individual representing the minority party in this matter. I am very, very interested in what the Surface Mining Control and Reclamation Act states and what it requires.

As the ranking Democrat on the subcommittee, I am very concerned about a bill which, in my estimation, would profoundly change the way the Federal Government, in conjunction with the States, regulates coal mining. As I understand the legislation before us, it would effectively eliminate the backstop protection the Federal Government provides not only State regulators, but more importantly provides coal field citizens, and I might add, all the citizens of the United States by extension. This and the health and well-being of the people who are living in and near the coal fields is my primary concern today.

Mr. Chairman, I believe that we have to take very seriously the questions of whether or not by default, not by design—I don't put any conspiratorial element into the presentation of these changes. The question is, and it is a serious question, would we, by default, be rolling back environmental standards on perhaps an interstate basis, that is to say, something which is regulated to one degree or another and in one manner or another in one State, end up having consequences and implications for other States simply as a result of perhaps waste, toxic materials, moving from one area to another. These kinds of questions have to be taken into consideration.

If the States don't have the Federal Government backing them up, if there is not an even playing field for all coal-producing States and coal producers, and by extension, consumers, what will be the replacement? To whom or what will the citizens in Wyoming or West Virginia or elsewhere turn when blasting occurs in the middle of the night, or who protects the ordinary taxpayer when the State does not act as it should or someone believes that the State is not acting as it should to ensure that the mining is conducted in a safe manner, safe in all respects, from occupational safety to environmental questions, if we remove the hammer of potential Federal intervention, in the absence of responsible State action?

I don't preclude the idea that action by the State would be responsible, but that is how lawsuits get started. Somebody feels that responsible action is not being taken. What happens to a person with a legitimate grievance that cannot find redress with the coal company or the State, etc., and why should we want to go down that road in the first place, when, with a minimum of expenditure by Federal inspectors, we can eliminate the question of whether or not there needs to be suits or concerns on the part of the citizenry in the first place? In summary, Mr. Chairman, will we be eliminating necessary checks and balances?

Mrs. Cubin's bill, in my estimation, very clearly sets out what the Federal Government should not, in her estimation, do, but what happens if we change the rules? I hope that she feels that is a fair assessment.

I do think that her bill is clear and precise in what it states with respect to Federal Government responsibilities, obligations. Our question, or my question then is, I repeat, what if we change the rules? What will be the practical effect of returning, if you will, the regulation of coal mining to the States virtually exclusively? Is this a States' rights issue as such, or are there more important issues in terms of the public health and safety that would be imperiled again, perhaps by default, in this legislation?

In closing then, Mr. Chairman, I note that several of the States which have contacted us on this matter are divided in their support or lack thereof in the bill. I note the State of Kentucky does not endorse the bill. I mention that in passing, so I am not certain that even if, again, the intentions, good intentions of the bill are noted for our conversation today, and I, of course, always do that with respect to the legislative desires of any member, already we see that there may be differences of opinion among the States as to what is the proper position to take.

Therefore, I am hopeful that the Federal Government would be seen in this instance as a source of first resort rather than last resort as a way of overcoming the possibility of environmental degradation and/or making it more difficult for the citizenry, the consumer, to be able to seek redress for what they believe may be a grievance, intended or otherwise, which may come as a result of the passage of this legislation.

Thank you, Mr. Chairman.

Mr. CALVERT. Thank you. Mr. Cremeans.

STATEMENT OF HON. FRANK CREMEANS, A U.S. REPRESENTATIVE FROM OHIO

Mr. CREMEANS. Thank you, Mr. Chairman. Today is the beginning of what I feel will be a positive discussion of the future of the Surface Mining Control and Reclamation Act.

H.R. 2372, the Surface Mining Control and Reclamation Amendments Act of 1995, introduced by Representative Cubin and myself, is long overdue. States and specifically State regulatory agencies have complained for years that the Federal Office of Surface Mining has consistently overstepped its bounds and placed undue burdens on the State agencies.

The Office of Surface Mining is yet another example of a Federal agency that was created with the best of intentions, but has simply gone awry over the years. H.R. 2372 has been offered in this committee today to bring back focus to the Office of Surface Mining and to mining reclamation in general.

There have been numerous complaints from private industry and from State agencies that OSM has truly overstepped its authority. In some cases, OSM has given approval to State programs and then gone back into the case and second-guessed the State agency. This process is counterproductive and duplication of work, and to me, just plain unnecessary.

Director Uram, in the Office of Surface Mining 1994 annual report states that OSM's secondary priority is to "improve our relationship with the States by building on the concept of shared commitment and focusing on-the-ground results."

H.R. 2372 will help the Director in his quest for on-the-ground results. We need to stop spending time deciding who gets to decide how to get a reclamation project done and truly focus on its results.

Those States that have approved regulatory programs should have final say on reclamation questions. They should not have to constantly concern themselves with the Federal Government stepping in at the last minute and then second-guessing their decision.

My home State of Ohio is a perfect example of a State with a program that works. Ohio did not have a single notice of violation

in 1994, according to the OSM annual report. Ohio's reclamation program works. As a matter of fact, it has been a tremendous success.

There is just no need for the Federal Government to interfere.

H.R. 2372 will help clarify the role of OSM as it relates to State governments and their regulatory programs. I understand that there are a number of issues that still need to be addressed, especially with regard to historic preservation. I look forward to addressing these issues during this process.

Mr. Chairman, H.R. 2372 is responsible legislation that moves OSM into the 90's. I thank you for the opportunity to offer it today.

Mr. CALVERT. Thank you, Mr. Cremeans. Mr. Rahall.

STATEMENT OF HON. NICK JOE RAHALL, II, A U.S. REPRESENTATIVE FROM WEST VIRGINIA

Mr. RAHALL. Thank you, Mr. Chairman. Mr. Chairman, members of the subcommittee, on the wall in the back of our room sits the portrait of a former chairman of our committee, Mo Udall. He was chairman when I came to this body in 1977, and he had been through many a struggle trying to enact a fair and equitable surface mining control law across our land. He was finally successful in my first year on this committee. He is truly the father of the Surface Mining Act, so if you see me during my comments or during the course of this morning's proceedings, Mr. Chairman, look back there and wink, it is because I am sure he will be winking at me a few times during the course of this morning.

When I came to this body in 1977 in that congress, whatever number it was, fresh in my memory was the events of approximately four years ago in my home State, right in the heart of the district I have the honor of representing, because it was on February 26, 1972, at 8:00 in the morning that a coal waste dam failed on the middle fork of Buffalo Creek in Logan County, West Virginia. Over 175,000,000 gallons of water and coal waste raced through a 17-mile valley. In its wake, 125 people were dead; 523 were injured; and 4,000 were left homeless.

The coal company called it an act of God. Investigations found that actually God had nothing to do with it. The dam was built with little in the way of sound engineering practices. This catastrophe was the last act in a long and cruel saga of so-called State regulation of the surface coal mining industry, a saga that left a legacy of tortured landscapes, acidified streams, high walls, refuse piles, and open mine shafts throughout the coal-producing regions of our Nation.

While the lives of those 125 individuals could not be reclaimed, the ultimate sacrifice they made raised the level of public attention to the plight of coal field citizens adversely affected by certain coal mining practices from a local level to a truly national level.

So it became in 1977 a major factor in the enactment of the Surface Mining Control and Reclamation Act, SMCRA. Today, safeguarding the people who reside in coal field communities is the responsibility of the Office of Surface Mining. This Federal agency is their second line of defense, their safety net, if you will, against the occasional failure of State enforcement authorities to fully implement SMCRA.

This failure does occur. There can be no doubt in that fact. This failure on the State level does occur, and at times, it occurs with an astonishing effect. Even so, as we consider H.R. 2372, I am pleased to note that the less rabid State regulatory authorities understand this as well.

As our ranking member has noted and as the Chairman maybe noted, I can't recall, both Kentucky and West Virginia refuse to support the bill that is the subject of today's hearings, and rightly so. Kentucky, West Virginia, other States, at times in the past when there have been real problems with the administration of SMCRA, have come to this Congress and we have made those surgical strikes; we have made those corrections, for example, the two-acre exemption.

And today this is not a serious problem in these States that are affected by the administration of SMCRA, the most closely affected, that is.

It is a foregone conclusion that SMCRA has served the people of the Appalachian coal fields well. It has made the coal fields of this Nation a much better place in which to live, and there should be no doubt about it, that SMCRA has well-served the coal industry as well. It has well-served the coal industry itself, and those responsible coal operators who have lived with SMCRA, who have abided by its rules and regulations, have served this Nation and have served the coal industry proudly, and I salute them this day.

The vast majority of the coal industry is in compliance with the law. Countless acres of old, abandoned coal mine lands have been reclaimed. Production continues to rise. Coal companies are proud of their reclamation awards that they receive, and the acceptability of surface mining has vastly increased since the mid–1970's, in large part, due to enactment of SMCRA.

Yes, we had confrontational times in those days, highly confrontational, but the coal industry realized that by accepting this law when it was enacted then and by accepting it to this day, for the most part, that they have been well-served, and our land and our environment and our coal field residents have been well-served. Yet today, we have a hearing on a bill that would reverse all of that progress.

In one fell swoop, this legislation would return this Nation to the days when coal-producing States were pitted against coal-producing States, each vying to increase the competitiveness of the industry by shortchanging environmental health and safety regulation. You had one State undercutting its neighbor in a highly competitive industry, and who suffered but the people and their health and safety.

If this legislation is enacted into law I fear there would be nothing to prevent another Buffalo Creek mine disaster from occurring once again, and that leads me to one unfortunate conclusion.

This bill represents a declaration of war on coal field citizens. It would rob them of a fundamental right, hard fought over the course of lifetimes, to environmental justice. Mr. Chairman, this is a right they will not easily relinquish.

I look forward to today's testimony. I do have residents from the coal fields of southern West Virginia that have traveled here to Washington at their own expense to present firsthand their story

and to present firsthand their need for this Federal oversight, and I know that our first witness, Mr. Uram, the Director of the Office of Surface Mining, considering all of the problems and troubles through which he has traveled in recent months with layoffs and with one problem or another, that perhaps, he might find this a justifiable relief, coming here today to be with us.

Thank you, Mr. Chairman.

Mr. CALVERT. Thank you, Mr. Rahall. Mrs. Cubin.

STATEMENT OF HON. BARBARA CUBIN, A U.S. REPRESENTATIVE FROM WYOMING

Mrs. CUBIN. Thank you, Mr. Chairman. First of all, I would like to sincerely thank you for holding this hearing, and I thank all the other members for being here also.

The purpose of this legislation is to reaffirm and clarify the original intent of the Surface Mining Control and Reclamation Act of 1977, which is to place with the States the primary responsibility for the day-to-day regulation of coal mining operations.

Now, my good friend from West Virginia talked about Mo Udall being in the picture back there and being the father of this act, and I just wanted to say if I see him winking back at you, Mr. Rahall, I am going to withdraw the legislation completely.

But his intent was, when the act passed, was for the States actually to take over, for them to have primacy and so I think that this legislation, while it is imperfect, and while I am more than willing to work for changes in the legislation, I think truly that the legislation in the end can result in a piece of legislation that Mo Udall would have liked.

This legislation which I have sponsored with a number of my colleagues on this committee is, I believe, a vital component of our efforts to return more control to the States and eliminate duplicative and costly regulatory policies of the Federal Government. In the 18 years since the enactment of SMCRA, I think that the States have done a remarkable job balancing the protection of the environment with the production of coal as a major energy source, but I believe there remains a great deal of tension between the States and the Federal Office of Surface Mining over their respective roles as regulatory enforcers.

H.R. 2372 is intended to eliminate that conflict and allow the States to enforce their own laws.

I recognize with you, Mr. Rahall, that Mr. Uram has done a wonderful job of trying to get OSM and the States working closer together with a partnership, and I believe that he has made excellent advances in that area, and I am proud of that, and I appreciate that very much. However, the problem is, I don't think we can count on Mr. Uram to be there forever, so that is why I think this should be more than administrative policy. I think we need to write these protections into law so that the industry doesn't get caught in the middle between the State enforcement and the Federal enforcement, which is the reason that I actually brought the legislation in the first place.

Contrary to what some of the opponents of this legislation might say, this bill does not remove OSM's oversight authority, nor does it prevent them from stepping in to take action against a coal min-

ing operation in cases where a violation of the act poses imminent danger to the environment or the health and safety of the general public.

More importantly, the Federal Government retains the ability to take away the State's regulatory powers if it is determined that they have failed to properly administer the program.

I do believe that—I don't know this, but I feel certain that West Virginia's enforcement program and their State primacy program under SMCRA is much stronger than it was at the time of that horrible tragedy that happened in West Virginia. I think that if that situation existed today, that coal mining operation would be shut down, that if the States didn't take charge, then the Federal Government has every authority to take the primacy back and to issue cessation orders. I just don't think that would happen today.

Having said that, let me also say that the reason we are here today is to receive comments on H.R. 2372. No bill is perfect, as I said upon introduction, and this bill is no exception. So for the record, I would like to acknowledge a letter that I recently received from the State of West Virginia which expresses concern about two provisions in the bill.

The first provision addresses the regulation of public roads. As originally drafted, the bill was intended to resolve a longstanding problem in Utah with the duplicate regulation of public roadways. Thanks to Mr. Uram, I think that problem is at least calmed down at the present time, but that doesn't mean that the problem has gone away. H.R. 2372 is intended to clarify the extent to which the jurisdiction of SMCRA extends into the public road networks of coal mining States, but as we all know, every State is different.

I would like to therefore extend to my colleague, Mr. Rahall, an invitation to work with me and craft an amendment to the bill to address West Virginia's particular problem with the roads provision. In no way would I ever want to introduce legislation that would be detrimental to another State.

I think that this demonstrates very clearly that most things, if they are applied at the State level and if they are enforced, if they are actually enforced, which is absolutely important, that most things can be handled better if they are handled at the States. We were certainly not aware of the problem that West Virginia would have with the roads provision, and I want to get that language so that it absolutely fits West Virginia or any other State that might have a problem with that issue. I look forward to working with them on that issue.

As I also understand it, West Virginia has some additional concerns about language in the bill which is intended to eliminate duplication in enforcement between the regulatory authority under SMCRA and the regulatory agency approved by EPA under the Clean Water Act. I believe, too, that language needs some fine-tuning, and I am open to any suggestions on how to do that.

Let me say that I do not dispute the need for limited Federal oversight by the Office of Surface Mining. I give every credit to SMCRA and to Morris Udall, and to the people who had the foresight to pass that law in 1977 that has been expressed by my friend from West Virginia. But I also believe that we must recognize the expertise and ability of the States with approved regu-

latory programs to enforce their programs and make decisions based on the distinct differences in terrain, climate, and other conditions which exist within the borders.

The concept of State primacy needs to be given more than just a wink and a nod by the Federal Government. It is time to empower the States to do what they do best and return stability and certainty to the regulatory area.

I would like to address first, some of the problems that Mr. Rahall brought up, and say that one instance that I am aware of, I believe it was Kerr Coal Mining Company, actually received an award from OSM for their reclamation on a project, and then some months later, when the administration changed, a complaint came in from OSM, was filed against them, and had the coal company tied up in expensive litigation for a long time, after the OSM had already granted an award to this. Again, I think that depends on the administration at the time.

Mr. Abercrombie certainly has some valid concerns also. As far as interstate pollution is concerned, this is a surgical bill. It is a surgical amendment to SMCRA, and when we get into what the legislation does, you will see that the long-reaching effects simply aren't there that you are concerned with.

What we want to do is clarify who should enforce the law, and as I said, the bill was originally written for the States to assume primacy, for their program to be approved by the Federal Government, and for them to enforce their own law.

Mr. Rahall is absolutely correct in saying that we do not have support from the State of Kentucky nor West Virginia. I received a call from a State senator in Kentucky. It was a personal call, and he expressed to me his very strong support for this bill, and he indicated that there were many, many lawmakers in the State that are in favor of this bill, since the sitting governor was just defeated and likely, that will mean that there will be a new head of natural resources who will agree with this legislation.

The last thing I would like to say in closing is that I would like to personally invite Mr. Rahall to come to Wyoming. The eastern coal mine operations are much older, obviously, than the western operations, and we fortunately, in our reclamation and the way the mines are mined, we have been able to learn from the problems and mistakes that have happened in the east. We don't have the same kind of problems.

I would personally like to invite you to come to my State and to look at the mining, and likewise, I would like to go to West Virginia and Kentucky, because I need to learn the problems that you have to deal with, too.

Thank you for your concern about this legislation, and I look forward to working with you.

Mr. ABERCROMBIE. Would the representative yield just a moment?

Mrs. CUBIN. Certainly.

Mr. ABERCROMBIE. May we then help to sponsor, perhaps together, an indication at least to the leadership of the House then that we should increase funding for committee travel?

Mrs. CUBIN. I don't think I was ever involved in that decision.

Mr. CALVERT. We will see what we can do. The gentleman from California, do you have an opening statement?

Mr. DOOLEY. Pass.

Mr. CALVERT. We have the Chairman of Parks and Public Lands who is with us today; Jim Hansen, from the State of Utah, and he is not a member of this committee, but if there is no objection, do you have an opening statement, Mr. Hansen?

STATEMENT OF HON. JAMES HANSEN, A U.S. REPRESENTATIVE FROM UTAH

Mr. HANSEN. Thank you, Mr. Chairman. I really appreciate that. I don't mean to intrude, but I appreciate the opportunity to sit with you for just a moment. I just wanted to come here in full support of the gentlelady's bill.

I honestly think that there is a lot of problems that need to be squared away, and as you know, in our committee, we have talked a lot about R.S. 2477 roads which we are working on, which is a problem in the west where people have established rights-of-way, and it has been going along great until FLDMA came along, and actually, until this Administration, and then we find people who are saying, no, there is no way you can use these roads without proving that you have jurisdiction on the roads.

This isn't exactly the same problem, but we face a primacy problem here also, and when we have this group saying that they have jurisdiction over roads which coal trucks go up and down in the States of Wyoming, Utah, many of the western States, that is many, many miles. The State of Utah has got coal all over, especially southern Utah, and it goes all the way over to what is called IPA, that is Intermountain Power Association. It is done by rail and it is done by truck, and that is one of the largest electrical generating plants there is in the world. They wield their power to southern California.

If we pass the wilderness bill some of those people want, we couldn't do that; and secondly, if we start getting jurisdiction over those roads, southern California is going to have a brownout in a hurry, because that is where they are getting an awful lot of their power.

We are just trying to say who has primacy of the roads. For years and years, it was established that the State had primacy of those roads, and now all of a sudden, I think we have a duplicate question.

I think it could be resolved and I think it should be resolved. So far, all we have heard is talk. Yeah, that is a problem, we will see what we can do about it, but no one has done anything about it.

Section 10 of this bill specifically addresses this particular problem which we find at issue with the Federal Government. It shouldn't be a problem; it is not a big deal, really, but it is one of those things that will alleviate something that has turned it into a huge problem that would have ramifications as to who is going to get power, where is it going to go, who can move this coal, and as I have great respect for my friend from West Virginia, and the great coal they produce in West Virginia, our friends in Kentucky, but we have a lot of coal out there also, and we won't get into a debate of low-sulfur versus high-sulfur coal, Nick, but anyway, we

would like to have the opportunity to move it without all of these problems.

The State of Utah, very candidly, is very upset with the Federal Government because they are trying to exert jurisdiction over many of these roads. We feel that it has been laid to rest and the primacy does rest with the State.

In our case, as the gentlelady pointed out, I think Utah, correct me if I am wrong, probably has Several problems right now. Wyoming also has particular problems.

I think this is a good step forward to taking care of this problem. I hope if there is any problem, we can work it out with our friends from the other coal-producing States. I think this is an excellent piece of legislation, and I would like to add my support to it.

Thank you, Mr. Chairman, for allowing me to speak in your hearing.

Mr CALVERT. Certainly, Mr. Hansen. Our first panel today is Bob Uram, who is the head of the Office of Surface Mining Reclamation and Enforcement; Jim Carter, Director of the Division of Oil, Gas and Mining, for the State of Utah, Natural Resources, on behalf of Michael Leavitt, the Governor of Utah; and Fred Bowman who is with the State of Illinois Office of Mines and Minerals.

If you will both step up to the table, and first, Bob Uram, Director of the Office of Surface Mining.

STATEMENT OF ROBERT J. URAM, DIRECTOR, OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

Mr. URAM. Thank you, Mr. Chairman, and distinguished members of the committee. I appreciate very much the opportunity to appear before you today to discuss H.R. 2372. I have prepared written testimony for the record, including a section-by-section analysis of the bill and have provided it to the committee. I ask that my written testimony be included in the record, Mr. Chairman.

Mr. CALVERT. No objection.

Mr. URAM. The Administration opposes H.R. 2372, and in the time allotted to me, I would like to review briefly why.

While this law has had a rocky road, today, the Surface Mining Act is a success. Coal production has more than doubled; productivity is up dramatically; and the coal fields are safer and cleaner than they have ever been before.

In large part, this is because of the regulatory stability that has gradually emerged in the Federal-State relationship. We have a continuously evolving State-Federal team effort, which draws its basic tenets from the act that Congress passed in 1977, where the States are the primary regulatory authorities, while the role of the Office of Surface Mining is to ensure that there is a basic level regulatory playing field between the States.

The act is now enforced in a uniform manner across State lines to ensure both the coal industry and the coal field citizenry equal protection of the law.

Preserving these principles really promotes stability. With these principles in place, the Federal-State relationship will work to ensure environmentally safe coal mining, prompt and proper reclamation, primary enforcement and permitting authority for the States, and equal protection against abusive mining practices for American

families, whether they are located in West Virginia, Ohio, or the Powder River Basin.

Under our shared commitment policies, we work with States to ensure the integrity of these protections. We have been working in teams with States toward achieving land reclamation and realizing on-the-ground success at the least possible cost.

Since I am Director, Federal-State teams have redesigned and reengineered the process-driven oversight into a results-oriented system. We have substituted performance agreements with each State based on its particular conditions for the Washington-driven mandates that we formerly had, and we have remolded and worked with the States on the contentious 10-day notice process into one that truly respects State judgments and ends improper OSM second-guessing, while still maintaining the critical Federal presence in this area.

We are also working with States to individualize solutions as we have with the State of Utah on the roads issue, and we are trying where problems are made in the act to find specific answers to State-specific problems.

Some may find the provisions of H.R. 2372 attractive based on a claim that the passage will result in less OSM interference, but I believe it will instead undermine a significant share of progress in developing quality State programs. In fact, as members of the committee have noted, two of the major coal-producing States, Kentucky and West Virginia, which produce 31 percent of the Nation's coal between them—they may be only two States, but we are talking about 31 percent of the coal production, and in the case of those two States, probably close to a majority of the number of actually producing mines or number of sites regulated in the act, a very large number of mines in both of those States. They have notified the Interstate Mining Compact Commission that they do not support H.R. 2372.

We are committed to working with the States to improve this program, but the changes in H.R. 2372 will hurt and not help those efforts. In my view and in the view of many others with long years of experience with this law, quality State programs would not exist at today's high level if it were not for OSM's ability to use the enforcement tools this law seeks to abolish.

The Surface Mining Act presently allows OSM to have a graduated response to problems in State compliance with their own approved programs through the use of inspections, investigations, Federal NOV authority. All of these are threatened by H.R. 2372, and without these tools, I think one of the ironic and unintended consequences of enactment may be an increased pressure for Federal takeover of State programs, where we totally substitute Federal enforcement for State enforcement when deficiencies are documented, and I think that would be pressure in a wrong area. The graduated response, the ability to deal with problems as they arise, and to prevent them from becoming major problems is a critical part of OSM's responsibility.

In summary, we oppose H.R. 2372 because we think it is unnecessary. It is likely to lead to an unraveling of effective State regulatory programs that were many years in the making, and it will lead to regulatory instability and more litigation. It will result in

an increased caseload for the Federal court system, and ultimately, more cost to the American taxpayers. It could result, as I said, in more Federal takeovers of State programs. It will certainly reduce the ability of States to protect water quality, and I acknowledge Mrs. Cubin has said that perhaps she is willing to rethink that particular provision, but as written, I think it would cause great harm to the progress we have made in cleaning up the streams of the coal fields.

Again, Mr. Chairman, I very much appreciate the opportunity to appear before the committee to discuss the proposed legislation and will be pleased to answer any questions you may have.

(Statement of Mr. Robert J. Uram can be found at the end of the hearing.)

Mr. CALVERT. Thank you, Mr. Uram. Next, Mr. Bowman, Office of Mines and Minerals, State of Illinois.

STATEMENT OF FRED BOWMAN, DIRECTOR, OFFICE OF MINES AND MINERALS, STATE OF ILLINOIS

Mr. BOWMAN. Good morning, Mr. Chairman. My name is Fred Bowman, and I am Director of the Office of Mines and Minerals in the Illinois Department of Natural Resources.

I am here today on behalf of the Interstate Mining Compact Commission, a multi-State, government organization representing 18 mineral-producing States, 14 of which operate federally approved primacy programs under SMCRA.

We appreciate the opportunity to present our views on legislation introduced by Mrs. Cubin to amend the act by appropriately eliminating the enforcement authority of the Federal Government in primacy States.

A copy of my written testimony has already been submitted for the record, and I will therefore summarize our position on the legislation in my oral remarks.

As we explained at this subcommittee's June 27 oversight hearing on the role of the Federal Government in primacy States, we have been running effective and efficient regulatory programs for some 15 years now.

The record, as evidenced by OSM's own oversight reports and annual reports to Congress convincingly demonstrates that progress has been made by the States in developing and implementing first-class programs that are protecting the environment, responding to the concerns of coal field citizens, and ensuring adequate supplies of coal as being mined in accordance with State and Federal reclamation programs.

Although some have characterized it otherwise, we do not see the legislation being debated here today as emasculating the progress that has been made, nor will it undermine the objectives of SMCRA. In fact, it will clarify the lines of authority under the act, and thereby define who is in charge and how the act will be implemented.

We believe the adjustments to SMCRA contained in H.R. 2372 regarding enforcement authority are the culmination of 15 years of experience under the act, whereby the States and OSM have attempted to sort out their respective roles and responsibilities under the cooperative federalism envisioned by the act's framers.

As has been the case with other pieces of complex legislation that attempt to strike a balance between State and Federal authority. SMCRA has seen its fair share of controversy and confusion.

Indeed, the Federal courts have struggled for years with several passages in SMCRA that have been labeled as unclear, contradictory, or subject to varying interpretations. Recently, the U.S. District Court for the District of Columbia in ruling on the very subject matter of this legislation Stated that, while the provisions set forth in section 521 may not explicitly authorize the Secretary to issue an NOV during an oversight inspection any time he or she disagrees with the State response to the TDN (10-day notice.) The most logical statutory construction authorizes the Secretary to issue Federal NOVs in primacy States. Characterizing the regulation as a "permissible interpretation" of SMCRA, the court went on to uphold the regulation.

The most telling aspect of this ruling is how the court had to struggle to find a basis pursuant to which it could uphold the regulation of Federal NOV authority in primacy States. According to the court, there was no clear articulation by Congress even in its legislative history that it could rely upon.

Instead, the court resorts to permissible interpretations of SMCRA based on its reading of SMCRA as an entire enactment, and thus, the problem we face today. No one is really sure what Congress meant when it fashioned the provisions of sections 521 and 504 of the act regarding Federal enforcement authority in primacy States.

The courts and several different administrations have attempted to settle the issue, but it remains unresolved. It is therefore appropriate and timely for this Congress to clear away the smoke and clarify this critical component of SMCRA's implementation.

You should know, Mr. Chairman, that the States have made several good faith efforts to work out several aspects of this issue with OSM over the past few years.

Most recently, we have labored to set out at least a partial fix with respect to the use of the TDN in primacy States. In our 47-page rulemaking petition, we not only set out the remedial regulatory language, but articulate a lengthy justification for the change based on the provisions of SMCRA, the legislation history and legal precedent.

Unfortunately, OSM was uncomfortable with proceeding forward with the petition either by direct promulgation or through negotiated rulemaking. We therefore withdraw our petition with the hope that OSM would provide another route of relief.

The other route represented——

Mr. ABERCROMBIE. Mr. Bowman, excuse me, sir, just one moment. Was it 504 you were mentioning? I want to make sure I am with you.

Mr. BOWMAN. I believe so, 521 and 504.

The other route presented itself in the guise of an OSM task force effort that was intended to address the issues raised in our petition with regard to the issuance of 10-day notices and the handling of citizens' complaints in primacy States.

The States were a major player in this initiative, and while it bore good fruit, it failed to resolve the underlying issue of Federal

enforcement authority in primacy States, an issue that continues to stand in the way of an effective State-Federal partnership under SMCRA.

We continue to work with OSM on this initiative. We also believe that the only hope for effective resolution of that issue is Federal rulemaking that clarifies the issue. To date, OSM has been reluctant to engage in such rulemaking.

Mr. Chairman, we come to you in good faith today urging your serious consideration of H.R. 2372, not because it is the politically correct thing to do, but because it addresses an obvious problem that has been unable to be resolved in any other form for the last 10 years. Are there differences of opinion about its necessity and its likely impact? Yes, there are, just as with any controversial piece of legislation.

We believe, however, that this is the right thing to do and the right time to do it. The result will be a more workable Federal-State relationship and more effective implementation of SMCRA. We urge you, therefore, to move this important piece of legislation forward.

I would be happy to answer any questions you may have or refer them to the States for a later response. Thank you, Mr. Chairman.

(Statement of Mr. Fred Bowman can be found at the end of the hearing.)

Mr. CALVERT. Thank you, Mr. Bowman. We have a very important vote right now on the journal, and I know that Mr. Uram needs to catch a plane at 12:00, so what we are going to do is just recess very shortly, come right back, take the testimony of Mr. Carter, and then direct our questions to Mr. Uram so he can get on his way.

So if you will excuse us for just a few minutes, we will be right back. We are in recess.

[Recess]

Mr. CALVERT. The committee will come to order. Mr. Carter of the Division of Oil, Gas and Mining, Utah Department of Natural Resource, on behalf of the Governor of Utah.

STATEMENT OF JAMES CARTER, DIVISION OF OIL, GAS AND MINING, UTAH DEPARTMENT OF NATURAL RESOURCES

Mr. CARTER. Thank you, Mr. Chairman, members of the Committee.

My name is Jim Carter. I am appearing before you this morning to present the testimony of Ted Stewart, the Executive Director of the Utah Department of Natural Resources in support of H.R. 2372, the Surface Mining Control and Reclamation Amendments Act of 1995.

I have submitted written testimony, and I will just supplement that with these comments.

Last June, Mr. Stewart testified before this subcommittee that the Utah coal regulatory program is achieving the purposes of SMCRA. Mr. Stewart also testified that several longstanding conflicts between Utah and the Federal Office of Surface Mining were making progress toward resolution through improved management at OSM and a better working relationship between OSM and the States, and this continues to be the case.

The underlying causes of those problems, however, have not been addressed, being rooted in the language of the organic legislation of the coal regulatory program itself, SMCRA. It is axiomatic that a successful regulatory program cannot have two masters.

Both OSM and the primacy States have important roles to play in implementing the regulatory program. Unfortunately, the present structure of the coal regulatory program makes those Federal and State roles duplicative and competing at the expense of the regulated community, coal field citizens, the environment, consumers of coal-generated electricity, and the taxpaying public at large.

Duplication of roles in the coal regulatory program has not only been a waste of scarce public resources, but has actually been counterproductive in that it has created interagency controversy which diverts time and resources from the real work of the program.

It has been said that the changes proposed by H.R. 2372 would eliminate Federal involvement in the coal regulatory program. This is simply not the case.

OSM's direct enforcement authority in imminent harm situations remains unchanged, the impoundment failure that Mr. Rahall mentioned, for example. OSM will continue to conduct oversight of State primacy programs, will continue to require amendments to State programs to keep them no less effective than the Federal program, and will continue to have the ability to take back State programs which simply fail to perform.

The amendments proposed will not diminish the capacity of OSM and the States to enforce compliance with the regulatory program, but will simply provide a clear allocation of enforcement responsibilities between the primacy States and the Office of Surface Mining.

An examination of duplicate enforcement in the Utah coal regulatory program is instructive. Since May 1993, OSM has taken five direct Federal enforcement actions against Utah operators, citing the operator for a practice or condition specifically previously approved by the Utah program and incorporated in the operator's coal permit. Each violation arose out of a disagreement between OSM and Utah over the interpretation of Utah's program language. None of the five violations concerned fly rock, water pollution, air pollution or any safety or environmental hazard.

Duplicate enforcement has not helped to protect the citizens or the environment. As I said, it has diverted scarce resources away from other, more productive work by OSM, Utah and coal operators.

These types of conflicts are not the only problems with duplicate regulatory authority. The cost of maintaining two separate, redundant compliance programs is one which taxpayers should not have to bear.

The solution is to amend the law to clearly segregate the roles of OSM and the primacy States and restore the delegation of authority which SMCRA intended.

There is another aspect of H.R. 2372 which is of great importance to the State of Utah and to the efficient implementation of SMCRA as well. Section 10, *Definitions*, would exclude bona fide

public roads under the control of units of Federal, State or local government from the jurisdiction of the coal regulatory program.

The question of whether and under what circumstances public roads fall within the jurisdictional reach of SMCRA has been fodder for a series of Federal lawsuits and failed rulemaking attempts since 1983.

Earlier this year, Utah assistant attorneys general and Department of the Interior solicitors reached agreement on the present State of the law and the regulations as they apply to public roads. There is quite a volume of legal information. That agreement was essentially memorialized in a letter from the State of Utah to the Office of Surface Mining, dated July 3 of this year, and a response letter from the Office of Surface Mining to the governor of the State of Utah dated July 24 of this year, both of which are attached to the testimony that I have submitted.

It is our view that section 10 of H.R. 2372 would confirm the already agreed upon statement of the law as it applies to public roads, and would codify the exemption from regulation of bona fide, open access, multiple use public highways, which are either owned by or maintained under the authority of legally constituted public entities.

This provision would not allow exemption for roads which are public in name only or for roads which were deeded to public entities in order to avoid regulation, but would define an unclear provision of SMCRA, whose lack of clarity has consumed countless public hours and resources.

I would note here that if the language proposed would create problems, unanticipated difficulties for West Virginia or other States, we would be eager to sit down with those States and discuss that language with sponsors of the bill to see if we could iron those things out.

In summary, the coal regulatory program created by SMCRA has provided great benefit to the environment, the citizens, and the coal mining community. The working relationships between OSM and the State are improving.

There are, however, flaws in the structure of the regulatory program itself, which can lead to future counterproductive, duplicate activities which require clarification.

When the source of a programmatic problem is the underlying structure of the program, Congress should not hesitate to correct the flaw.

We believe that the amendments proposed would consolidate the gains made recently in interpretation of the regulatory program, and will prevent future counterproductive duplication of effort.

Thank you for your time.

(Statement of Mr. Ted Stewart can be found at the end of the hearing.)

Mr. CALVERT. Thank you. Mr. Uram, in your testimony, you mentioned, rightfully so, about the successes of the coal industry in recent history over the last 20 years or so, that the coal industry has become tremendously more productive. As a matter of fact, in 1979, there were over 6,000 coal mines in the United States, 6,170 to be exact, according to the statistic I have; and at that time, your staff was approximately 1,093 people, according to the statistic that

I have. Today, there are approximately 2,475 active mines in the United States, but your staff level is at 950 people.

So in other words, in 1979, you had six active mines per employee, and today, we have 2.5 mines per Federal employee. Any comment that you would like to make on that?

Mr. URAM. Yes, Mr. Chairman, two comments. First, I would love to still have 950 employees. As you know, as a result of the budget situation, we have had to have a very, very significant reduction in number of employees in the Office of Surface Mining, and when we complete the reduction of force process, we will have 650 employees, which is the lowest level that has ever been, and clearly inadequate to meet our responsibilities under the act. We will have a most difficult year next year as a result of the budget reductions.

The second point I would like to make is that while it is true there is a reduction in the number of active producing mines, in fact, the number of sites which are subject to regulatory jurisdiction is over 13,000, and that is far higher than it was in 1977, because as you know under the act, both the State regulatory programs extend jurisdiction not just to active mines, but to processing plants, to tipples, to refuse piles, and also the mines which are in the reclamation stage are also subject to continuing inspection and reclamation responsibilities.

In fact, we have some of our most severe problems at mines which are in the reclamation stage, mines which have been mined but not properly reclaimed. Either there is instability in high walls, landslides, acid mine drainage, so there is a tremendous amount of regulatory activity involved in the nonproducing mines which, as I say, number over 13,000.

The final point I would like to just make there is that the nature of our responsibilities have significantly changed since 1979 in that we did not have an applicant violator system at that time, which has a considerable number of employees. We did not have regulatory jurisdiction over the State of Tennessee at that time. We did not engage in the training program or the technology development and transfer program that we have, so I think that the Office of Surface Mining both, even before the cuts, was staffed very leanly, and now it is staffed far below acceptable levels.

Perhaps the final point is that we have those many employees, but not all of them, obviously, are reclamation specialists who work on the ground. That is a very limited number compared to the State employees, and I think very consistent with the progress of the program.

Mr. CALVERT. Bob, it was reported to me the other day that your deputy, Mr. Ed Kay, was speaking to a group of OSM and State regulators in Pittsburgh earlier this week, where I am told that he responded to a question about what might happen budget-wise if OSM has to live under a more restrictive upcoming continuing resolution.

My understanding is that Mr. Kay replied that no matter what, OSM would not lay off more Federal personnel. Instead, the agency would simply send less grant money to the States, both in Title IV, abandoned mine lands program, and Title V, active mine regulatory arena.

Could you confirm or deny that viewpoint?

Mr. URAM. I wasn't present at the meeting. I am not sure what Mr. Kay did or did not say, Mr. Chairman. I mean, we don't know what the Congress will pass in terms of a continuing resolution.

We have worked very carefully to manage our financial resources. When Congress gets a continuing resolution, we will look at it, and make the best decision we can on how to proceed to best carry out the Surface Mining Act.

Mr. CALVERT. Well, I believe that both the authorizing panel, the subcommittee, and certainly the Full Committee, and the appropriators have made clear the intent of Congress is to leave the grants to the States whole.

Do you share that perspective, if in fact a continuing resolution goes through intact?

Mr. URAM. I certainly do share that perspective, Mr. Chairman, and we have an obligation not to violate the anti-deficiency clause. Two-thirds of the money that the Office of Surface Mining received, ⅔ of our budget, goes directly to the States in the form of grants.

At some point in the process, depending on the level of the continuing resolution, it may be inevitable that we would not be able to provide money as quickly to the States or in the same way we would do if we had our full budget, just to avoid violating the anti-deficiency provisions.

As I said, two-thirds, probably slightly more—we are probably up to 75 percent now with the cuts, of our money goes directly to States, so depending on the levels provided in the continuing resolution, we may have no choice but to reduce the rate at which funds are provided to States so as to not get into an anti-deficiency situation.

Mr. CALVERT. Is this a way of saying that you would borrow from those funds in order to continue to operate the way you have been operating?

Mr. URAM. I don't know that it is a question of borrowing. We just may not have the funds available consistent with the continuing resolution to provide full funding for the States. It might mean that abandoned mine land grants, for example, would be slowed down at some point in the process.

I think when you don't have a budget, when you have continuing resolutions that set things at various levels, you have to do what you can to be fiscally responsible, and we will make every effort to fulfill our responsibilities and to manage our resources in a fiscally responsible manner.

Mr. CALVERT. The question being, if it was between using the moneys in those funds or having less Federal personnel, which decision would you make?

Mr. URAM. I don't know if it is an either-or question. For example, it would do the States no good if we laid off the people who were responsible for providing the grants to the States or the people who collected the abandoned mine land funds.

This is a system, and we need to keep the whole system working. Without Federal employees in place, we cannot pay the States, and so we will look at that. I think it is possible that there would be conditions in which we would have some reduction of grants to the States in order to keep the Office of Surface Mining running.

Mr. CALVERT. That is what I thought. Thank you. Mr. Abercrombie.

Mr. ABERCROMBIE. I won't go much further with what was just said, other than to say or ask you to give a final clarification there.

Presumably, you could disappear, I assume, and then money could appear in the States, but what you are saying is that in order to carry out section 102, as long as we are talking about different sections—if you look at section 102 of the Surface Mining Control and Reclamation Act, it lays out 13 purposes. Would you agree or take my word for it, if you don't have the purposes right in front of you, Mr. Uram?

Mr. URAM. I don't have the purposes in front of me.

Mr. ABERCROMBIE. They go A through M; it adds up to 13 purposes. May I construe your answer to the Chairman's question to be that you would try to maintain sufficient personnel to carry out the purposes as laid out in the act?

Mr. URAM. Yes.

Mr. ABERCROMBIE. Consistent with a human being's reasonable understanding as to how to carry out those purposes with the money made available to you, and that includes obviously having to work with the States and grants and all the rest of it. At some point, you have to start making various kinds of tradeoffs, and I take it at that point, you would be perfectly willing to state in public and/or in writing why you did what you did with respect to personnel and/or grants to the States.

Mr. URAM. Absolutely, Mr. Abercrombie. One thing, if I may, also just recall it, of course, the continuing resolution also states that it shall not cause furloughs. The intent of, at least, the prior continuing resolution was to avoid furloughs of Federal employees, so that is something I would obviously need to take into account.

Mr. ABERCROMBIE. So that if Congress at some point can do its job, maybe you will be able to do yours.

Mr. URAM. Yes, sir.

Mr. ABERCROMBIE. Let me just go to a couple points here then. With respect to the purposes, those 13 purposes, I see three in particular where the States are mentioned, because there has been at least an implication in some of the testimony and commentary this morning that the—if you happen to have the act in front of you, it is on page 148, the purposes. I am not going to throw a curve at you. I am not looking for esoterica.

Mr. URAM. I do actually have the act.

Mr. ABERCROMBIE. At least some of the implication this morning was that once this process got underway and was successfully carried forward, that it would devolve to the States then, that there has been this process of Federal and State cooperation, and sometimes in fits and starts, but nonetheless, it has been fairly well accomplished since 1977, and so that the purposes really were to move it to the States.

I don't read it that way. I see here, number G, assist the States in developing and implementing a program to achieve purposes of this act, and I think that is what you have been doing, assisting them.

It doesn't say the State should take over. It says you assist the State in developing and implementing. Number I says, assure ap-

propriate procedures are provided for the public participation and the development, revision and enforcement of regulations, standards of reclamation plans, and programs established by the Secretary or any State under this act. It says assure that appropriate procedures.

That is your responsibility, right? So the States do get to develop these things, but your job is to assure that it is all carried out properly, right?

Mr. URAM. That is correct.

Mr. ABERCROMBIE. Then the last, number M, whenever necessary, exercise the full reach of Federal constitutional powers to ensure the protection of the public interest through effective control of surface coal mining operations. That is the final one.

I think that is pretty clear and plain English, isn't it? Aren't you, whenever necessary, to exercise the full range of Federal constitutional powers?

Mr. URAM. Yes, Mr. Abercrombie.

Mr. ABERCROMBIE. You agree to that. Let us take up Mr. Bowman's points. Now, I have gone through 521. It seems to me on the whole pretty much boilerplate. I could substitute meat inspection with not a whole lot of difficulty, a couple of particularities that might be associated with surface mining, but if the courts are in some State of confusion as to what is the effect of the enforcement section here under 521, I am not quite sure of the caliber of the judges that are having to go through all of this, but couldn't you and haven't you, can't you just work on this regulatory, whatever regulatory language or elements you might have in the regulations that come out of this section on enforcement and get this squared away? Do we need an entire new bill like this to be able to handle 521?

Mr. URAM. No, Representative Abercrombie, I don't think we need a whole new bill. We do have the administrative authority to make whatever changes would be needed. In fact, there was a major rulemaking in 1988 which established a good set of rules and established the principle that OSM was to defer to the States unless their actions were arbitrary and capricious.

I would agree there is no need for a statutory change.

Mr. ABERCROMBIE. Well, can't you sit down with Mr. Bowman and others in his association and all that, because he himself said there is some confusion from the existing legislation regarding differing interpretations?

I believe I quoted him right. We have had differing interpretations of the Bill of Rights. We are still having arguments about that. We can't even figure out what the First Amendment to the Constitution means, so it doesn't surprise me that there is that.

I don't think we should have legislation every time there is an argument about interpretation of a regulation, because then you have a new set of legislation. I don't think you should regulate by legislation. I think going down that path lies incredible difficulties.

Can I have your assurance today to the degree that some people may feel even more intense negotiations need to take place with respect to the enforcement provision, that you commit yourself to that?

Mr. URAM. Yes.

Mr. ABERCROMBIE. One final thing then. Mr. Chairman, I see the light is red there. Both Mr. Carter and Mr. Hansen, when he was here, have focused on the one particular section, I believe it is the last section, number 10, of Mrs. Cubin's bill.

With respect to public roads, and my question would be for you, does this need legislation now, because even Mr. Carter indicated that the law as a whole, he believes, while it has flaws in the structure of regulatory programs, nonetheless, has been of great benefit.

Is it possible for you to deal with the public roads question short of legislation and could you comment then on the question of the public roads difficulties in section number 10?

Mr. URAM. Yes. First of all, I think we have completely resolved the issue of the jurisdiction of roads in the State of Utah. I agree with Mr. Carter's statement that they have provided us an interpretation of their program, which we have accepted, and there really is not a problem.

If the Utah situation prompted section 10, that situation has been completely resolved, and what I believe section 10 would do would be upset similarly settled situations in other States and would require rulemakings by the Office of Surface Mining, changes in State regulatory programs, and would require hundreds, if not thousands of changes in permits where there is no problem right now.

I believe section 10 would create serious problems, particularly in some parts of the country. Roads can really provide serious environmental problems in terms of sedimentation, safety, noise, and traffic, so I think we have a very good situation right now, and the Utah situation certain provides no basis for the legislation.

Mr. ABERCROMBIE. To the degree that there is any remaining question about the public road situation, you would certainly entertain from anyone who has such questions an inquiry and do your best to give them an answer which would satisfy their needs. Is that a fair stipulation?

Mr. URAM. Yes, it is.

Mr. ABERCROMBIE. Thank you. Thank you, Mr. Chairman.

Mr. CALVERT. Thank you. I just wanted to make one point before I turn over the questioning to Mrs. Cubin.

Under findings in section F, because of the diversity in terrain and climate, biological, chemical, and other physical conditions in areas subject to mining operations, the primary government responsibility for developing and authorizing issue and in enforcing regulations where surface mining and reclamation operations subject to this act should rest with the States.

That is under the findings prior to the purposes within the act.

Mrs. Cubin.

Mrs. CUBIN. Thank you, Mr. Chairman. It has been made very clear that Mr. Uram does not think that we need statutory change to ensure that these problems can be solved. He thinks that it can be done administratively or through regulation.

Mr. Abercrombie does not believe that we should regulate through legislation.

Well, I think that is one of the fundamental differences between his philosophy of government and mine. I don't think that we

should legislate through regulation, and I think that is what happens or what has happened in a lot of these cases.

Now, we have it very clearly understood that Mr. Uram does not think we need statutory change to ensure continued, if you will, or to ensure that we won't face these problems with interpretation any more.

Mr. Bowman, how do you feel about that? Do you think that we do?

Mr. BOWMAN. Very much so. It is obvious, as we mentioned here earlier that administrative policy is not the way to handle this issue.

To be blunt, very likely the players are going to change, and if they do, then we have to look at another administrative policy. It seems to me that the only proper way to address this is through the rulemaking process. Yes, ma'am.

Mrs. CUBIN. Thank you. I agree with that very much, because as has been pointed out, it is the problem of interpretation in this bill.

This act was passed in 1977, and we still don't have an answer, so I should think that would be enough time to convince any hard head that it is time that we answered this question.

Mr. Carter, what is your position on whether we need a legislative or an administrative fix?

Mr. CARTER. My position is the same as Mr. Bowman's, and yours, Congresswoman.

These have been perennial problems, particularly these two issues. The road issue for Utah, I think, cropped to the surface and became a large issue in Utah, but I think that same issue is present in all the other States.

The enforcement issue certainly has been a problem of long standing, and our position is that given the opportunity to correct what we believe is a structural flaw in the law itself, we should do that.

I want to make clear that we do feel that Mr. Uram has done an excellent job in changing the management activities of the Office of Surface Mining, and he addressed these things as an administrator, but I share the same concern.

There has been quite a turnover, if you will excuse me, at the Office of Surface Mining through the years, and it seems that with each change of leadership, there is a change in philosophy, and our concern is that there is not much staying power with these sorts of administrative solutions. We would like to see something more permanent.

Mrs. CUBIN. Thank you.

Mr. ABERCROMBIE. Would you yield just a brief moment on that, please?

Mrs. CUBIN. Certainly.

Mr. ABERCROMBIE. I understand Mr. Carter and Mr. Bowman both, but when you move it to the State or the organizations, there is no guarantee that either of you are going to be here next week or next year either, so I am not quite sure that there is any more permanence in terms of either personnel or regulatory consistency if you move to another level of oversight or devolve another level of oversight.

Mr. CARTER. To the extent that our roads issue has been answered pursuant to an agreement by exchange of letters, I couldn't agree more.

That is one of the reasons that I think that agreement should be memorialized in the law itself, so that our hard work and the many years of energy and effort we put into resolving that issue can be solidified so that my successor and Mr. Uram's successor don't have to do this again.

Mrs. CUBIN. Reclaiming my time, I realize Mr. Uram has to leave at noon, so I want to get to the questions that I have for him.

I have been reviewing the transcript of the last hearing where you testified on June 29, 1995, because I remembered it, but when I read it, I was very shocked, and I was left with the opinion that you remain skeptical of the State regulators' capabilities, and you believe without the OSM looking over the shoulder of the State regulatory authorities, that they will inevitably fail to do their job, and that coal operators will quickly create a coal field environment that is a big disaster.

What your exact words were is that I do not trust the States to enforce the regulations, the things in SMCRA. Is this a philosophical difference between you and the supporters of H.R. 2372, or do you have some foundation that you based that on, either narrative or statistical or anything?

Mr. URAM. Mrs. Cubin, let me just say that the view that I have that it is critical to continue too have backup Federal enforcement authority is based on my long experience with the Surface Mining Act, both prior to its passage when I was an associate solicitor in 1979 and 1980, and now that I have returned to the program.

I think if you look at the history of this program, you see that from time to time, for one reason or another, States have had tremendous difficulty in enforcing the provisions of the Surface Mining Act, and OSM's presence in the coal fields and its enforcement authority has been critical to making sure that the families and the coal fields are protected, and that the States ultimately keep primacy.

You can just go across the company and see that has happened from time to time and in various places, in Oklahoma——

Mrs. CUBIN. But Mr. Uram, these 10-day notices of violation, and the 10-day—you know what I am trying to say. They are not the solutions to the kind of problems you are talking about.

The solutions to the kind of problems that you are talking about, you still have cessation orders, declaring that the plan doesn't meet OSM's requirement, pulling the whole plant, so that doesn't relate here.

Mr. URAM. I think it does relate, and I think it is a very important distinction, and I hope that we will be able to have a discussion so that we can perhaps share and reach a common understanding of this issue.

If you have to take over a program completely, it is very expensive. It costs millions of dollars. You displace State employees. You actually have literally a Federal takeover program. We seize the State records, take them over, have Federal employees in their place as we did in Tennessee in 1985. That took, I think, 17 months and cost millions and millions of dollars.

That is a very drastic response. As an administrator, you don't want to let a State program get into so much trouble that you have to completely take it over and disrupt those ongoing relationships, so——

Mrs. CUBIN. But that is one extreme, and the other is NOVs.

Mr. URAM. The purpose of the NOV authority is that just as problems start to occur, if a State is having difficulty, you can go right in there. It is a very graduated, very measured response, and say to the State, let us solve the problem today. It is a heads up notice to the State. The 10-day notice with the backup enforcement authority is a good communications tool. It is a good prevention measure to preserve and protect State primacy.

Mrs. CUBIN. Your own words just now were backup authority, that the Federal Government's role should have backup authority, and yet you supersede the States or historically, the States' opinions have been superseded somewhat on a regular basis.

It is clear in the law that the States were to enforce. Mr. Abercrombie said something about, in reading one of the 13 purposes, to develop and implement the program, but it didn't say to enforce.

The States were originally intended to enforce with just oversight by OSM. Let me move on.

In that same subcommittee hearing, you said something to the effect that 10–20 percent of all State notice of violations are a result of an OSM participation, either through joint inspections or 10-day notices that OSM has issued.

Could you explain how those joint inspections are anything except dual enforcement, and tell us how you believe that it is productive and efficient, that it is a productive and efficient use of OSM's limited resources to have to do this jointly?

Mr. URAM. Yes, I would be glad to. I think OSM's participation is very limited and measured and very helpful, both as a training function, a quality control function, and a backup function.

Last year, for example, I think there were approximately 120,000 State inspections conducted by about 750 State inspectors. The number of OSM inspections in primacy States was probably in the nature of 2,500 inspections, a fairly small number, but a good number to do quality control and check and to make sure that the programs are being properly enforced.

The number of on-the-ground violations OSM actually issued last year was in the range of probably 20 to 25 or so. It is a very small number, but these serve an important purpose.

As I tried to explain at the last hearing, my view is that the backup enforcement authority is part of a system that really works well. It is not just the reclamation specialists on the ground working together. We have program specialists. There are discussions between the field office directors and the head of the State regulatory authorities, and there is a whole system in place which really works to achieve the quality of the programs that we have today.

Mrs. CUBIN. We wouldn't be here if it really worked to achieve the goal of the act. We wouldn't be here today.

It obviously isn't working well, or we wouldn't be here. When you were in my office recently to discuss this hearing, you mentioned that OSM was making every effort to resolve some of the dual enforcement problems administratively, and that based on your direc-

tives from Congress, OSM was working hard to reduce staffing levels at headquarters, and live within certain budgetary restraints.

While I believe that is very admirable, and I think Vice President Gore with his program of reinventing government, I think, would be happy with you in that regard. It was indicated to me that these staff reductions will affect OSM's ability to process State program amendments. Is that true, first of all?

Mr. URAM. I think the cuts were sufficiently severe that every element of the program will be adversely affected, and we will have to work hard and reengineer and do what we can to keep things going.

Mrs. CUBIN. You indicated to me that would be the main problem. Is that correct?

Mr. URAM. No, I wouldn't say that would be the main problem, Mrs. Cubin.

Mrs. CUBIN. Assuming it is a problem at all, wouldn't you think that it would be beneficial to free up some staff so that they could work on these State amendments, rather than just looking over the shoulder when the State has had the inspections and verified that they are in compliance with their State plan? Wouldn't you think that would be administratively a wise thing to do, is to move some of those people from the issuing of NOVs to approving the changes in the State programs?

It seems to me that would really be efficient and beneficial to the industry and take a burden off of you.

Mr. URAM. As I said, this is a system that we are working on. We have tried, as we have dealt with the budget cuts, to preserve the effectiveness of the agency and all its programs and all its aspects, and as I said, we have a relatively few number of people who are doing the reclamation inspection work directly, but they also participate in the State program reviews, so that is part of their responsibilities as well. We are working, and I think both Mr. Carter and Mr. Bowman can address this later, that we are changing oversights and we are focusing our resources in a way to be most helpful to the States in improving the quality of their programs.

Mrs. CUBIN. Just one last thing, because I know Mr. Rahall needs to ask you some questions before you have to leave at noon.

Would you explain to the committee what, if anything, you would be willing to do to expedite the approval of State program amendments?

Mr. URAM. We are looking at reengineering potentially the process of State program amendments to see if we cannot approve our effort in the time it takes to review those programs. We have been trying to work with States to talk with them before they actually submit the amendments to make sure that they meet all the standards, so we will continue to work on that with the States over the next year.

Mrs. CUBIN. Thank you.

Mr. URAM. Thank you, Mrs. Cubin.

Mr. CALVERT. Thank you, Mrs. Cubin. Mr. Rahall.

Mr. RAHALL. Thank you, Mr. Chairman. Mr. Chairman, I think what we have been discussing here is a classic example of what the

hard rock mining industry comes to me and says on my efforts to reform the mining law: 'if it ain't broke, don't fix it.'

If it ain't broke, don't fix it. The current law is very clear. It gives States day-to-day responsibility. The law is very clear in that regard, and it gives you, Bob, as director, enforcement authority to make sure they obey the law.

That is spelled out, your purposes are spelled out very clearly in one of the paragraphs—several of the paragraphs of the law, so your responsibilities are spelled out very clear.

Nobody should expect with that type of relationship set up that everything is going to be lovey-dovey every day of the week and every week of the year. Naturally, there are going to be tensions, but it pales in comparison, that tension pales in comparison of what it would be like in the days of old. You talk about tension, the tension of State-versus-State, when it comes to making big bucks, when it comes to one State trying to undercut the neighboring State in order to secure that business.

So the system today works, and let us get down to the bottom line, which is, our bottom line in public office. We are responsible to our constituencies, number one. We are responsible for protecting our constituencies that sent us here.

Let me ask you about what I consider the two major constituencies of SMCRA, which is number one, coal field residents, and number two, the industry, putting the States aside for the moment.

Operating under the assumption that we are in the business of taking care of our constituents, let me take them first. What are the benefits of the pending legislation for coal field residents, citizens?

Mr. URAM. What are the benefits?

Mr. RAHALL. Yes, of the current legislation, if it were enacted.

Mr. URAM. 2372?

Mr. RAHALL. Correct.

Mr. URAM. I don't see any benefits for the families in the coal fields.

Mr. RAHALL. Let us take the industry. What are the benefits for the coal industry under this legislation? Law-abiding coal industry, I am talking about; those coal operators who have been, as I mentioned in my opening statement, which are the vast majority who have been complying with this law and who have been living exactly by the rules. What are the benefits of this legislation to them?

Mr. URAM. To people who were already complying with the law, this would not provide any benefits to them that I could see, Mr. Rahall.

Mr. RAHALL. All right. How about the States? It is my understanding that OSM enforcement action in the western States pales in comparison to the eastern States, so that it would seem if anybody had a beef with Federal NOVs and CO's being issued, it would be the eastern coal States. Lo and behold, we have the two largest eastern coal-producing States, Kentucky and West Virginia, who happen to be opposed to H.R. 2372, and by the way, Mr. Chairman, I would like to submit those letters from those respective environmental protection agencies for the record at the beginning of my comments, which I forgot to do.

Isn't that rather ironic, I guess, is my question to you, Bob, and why do you suppose that Kentucky and West Virginia find that they cannot support this bill?

Mr. URAM. Let me just address Kentucky, because I think that is probably a really very important State, and this process in Kentucky really recognizes the importance and the value to its program of having the Federal inspectors in the field, of having the 10-day notice authority. They regard it very positively; they are very supportive of it, and they believe it is one of the keys to the fact that they have a successful regulatory program.

I have a letter here from Secretary Shepherd to Greg Conrad, the head of Greg Conrad, the head of the Interstate Mining Compact Commission, and Mr. Secretary Shepherd says that we have found that the law's provisions for dealing with citizens' complaint properly recognizes and respects the primacy of State decisionmaking, but still provides for checks and balances from our Federal counterparts.

I think Mr. Shepherd's views are exactly correct. It provides the balance, but also provides the checks and balances for the Federal counterparts, and I don't believe the system is in any way intrusive at this point in primacy.

I think it is fair to say in the past, Mr. Rahall, there were some instances where OSM did not respect the rules that were adopted in 1988, and which they did not defer to the States when they should have, but I have taken care of making sure that proper deference is there.

I think it might be fair to add that I believe that every single director of the Office of Surface Mining, Republican and Democrat alike, has always reaffirmed that this is a proper interpretation of the act, and that the 10-day notice authority and the violation authority is one of the keystones to making this a successful law.

Mr. RAHALL. Let me ask you about some figures here. As we know, industry likes to throw out figures alleging that the number of OSM-issued NOVs continues to increase.

For example, the National Mining Association has an elaborate chart attached to their testimony that would lead one to believe that this was the case. Somehow, however, I suspect there is more to the story, as there often is, to such charts and such figures, and I just wonder if you could offer us any illumination about that chart attached to the NMA's testimony?

Mr. URAM. Mr. Rahall, I haven't seen the chart, but let me just address the question of whether there has been some sort of dramatic increase in the number of Federal notices of violation issued.

Mr. RAHALL. Fine.

Mr. URAM. I think the real concern here is for on-the-ground violations; that is the real focus.

Over the last three years, the Office of Surface Mining has had an increase in the number of notices of violations that we have issued in primacy States, but virtually the entire increase that we are talking about deals with what is really a Federal responsibility, which is administering the abandoned mine land fee collection program.

For example, over the last three years, the number of actions which we have issued of notices of violations to collect reclamation

fees has increased from 20 in 1993, to 72 in 1994, to 121 in 1995, and this is people who are basically failing to file the equivalent of tax returns, failing to pay their fees, and that is where the increase is.

The States have no problem with that whatsoever. In fact, they encourage us to take those actions so they can get their share of funds.

On the other hand, the number of on-the-ground violations has been constant or declined slightly over the last three years.

Mr. RAHALL. So if they are not paying the AML fees then, we have less money coming in, which exacerbates the budget deficit. We have less money to give to the States, and what we have here is a classic example of biting off your nose to spite your face?

Mr. URAM. Absolutely. The bill would take away our ability to collect fees and would make the budget deficit worse, Mr. Rahall.

Mr. RAHALL. Mr. Chairman, may I ask one last question since Bob has to leave, and I would like to talk about the big shrill we hear from the new majority about private property rights.

We have been hearing this with increasing shrillness, especially those who are prone to attack government regulations as an infringement on private property rights.

My question is, what about the private property rights of coal field citizens and how they would be affected by this legislation? The pending bill would strip OSM enforcement authority, and by doing so, I suspect highly, jeopardize the private property rights of coal field citizens.

We are going to hear that in the next panel, I might say. I see this happening; I hear it from constituents all the time.

When a State allows blasting at a coal mine to blow out windows of a private home, is that not an infringement on private property rights? When a State allows acidified water to seep into a stream, does that not affect the private property rights of people who live downstream?

Without OSM having this enforcement authority that we have been talking about to address these situations, are we not harming the private property rights of our coal field residents?

Mr. URAM. I would have to agree with you totally, Mr. Rahall.

Mr. RAHALL. Thank you, Mr. Chairman.

Mrs. CUBIN. Mr. Chairman, I would ask if it would be all right if I could submit some written questions for Mr. Uram since he does have to leave, and I would like one last question.

Mr. CALVERT. Certainly. I have a question, and there is no objection. So ordered.

One of the issues we keep coming back to, Mr. Uram, is what is primacy? Do the States have primacy or don't they have primacy? Could you answer that question?

Mr. URAM. Oh, yes, the States do have primacy, Mr. Chairman.

Mr. CALVERT. Now, I have a resolution here from the Interstate Mining Compact Commission. Mr. Bowman may be able to answer this question, where a number of States signed on to this resolution, which is in the back of your testimony.

The States of Kentucky and West Virginia, could you comment on Kentucky and West Virginia, and do they believe in the concept of primacy?

Mr. BOWMAN. Is that question to me, Mr. Chairman?

Mr. CALVERT. Yes.

Mr. BOWMAN. Yes, most certainly. I believe there has been a little bit of misunderstanding, or it is my understanding, with all due respect, that Kentucky and West Virginia are neutral on the issue, and I have some documentation here that was in the Charleston Gazette a few days ago.

Mr. RAHALL. Let us take the actual words.

Mr. BOWMAN. Sir?

Mr. RAHALL.

Just take their actual words instead of quoting from a news paper.

Mr. BOWMAN. If I may read a quote.

Mr. RAHALL. That was respectfully stated.

Mr. BOWMAN. Yes, sir?

Mr. CALVERT. Well, reclaiming my time, I can't comment on West Virginia newspapers. I have comments about my own.

Did they or did they not sign on to the Interstate Mining Compact Commission resolution, Mr. Bowman?

Mr. BOWMAN. Yes, they did.

Mr. CALVERT. And this resolution that has been submitted for the record states that all the States that signed on to this are in favor of the States maintaining primacy on enforcement and have real questions about dual enforcement. Isn't that correct?

Mr. BOWMAN. That is correct.

Mr. CALVERT. Thank you. Mrs. Cubin.

Mrs. CUBIN. Thank you, Mr. Calvert. I just wanted Mr. Carter and Mr. Bowman to be able to respond to the same questions that Mr. Uram just responded to. I would like to hear what their answers were, but unfortunately, I didn't write down all your questions.

I would like for Mr. Carter and Mr. Bowman to respond to those last questions that you asked of Mr. Uram, but I didn't write them down. Would you mind posing those questions again?

Mr. RAHALL. I asked the questions; I'm not sure what they were.

Mrs. CUBIN. You asked the questions of Mr. Uram, but I would like the other two gentlemen to be able to respond to those same questions.

Mr. RAHALL. We will submit them for the record. Mr. Uram has to leave.

Mrs. CUBIN. Right. Mr. Uram has to leave, so he can go, but I would like to hear from the other two.

I believe you asked something like what is the benefit to the people who live on the coal fields, and you gave an example about windows being blown out and that kind of thing.

That was all I wanted from the panel.

Mr. RAHALL. You would like to ask them on your next round?

Mrs. CUBIN. I don't know what your questions were.

Mr. CALVERT. Mr. Uram, we know that you need to leave. We appreciate your testimony and your staying here to answer our questions, and have a good flight and a good day, and we will see you soon.

Mr. URAM. Thank you very much. I appreciate the opportunity to be here.

Mr. CALVERT. Certainly.

Mr. RAHALL. Thank you, Bob. It is a good job that you are doing with OSM.

Mr. CALVERT. Thank you, Mr. Uram. With that, maybe I can ask the other gentlemen. The questions, I guess were, and maybe the comment would be, are the States capable of representing the local communities, the local communities in the sense that the problems that Mr. Rahall mentioned, blasting or issues regarding mining? Do you have any interest at all in enforcing those types of activities on the properties? Don't you hear from your local citizens? Do they have any comment about that?

Mr. BOWMAN. There is no question that coming from Illinois that those are very sensitive issues all over the country, but I think OSM has gone on record numerous times in its report to Congress that the States are very apt at handling their own problems within their respective States.

They themselves have complimented us through those reports numerous times. In answer to that, Mr. Chairman, yes.

Mr. CALVERT. I have one comment to make. In hard rock mining, obviously, blasting is used significantly, I would say much more than coal or other soft materials, and the Federal Government is not involved in that directly, necessarily, and we certainly have problems, but I will guarantee you that the local communities—we hear from them if there is a problem with blasting.

I have a lot of hard rock mines in my district, so I can attest to that.

Any other questions for the two witnesses?

Mr. RAHALL. Mr. Chairman, if I might respond to——

Mr. CALVERT. Certainly.

Mr. RAHALL.—[continuing]. whatever resolution it is that you read there and which you tried to say my State endorsed--

Again, I say let us read their letter, signed by the Office of Mining and Reclamation Chief, John C. Ells, State of West Virginia, Division of Environmental Protection, Gaston Caperton, Governor, 10 Winjunkin Road, Nitro, West Virginia 25143; October 12, 1995; read what they say. "West Virginia DEP declines to endorse the recent resolution adopted at the annual meeting, or whatever you referred to, nor can it endorse the currently proposed H.R. 2372." That is what we are considering here today.

Mr. CALVERT. Let me just ask the question to Mr. Bowman once again. Did they or did they not sign onto this resolution?

Mr. BOWMAN. If I may bring Director Greg Conrad, director to the IMC to the table, please?

Mr. CALVERT. Certainly. Go ahead.

Mr. BOWMAN. He can respond to that.

Mr. CONRAD. Thanks, Mr. Chairman. I am Greg Conrad, Executive Director of Interstate Mining Compact Commission.

To clarify for Mr. Rahall and for the subcommittee, when we took this vote in September at our San Antonio meeting, all of the States supported the resolution.

We, however, offered an opportunity to those States to re-evaluate their vote on that resolution and to get back to me within a couple weeks thereafter.

West Virginia, in fact, did get back to me with the letter that Mr. Rahall has referred to, indicating that although they continue to strongly support primacy in their State and are concerned about Federal enforcement authority in primacy States, that they were concerned about the contents of the particular legislation, since they had not had a chance to review it prior to its introduction. They wanted some additional time to consider what the impacts of that legislation would be, and consequently, they indicated that they could not endorse that legislation and withdrew their endorsement of the resolution. They do not oppose the legislation; they simply do not endorse it, which as they have clarified to me, means that they are neutral on the legislation.

Kentucky has done the same thing.

Mr. CALVERT. All right. Thank you.

Mr. RAHALL. Mr. Chairman, may we move on to the important parts, that is, the effects on constituents?

Mr. CALVERT. Thank you, Mr. Rahall. We appreciate your coming to this meeting and we thank you for your testimony and answering questions.

Mr. ABERCROMBIE. Mr. Chairman.

Mr. CALVERT. Yes.

Mr. ABERCROMBIE. Excuse me. I really don't think the last statement, while it may be the gentleman's opinion, can be left to stand as fact.

I don't think the letter says that failure to endorse means we are neutral. That is not what that letter says, and I don't regard the common sense understanding of the English language with respect to whether something is endorsed or not endorsed to be as the gentleman made his interpretation, so I want that on the record.

Mrs. CUBIN. Mr. Chairman, there we go with that interpretation again. I wonder if we need another piece of legislation.

Mr. ABERCROMBIE. You are dreaming if you think you are going to write legislation and it ends up calming interpretations or regulations. You don't write legislation that way. It has never been done. Moses couldn't do it.

Mr. CALVERT. Thank you, Mr. Abercrombie. Thank you again, and we are going to introduce our next panel, and then we are going to go vote.

Mr. Quinn, the Senior Vice President and General Counsel, National Mining Association; Blair Gardner, Vice President of External Affairs for Arch Mineral Corporation; Mr. Gene Saunders, President of Local Union 9177, United Mine Workers of America; Mr. Tom Fitzgerald, Director of National Citizens' Coal Project; and Mr. Dickie Judy of Foster, West Virginia.

If you would all like to take your seats, again, I apologize. We need to go vote.

[Recess]

Mr. CALVERT. The committee will come to order.

First, I would like to introduce Mr. Harold P. Quinn, Senior Vice President and General Counsel for the National Mining Association.

Mr. Quinn, you may begin your testimony. We are under the five-minute rule, so you will see a green light and then go to red,

so try to keep your testimony to five minutes. Thank you very much.

STATEMENT OF HAROLD P. QUINN, JR., SENIOR VICE PRESIDENT AND GENERAL COUNSEL, NATIONAL MINING ASSOCIATION

Mr. QUINN. Thank you, Mr. Chairman. Good afternoon, members of the subcommittee.

My written testimony has been submitted, and I would appreciate it being part of the record. Rather than trying to summarize it, I would like to perhaps respond to a number of comments made by the director of the Office of Surface Mining in his testimony this morning.

Mr. Uram properly led off his written testimony with the historical context of this program and experience. I would agree that is an excellent starting point. However, I believe that where we depart is how we use that history.

On the one hand, it would appear that we have two choices, either to live in the past, history, or to take some lessons from that history and to move on.

I believe the Office of Surface Mining's view is the first, which is to live in the past and keep the program in very much the status quo, whereas, in our view, it is time to move on, recognize the States' capabilities, and provide the industry with greater regulatory certainty in their operations.

Mr. Uram touts the regulatory stability that has evolved over time under the Federal-State relationship. I would agree that this program is considerably more stable than it was in its initial days, however, the changing variable remains the Federal-State relationship which actually creates regulatory uncertainty for the coal industry, in that we are constantly subjected to two regulatory masters. We are unfairly penalized and punished by Federal citations, when we are only following the State-approved permit and the State policies under the State program.

Mr. Uram indicates that their current structure attempts to support on-the-ground success, and that is what they are looking for at the least possible cost. Unfortunately, that is not the case at all, and many of the instances where we see Federal intervention has nothing to do with the environmental good or the environmental standards, but more to do with process and whose views prevail on how we attain the overall objectives of this particular law.

I have mentioned a number of examples with a cross-section of cases in my written testimony. I believe they do indicate that the disputes and concerns we have do not disclose circumstances of State inaction or lax enforcement. Instead, they demonstrate disagreements over the application of program requirements to local conditions as well as the tendency of Federal inspectors to substitute their opinion for the State decisionmakers.

These disputes have little to do with the protection of the environment and much to do about whose views prevail and how to achieve the overall goals. The common denominator, however, does remain that the mine operators are placed at risk in this climate of regulatory uncertainty, answering to two regulatory masters.

Mr. Uram also indicated in his testimony that if this legislation is passed, coal industry representatives would urge the States onward in a race to the bottom to weaken their enforcement and environmental protection programs. My response is threefold.

I believe this statement shows little confidence by OSM in the States. It clearly overstates the coal industry's persuasive power with respect to the States, and certainly maligns our objectives which are to have greater regulatory certainty under this program.

Finally, Mr. Uram did indicate that this legislation would remove one particular tool in a full arsenal of tools that allows for a graduated response in the oversight of State programs. Ironically, however, he concludes that what would result by taking away one of many tools would be essentially an all-or-nothing approach. That is, when the Office of Surface Mining inspectors disagree with the States' decisions, they would have no choice but to take over the whole program.

This is clearly a misstatement of the law or demonstrates a misapprehension of his own rules as well as the law he is entrusted to administer. The law and its regulations provide a range of options to deal with these disputes between the State inspectors and Federal inspectors without engaging directly, or unfairly punishing, those operators caught in the middle of these disagreements.

We also think that Mr. Uram's views of the options misses the point in terms of what their role is versus the State role. The OSM's role in SMCRA, as we see it, is to monitor State compliance, and the State's role is to monitor operator compliance. We fail to see how a Federal notice of violation issued to an operator following a State permit, State policies, somehow corrects State compliance with that program, if in fact the true dispute is between the Federal agency and the State agency over what the proper application of the program should be.

Merely issuing a notice of violation to the operator does not solve that dispute, and in fact, that disagreement will persist for years to come. The only difference is that the operator is being unfairly punished for following exactly the instructions he was given by the day-to-day regulator, that being the State.

That will conclude my comments, Madame Chairman, and I appreciate the opportunity to be here today.

(Statement of Mr. Harold P. Quinn, Jr. can be found at the end of the hearing.)

Mrs. CUBIN. Thank you very much, Mr. Quinn. The next panelist we would like to hear from is Blair Gardner, Vice President for External Affairs for Arch Mineral Corporation.

STATEMENT OF BLAIR M. GARDNER, VICE PRESIDENT, EXTERNAL AFFAIRS AND SENIOR COUNSEL, ARCH MINERAL CORPORATION

Mr. GARDNER. Good afternoon, Madame Chairman. My name is Blair Gardner, and I am the Vice President for External Affairs and Senior Counsel for Arch Mineral Corporation in St. Louis.

Like Mr. Quinn, I did prepare written testimony today, which I hope might be included in the record.

Our subsidiary companies mine coal in five States, including both your State of Wyoming and the congressional district represented by your colleague, Mr. Rahall.

I participated in the oversight hearing which this subcommittee conducted in June, and I am honored to be asked to testify again today.

H.R. 2372 represents, Madame Chairman, a very modest but very appropriate reform of the 1977 Surface Mining Control and Reclamation Act. As I understand the bill, the amendments to SMCRA proposed have a single objective, and this is to define with greater precision the responsibilities of the Federal and State governments in enforcing this statute to avoid unnecessary duplication.

In its fundamental aspects, this bill is really not about the environment. It is not about being in favor of or against coal mining. It is about accountability.

The reforms proposed by H.R. 2372 are ones of process, not substance. These occur in the areas of enforcement and judicial review and permitting.

H.R. 2372 serves to remind those of us in the coal industry that we remain accountable for the environmental consequences of our mining. It reinforces the accountability of the States in their direct enforcement of the law.

Finally, it clarifies the accountability of the Federal Government to measure the performance of the States against the Federal statute.

Enforcement is not diminished by any provision of this bill. A mine operator remains responsible for meeting the same environmental standards that have been in effect since 1977. Instead, the bill clarifies that it is the State regulatory authority, not the Federal Government, which must determine if an operator meets the requirements of the law.

If an operation does not meet those requirements, then the full weight of legal sanctions available as administered by the States will fall on the operator. If the violation represents an imminent danger, OSM retains its full legal authority to enforce the law and require the mine to shut down.

Judicial review has modified in two important respects. First, the final decision of an administrative law judge is reviewable by the United States District Court, not by the interior board of land appeals. Second, the petition for review will be brought in the District Court in the State of the operation, and not in the District of Columbia.

The legal status of a surface mining permit is enhanced under this bill, Madame Chairman. It is clear that the legal standards which govern the operations are contained in the permit.

This is positive, because it will force both the operator and the regulatory authority to negotiate permit terms which are clear. It will discourage ambiguity as changes in the approved regulatory program are made by the States. The bill provides a mechanism for incorporating those changes into the operation.

At the June hearing, I understand that these concepts were greeted with skepticism by some. There was expressed a fear that the States had done a poor job in enforcing reclamation, and that

the States could not be trusted with their responsibility. In fact, by OSM's own analysis, the States do a better job today than they did five or 10 years ago in administering their programs.

This conclusion is one which has been reached in each annual report evaluating State program performance. If State performance has been declining, one might have reason for concern. Our experience is just the opposite, however. State administration of programs has improved, not declined.

Finally, I would ask this committee to remember the historical context in which the 1977 act was passed. Passage occurred at a time when the coal industry, measured both by production and the number of producing coal firms, was expanding. This arose because of the international disruption in energy markets during the 1970's.

This is not the reality in late 1995. Although coal production continues to grow modestly and continues to provide the United States with low cost electricity, the coal industry is shrinking. However measured, by the number of producing mines, the number of coal companies, or the number of coal miners, the industry is smaller today than in 1977.

The reforms proposed by H.R. 2372 reflect this modern reality, not the historical facts of 20 years ago. As you deliberate on this bill, I hope that you will share my conclusion that since 1977, our industry has matured. Regulatory authorities have become more adept in their enforcement, and it is time to adopt the mature and thoughtful reforms contained in this legislation.

Finally, I would also add that if either member of the panel present do wish to come to their opposite States to tour coal mines, I would welcome Mr. Rahall at our operations in Hanna, just as I would welcome you, Madame Chairman, at our operations in Logan County, West Virginia.

I appreciate the opportunity to testify, and I thank the committee for its courtesy and attention.

(Statement of Mr. Blair M. Gardner can be found at the end of the hearing.)

Mrs. CUBIN. Thank you, Mr. Gardner. I especially want to thank you for being here, since I realize you missed your daughter's 13th birthday in coming here to testify. We do appreciate it.

Had we known, we never would have scheduled it for today.

Mr. GARDNER. Abigail will understand.

Mrs. CUBIN. The next panel member that we would like to hear from is Mr. Tom Fitzgerald, the Director of the National Citizens' Coal Project. Mr. Fitzgerald.

STATEMENT OF TOM FITZGERALD, DIRECTOR, NATIONAL CITIZENS' COAL LAW PROJECT

Mr. FITZGERALD. Representative Cubin, Representative Rahall, I appreciate the opportunity to testify here today.

I am here to ask you not to dismantle the framework of an act that has helped to lift the environmental burdens of coal mining from the backs of downhill and downstream neighbors, and to make those impacts the cost of doing business.

The continued Federal presence in a collaborative, and when necessary, a regulatory mode, has been pivotal in providing some meager justice to surface landowners and neighbors.

The elimination of the NOV authority, the creation of a permit compliance exemption, and the severe restriction of public access to Federal courts and Federal administrative processes contained in H.R. 2372, coupled with the harsh reductions in Federal inspection and enforcement budget, will set back the implementation of this law and will rekindle the anger and cynicism of coal field residents toward the industry and government.

This bill dramatically curtails both the role of the Secretary of the Interior and the rights of coal field citizens. Beyond stripping OSM of the ability to issue notices of violation where the State has failed to act or justify inaction, the bill breaks the promise that Congress made to coal field residents in 1977, that although the States would be granted primary authority to implement the law despite their abysmal record, a continued Federal presence and meaningful citizen access to Federal forums would assure that the historic burdens of coal mining would not be reimposed on their shoulders.

The bill is a coal lawyer's dream, creating new ambiguities in OSM's base enforcement and inspection authority.

The relationship among the States, OSM, industry, and the public was not crafted on a lark. It was a deliberate and thoughtful allocation of authority and accountability, crafted out of congressional recognition that without a Federal floor of environmental standards, continued public involvement and a continued oversight role for the Secretary of Interior, the States would retreat to their tendency to under-regulate and the destructive forces of interstate competition would continue to spiral downward the regulation of mining.

In Kentucky, our State program implementation has stabilized after a tumultuous first decade. It is being fairly implemented, for the most part, and where disagreements concerning program implementation are largely resolved in a collaborative manner. Kentucky's experience, however, attests to the fact that OSM's presence is a necessary deterrent against abuse.

The precipitous decline of our State program in the 80's and the rehabilitation of that program in the early 90's is testimony to the wisdom of Congress in providing a continued role for the secretary and for citizens. This bill threatens to erode that progress and causes me great concern.

What is the effect of the bill? As has been testified to, the vast number of NOVs that are written, are written for nonpayment of AML fees, from delinquent operators who believe they need not pay their way, and for ownership and control linkages. Imposing a three-year statute of limitations and eliminating NOV authority will compromise OSM's effort to collect those fees from the deadbeats, and will reward the operators whose contract miners violated the law with impunity.

Those who didn't shirk their responsibilities will suffer, as well as the public, for each of these sites has neighbors, and each of these neighbors is picking up the tab for someone else's indifference to law.

What of the removal of NOV authority? Ask Muriel Smith, one of my clients in Perry County, whose ex-husband signed a waiver allowing a sediment pond to be built 100 feet above her house. The State claimed that looking behind the waiver would have been a property rights determination, since the permit had been issued, as if issuing the permit were not a property rights determination.

It took me five years through the court of appeals to vindicate her right to be left alone. But for NOV authority, she would have had to suffer a high hazard impoundment, 100 feet above her propriety without her consent. With that authority, the pond was removed immediately.

Ask Ollie McCoy whether OSM should have a continued oversight role. After the State declined to take enforcement against J & H Coal Company for a landslide that was tearing her home apart, Ollie asked OSM to intercede and to bring their technical resources to bear on the problem, resources that the State did not have available. Ollie's home was destroyed, and her life and that of her grandchildren disrupted before any action could be taken, but eventually, the coal company was issued a Federal NOV and took corrective action.

A Federal presence capable of grappling with difficult, technical issues where the State has not the resources or chooses not to extend them if still necessary. What do I tell the next Ollie McCoy? That Congress has removed both the authority to force responsible companies to act short of imminent danger and that they stripped bare the budget by which OSM could conduct the investigations?

What am I to tell the next Anderson family if you close the doors to the Federal courthouse? The Andersons, who, after winning a trial court verdict that mining had ruined their water supply, had the verdict overturned by a State judge, who reasoned that since 140 other families had lost their water supply and might sue the coal company, that this would render coal mining economically impossible, and took away the verdict on that basis.

Do I tell them that their access to a sometimes more impartial and dispassionate Federal forum before an appointed judge has been taken from them, and that their access to the interior board of land appeals for redress when OSM declines to take the action has also been eliminated?

There has not been advanced a compelling and legitimate reason to upend this law in such a dramatic manner. We are not here because the industry lacks mechanisms for addressing the 29 notices of violation written nationally in the past 18 months. There exist remedies for problems that arise in any alleged overreaching.

If you will bear with me for two seconds, I just want to finish up.

It would appear instead that OSM's authority is at risk more because they are holding industry accountable for their AML debts and the violations caused by their contract mines.

It is not too much to ask that those who live downhill and downstream have the law fully and fairly enforced, but it is not always done. It is not too much to ask that when the law is not enforced, that someone will be there to force the compliance with the law, but that doesn't always happen.

It is certainly not too much to expect that when the States fall down in their obligations, that someone will be there to protect the innocent and the rights of these landowners, and I ask you not to pass a bill that will deprive them of that very important safety net.

Thank you.

I am sorry, just by way of clarification, I did talk to Secretary Shepherd on the phone during the break, and he reaffirmed for me that he thought there was no ambiguity in his letter to Mr. Conrad. The State of Kentucky's position is that they oppose the bill. I have his phone number, if anybody wants to call him.

Thank you for your time.

(Statement of Mr. Tom Fitzgerald can be found at the end of the hearing.)

Mrs. CUBIN. I have to be just a little bit territorial here. When we are talking about notices of violation being issued for nonpayment of AML funds, the State of Wyoming has been certified that we have completed reclaiming all of the abandoned lands, and yet the State of Wyoming is the largest coal producer in the country and continues to pay into the AML fund.

I think when you are talking about western States, you have a whole different picture here than when you are talking about eastern mines, and certainly, we will continue to pay into the AML fund, but the companies that are operating in my State are being treated very unfairly, and I think we do owe them this legislation to help them overcome some of the problems.

The next speaker on the panel—when you are the chairperson, you get to have a little bit more leeway.

I have Mr. Saunders on my list, but I believe Mr. Dickey is the next one?

Mr. JUDY. Mr. Saunders is.

Mrs. CUBIN. Mr. Gene Saunders, who is the President of Local Union 9177 of the United Mine Workers of America. Mr. Saunders.

STATEMENT OF GENE SAUNDERS, PRESIDENT, LOCAL UNION 9177, UNITED MINE WORKERS OF AMERICA

Mr. SAUNDERS. Thank you, Madame Chairman and members of the committee, for the opportunity to present the view of the United Mine Workers of America on this proposed legislation.

I would ask for my testimony to be included in the record.

I am President of Local 9177 of District 17 of the United Mine Workers of America. My local is in Boone County, West Virginia, one of the largest coal producing counties in the eastern United States.

The United Mine Workers of America welcomes Federal oversight and participation in regulating surface mining. It is only through Federal legislation that all States must enforce consistent standards in the mining industry.

We stand with hunters, sportsmen, hikers, campers, and all citizens of Appalachia in our desire for aggressive enforcement of surface mining laws. We believe that a healthy coal industry can and must exist with enforceable restrictions on mining techniques and reclamation requirements.

I am here today to speak in opposition of the proposed legislation for the following reasons.

The ability of OSM to issue notices of violation is crucial to ensure compliance with the surface mining laws where a State will not diligently enforce the law.

An active Federal presence is needed to prevent States from creating competitive advantages by not enforcing the law, and the removal of direct Federal enforcement authority is the first step toward moving to a pre–1977 standard of inconsistent and inadequate reclamation.

The reality of Federal notices of violation is minimal compared to the importance of the ability of OSM to directly issue violations for noncompliance. The authority of the Federal Government to take immediate action serves as a check and balance on State inspectors. There is much less pressure on Federal inspectors and Federal administrators from the local coal industry to ignore or minimize violations.

Consistency within the industry and between States is essential. We cannot create an environment in which the bad actors in the coal industries are allowed a competitive advantage, because they are allowed to mine without following mining and reclamation law, yet that is one result of inadequate enforcement.

In addition and more importantly, the pressure on States to deviate from mining laws will increase the absence of Federal enforcement authority. The coal industry is very competitive. We are going through many changes due to the Clean Air Act and the profitable coal fields are changing within and between the States of Appalachia.

However, we can deal with those other changes as long as we have a level playing field with regard to the mining procedures that must be followed, and the reclamation that must be done after mining is completed.

If you remove the Federal inspectors from the field, each State will look for ways to ease regulations in order to increase the mining within their borders. That is unacceptable.

It is well known that the Surface Mining Control and Reclamation Act was passed in 1977 after many years of inconsistent State regulations and inadequate self-regulation by the coal industry. Federal enforcement in the coal fields is an essential element of Federal law.

We do not want to move back to the days before 1977. That battle has been fought, and we have lived with the Federal law for 18 years.

The citizens of West Virginia know too well what happens to State programs when the Federal Government withdraws its oversight. Our program, one of the best during the early 80's, was literally destroyed in the mid–80's under the administration of our previous governor.

The State neglected enforcement of mining and reclamation standards. They allowed the renegades of the coal industry to conduct mining operations without concern for proper reclamation standards. They allowed the renegades of the coal industry to conduct mining operations without concern for proper reclaiming procedures.

Our program was restored only after citizens filed suit to have the Federal Government take over the program. Such an action to

get the State to accept its responsibilities can only happen with the Federal Government's active role in the program.

If OSM is not allowed to issue notices of violation, the ability of the Federal Government to participate in our State programs will be destroyed. Without the immediate threat of Federal citations and the long-term threat of increased Federal control, the greedy elements of the coal industry would once again have the upper hand and drive the whole industry to the pitiful conditions that existed 10 short years ago.

Surface mining has great potential to damage the land and spoil the environment. I invite those from outside Appalachia to come to Boone County, West Virginia, and see the impact surface mining has on the land.

We are moving more stones than it took to build the pyramids. Only by compliance with federally approved regulations can we continue to mine without permanently and adversely affecting the land.

Mine workers, more than anyone else, understand that we must prepare for life after coal. We will continue in the hills and the hollows of West Virginia, Kentucky, and other States of Appalachia long after the coal has been mined.

We do not want our backyards spoiled by acid mine drainage, rock slides, and subsidence. The waters and lands of Appalachia must be taken care of. We believe we can mine coal and protect our natural resources, but it takes diligence.

Without the specter of Federal oversight and Federal enforcement, the program of my State and its border States will decline, and we will once again pay with polluted trout streams, unstable hillsides, and diminished drinking water supplies.

Once again, Madame Chairman, I want to express my appreciation for allowing me to testify before the committee today.

Mrs. CUBIN. Thank you very much, Mr. Saunders. I hope that the subcommittee will be able to take a trip to Boone County or somewhere similar so that we can see the situation of the coal mining in West Virginia.

The next person on our panel is Mr. Dickie Judy from Foster, West Virginia.

STATEMENT OF DICKIE JUDY

Mr. JUDY. Yes, Madame Chairman and distinguished members.

I am Dickie Judy, and I am opposing the H.R. 2372 bill and the reason why is that I have been through, with the coal situation, damage to my home, my property.

The coal companies, DEP asks the coal companies to do pre-blast surveys of homes. These are the pre-blast surveys, one of the home before, one of the home after. This was in a matter of four months.

Here is one that is before, and here is one that is after the blasting began. I contacted the DEP. They wrote violations, NOVs, cease blasting—look at the list. I am still right back where I started a year ago.

I moved to my home and I had it built, taking two years, in September 1994. At that time, they did the pre-blast survey and the blasting started in September.

I have called the coal operators, and the coal operators told me that they were in compliance with the law. I told them that my water was ruined; it was throwing iron water completely through our clothes, our drinking water. Everything was ruined.

The coal operators sent a gentleman down, and they put a water softener in for me. Before, we had 24 percent iron in our water. The water softener they put in costs me $24 a week to operate to solve it. A year later, we have 70 percent iron in our water. The coal operators said, we are not spending another penny on you.

We went to the DEP, the Surface Mine Board. The Surface Mine Board looked at everything. My lawyer said, don't even go in there. He said, you are beat, and I said, what do you mean, and he said, look in there, and there sat the Surface Mine Board, the coal operators, their lawyers, just laughing and having a game.

Everything that we went in to do, the coal operators, their credentials was all that they were interested in, who had Ph.D.'s, who had doctor degrees and everything in blasting, engineering. That is all they were interested in and that was all it consisted of in that hearing.

Homes that were built in 1892, and a home that was built in 1994 all decide to settle at the same time in four months when the blasting started. That was their opinion on it.

If we don't have OSM to take over situations like this, the damage done to our home and our property which cost me $100,000, maybe to collect $30,000 worth of damage.

The attorneys in the situation we are in, the ones that are large enough to handle against the coal operators, when we contacted them to do something, they said, we can't do it. We do work for this coal company. It would be conflict of interest.

The other attorneys that are not big enough to handle it, I called one and he come up, and he said, oh, my God, no. I have only handled $5,000 worth of damage. I can't handle this one.

Our State attorneys has appealed to fight some of these boards, they don't have the knowledge, the degrees in blasting, the engineering, construction, to go in and fight for this. The OSM has, and they have the equipment to do this with. The State asked the OSM to come in and help.

We need the OSM in the coal fields. Without it, there will be more violence, because the people in West Virginia are not going to stand by, and Kentucky, and let them destroy our homes and our families just because they want to get a tone of coal out, and that is what it amounts to.

They have 96,000,000 ton of coal to get out behind my house. They done the damage, 5,500 feet. They are coming within 2,200 feet of my home.

Without the OSM, we are going to have to build a great big steel vault over top of my property to keep the rocks and to keep our place from falling down. This is what we are faced with every day in West Virginia.

We need the OSM in there. Without it, West Virginia is under. I would leave the State and go somewhere where there is not even a lump of coal if the OSM gets out of this.

Thank you very much, Madame Chairman, and I would like to invite you on-site to my home to show you what is going on.

(Statement of Mr. Dickie Judy can be found at the end of the hearing.)

Mrs. CUBIN. Thank you very much, Mr. Judy. I will start with a question of you, Mr. Judy, since your testimony was last.

You had problems with two different homes on the same lot. Is that the case?

Mr. JUDY. Yes, Madame Chairman. I have 104 ½ acres.

Mrs. CUBIN. OK.

Mr. JUDY. One home is valued approximately $50,000 that they destroyed, which is the older home. It is the oldest home in Boone County, that type of home. Then I have another home that is valued at $250,000 replacement on it.

Mrs. CUBIN. Has the situation been resolved?

Mr. JUDY. The OSM has come in and they have taken their tests and seen that it was caused by the blasting, and now, they are in the steps of taking care of everything.

Mrs. CUBIN. This has been going on for a year. Why do you suppose it took the OSM a year to investigate?

They had, at their fingertips, they had available to them, and if this bill passes, it will still be available to them. They could either order the mine to stop blasting. The could order the mine to quit working. They could take the whole State program back. Why did OSM take a year to do anything about it, and then why did they not ever order or issue a cessation order?

Mr. JUDY. No, Madame Chairman. The State, this was the State. The OSM just got involved. They have to wait until the State gets through playing games, and that is what they done. They played games, and they have to wait until I go through all of this.

Mrs. CUBIN. But they don't have to wait, and that is why we are here.

Mr. JUDY. Yes, ma'am.

Mrs. CUBIN. The problem is that they issue these over and above the objections of the State.

Mr. JUDY. Yes, ma'am, Madame Chairman. In our State, they have to wait until the State gets completely through, then they have to take the testimony and read it, and they have to examine everything before the Federal will step in and take over.

Mrs. CUBIN. Is that part of the State primacy plan, do you know, or is that a separate statute?

Mr. JUDY. I am not positive on that right now, ma'am. I have been so confused in fighting this, it is unbelievable.

Mrs. CUBIN. Thank you.

Mr. JUDY. Thank you, Madame Chairman.

Mrs. CUBIN. Before I go on with questions, there were just a couple of observations that I wanted to make. I wanted to give an example of a problem that we have, and it is found in our Arch Minerals of Wyoming subsidiary.

The selective retention of a high wall near Hanna, Wyoming, has promoted the return and increased the population of golden eagles, hawks, and owls in that part of the State. It was initiated in the early 1980's as an experimental practice, and it was authorized under Statute 711 of SMCRA.

The project enjoyed the broad support of the Wyoming Department of Environmental Quality, the State Fish and Wildlife Commission, U.S. Fish and Wildlife.

Although it was recognized by the Wyoming DEQ for being an innovative example of reclamation designed to improve wildlife habitat, OSM refused to consider it for national recognition, despite requests by the Wyoming regulatory authority to amend its State program to ease permitting of such sites. The OSM has refused to authorized any liberalization of such high wall features, unless the permittee can prove that such bluffs were originally present.

So the point I want to make is that in most cases, the innovative research, the innovative plans that are for the betterment of the environment and for the living atmosphere in terms of wildlife and people, in the western part of the country, it is being done by the States; it is not being done with OSM.

I don't know if you were here earlier, but I certainly want to work with Mr. Rahall to address the problems that are different in the east than are in the west. I think this is just a good demonstration of why State programs are better, because there isn't a sock that fits you and that fits us.

Apparently, what is beneficial for you is very detrimental for the industry where I live. That is just an observation that I wanted to make.

Let me ask Mr. Gardner, if OSM is truly attempting to achieve the best on-the-ground results at the least possible cost and provide greater environmental benefits, could you explain why you believe States have had such a hard time in getting some State program amendments approved by the OSM, especially in Wyoming? Would you give a Wyoming example?

Mr. GARDNER. Madame Chairman, using the example you have just given, I think it was our perception after we discussed this with the agency people in Wyoming, that there was an enormous reluctance on the part of OSM to approve a specific State program amendment in Wyoming which would have allowed selective bluff retention for fear that States in the east would also demand a similar type of program amendment.

As Mr. Fitzgerald could explain in, I am sure, greater detail than I could, because Tom has litigated these questions actively for many years, the incomplete elimination of high walls in central Appalachia, particularly eastern Kentucky, has been a recurring problem, and there was a fear, I believe, on the part of OSM that if Wyoming were to adopt such a program change, notwithstanding, I think, unanimous agreement that it had a very important effect on increasing raptor populations in that part of the State, that it would be seized upon for ill purposes in the east.

I understand that. I don't think, however, that justified the refusal of the agency to consider what I think was a very appropriate change in State regulations which as Chairman Calvert mentioned recently, earlier this morning, it is in fact recognized as one of the functions of the 1977 act.

There may be other examples, but this is the one that frankly comes most readily to my mind.

Mrs. CUBIN. Thank you. Mr. Abercrombie.

Mr. ABERCROMBIE. Thank you. Mr. Gardner, let me go to you and kind of work my way backwards here.

You were in the audience. I spoke earlier of the 13 purposes——

Mr. GARDNER. I was, sir. Yes.

Mr. ABERCROMBIE.—[continuing]. in the act. One of the points that I mentioned about the States had to do was ensure appropriate procedures are provided for public participation and revision, enforcement, etc., regulation standards, reclamation plans or programs established by the Secretary or any State under this act.

I am not going to try and play lawyer, inasmuch as I am not, and happy on that account, but my understanding of the bill, and as I said at the beginning of my remarks, I come to this with no ax to grind from previous history, so I hope I am being objective about it.

My understanding would be is that Wyoming should be able to do that. Now, if this is a failure of the Office of Surface Mining to do it because they fear some kind of retribution or exactly the thing that you said, then they will start demanding in the east, if I am the director of the Office of Surface Mining, I simply go right to number I under purposes and say, wait a minute. This is appropriate to Wyoming. It may be not appropriate to Kentucky or West Virginia or wherever it is. Now, if you can establish in Kentucky or West Virginia that what we are doing is appropriate to you, all fine and good. If we establish a program there that you see has relevance in West Virginia, good, but I don't understand why they would fail to do something in Wyoming that was agreed would be beneficial, and might even be agreed by others looking at it in the Wyoming context.

They are not only under no obligation, but it seems to me as a matter of the clear intent of the law, aren't forbidden exactly, but they don't have to duplicate what has been done in one State in another State simply because it has been done in a particular State.

On the contrary, the law seems to say it should be situation-specific. Would you agree?

Mr. GARDNER. Absolutely, Mr. Abercrombie.

Mr. ABERCROMBIE. Then that is something we need to take up with OSM, I believe. I am open on it, but I am not sure legislation is the way to do that. That seems to be a question of the talent in the room in understanding what it is they are supposed to do or not do.

Inasmuch then as you had mentioned Mr. Fitzgerald's name in the context of your response to the chair, Mr. Fitzgerald, would you agree with the interpretation, although I hesitate to use that word after this morning's activity, would you agree with my observation that the purpose clauses clearly State here that OSM should be and can be situation-specific with respect to how it approves or disapproves the programs or regulations, etc.?

Mr. FITZGERALD. It is certainly not only in the purposes of the law, but if you look through the regulations, there have been significant areas where that sort of difference in geology and geography and climate have been recognized.

In terms of bond release, Congress recognized it in setting the extended liability periods differently for the east and west. Cer-

tainly, if a case can be built, that there is something distinct about high wall elimination in another State that does not present the very serious public safety problem. That incomplete elimination of high walls leave in areas of substantial rainfall like Kentucky, then there is a mechanism to do that.

There are petitions for rulemaking that require the agency to consider and to justify why they don't adopt, and to encourage public input on why they should adopt.

Mr. ABERCROMBIE. My understanding of the plain reading of the Surface Mining Act here is that precisely because it was recognized that there were numerous variations in climate, geology, etc., which you have just enunciated, that the office had to, by definition, be flexible with respect to how it implemented not so much the standards, but as to what those standards would mean in the various contexts.

Mr. FITZGERALD. During the initial program of the permit and program regulations, OSM was under the gun over a two-year period to adopt both the interim and permanent program by 1979. They, in some areas, were fairly proscriptive in saying that one size fits all for all of these different areas.

I think that there are areas where more flexibility in how you achieve that ultimate goal——

Mr. ABERCROMBIE. That has been a criticism over time, and as I say, that depends on the talent in the room.

To me, it is like the Constitution. The Constitution doesn't guarantee good government; it guarantees the opportunity for it. It depends on whether you have got people committed to it and understand it and all the rest of it.

So perhaps then we need some clarification of the existing legislation with respect to purpose. I am not sure, but I am willing to discuss that.

In any event, may I take it there is a general agreement with the observations I have just made? If you could just say yes or no, because I am at yellow here.

Mr. GARDNER. Sure.

Mr. ABERCROMBIE. Mr. Judy.

Mr. JUDY. Yes, sir.

Mr. ABERCROMBIE. Thank you for coming. It is not easy. I take it that you are not a professional witness.

Mr. JUDY. No, sir, I am not.

Mr. ABERCROMBIE.

Mr. ABERCROMBIE. Mr. Fitzgerald and Mr. Gardner may be more used to doing this kind of thing.

I wanted to ask you what you do for a living, if you don't consider that too personal.

Mr. JUDY. No, sir, I don't. I used to be a coal miner and I also was in construction, building homes and remodeling.

Mr. ABERCROMBIE. So you didn't get into this and you are not here today because you have got a professional interest. This is a personal interest based on your personal experience.

Mr. JUDY. Yes, sir, that is all this is.

Mr. ABERCROMBIE. Well, Mr. Judy, I told Mr. Rahall, and I certainly commended the Chair's attention and consideration, that I learned a long time ago that when somebody answers questions

and uses numbers with respect to years and puts the word and in between whatever the first two numbers are and the last two numbers, that I stay the hell out of their way.

Mr. JUDY. I don't blame you, sir.

Mr. ABERCROMBIE. So whatever it is that you said, I am on your side today.

Mr. JUDY. Thank you, sir.

Mr. ABERCROMBIE. Thank you.

Mrs. CUBIN. Mr. Rahall.

Mr. RAHALL. Thank you, Madame Chair. Let me also commend you, Mr. Judy, and your wife as well for traveling here to Washington at your own expense to present a very vivid, living example of why OSM is needed.

I think you have given an excellent description, and with the subcommittee's permission, if you would like, we will submit the material that you have given there for the record, if you ask that. You never did ask that, but if you want, we will do that.

Mr. JUDY. Yes, sir.

Mrs. CUBIN. Without objection.

Mr. RAHALL. Let me also commend Mr. Saunders who is, of course, with the United Mine Workers of America, and along with Roger Hammick who have traveled from West Virginia to attend this hearing as well. He gave excellent testimony, and I would like to ask, Madame Chair, that a letter to the chairman of the subcommittee from Cecil Roberts, Acting International President of the United Mine Workers of America, be made part of today's hearings as well.

Mrs. CUBIN. Certainly. Without objection.

Mr. RAHALL. Thank you. Tom Fitzgerald, we welcome you, of course, from that great State, still a Democratic State, of Kentucky. Thank you for being here as well.

Mr. Judy, let me ask you, if this bill were to be passed, OSM would not be able to investigate your situation and take enforcement actions. Say this bill was already in effect. What would you do? In other words, what other means would you have at your disposal to seek satisfaction?

Mr. JUDY. I have kind of taken steps into that. I am starting to sell off lots on my property so I can go to court and fight for my rights on my property. That is the only thing I have left.

Mr. RAHALL. So you have looked into selling parcels of your property then in order to secure the legal fees necessary.

Mr. JUDY. Yes, sir.

Mr. RAHALL. I might say you answered Madame Chair's question accurately a minute ago when the question was, why is it taking OSM so long. It is because of States' primacy that we have been talking about all morning, which was the intent of the act, to allow the States the day-to-day administration, and when the States hassle around, when they don't take immediate and proper actions, after giving the proper time to work it without you, then it is certainly the responsibility of a higher authority to step in.

Mr. Saunders, again, I commend you and the UMW for opposing this bill, in doing so as citizens of the coal fields. Do you have any personal experiences that you might be able to relate to the sub-

committee as to what the presence of OSM, whether that presence has been beneficial to you personally?

Mr. SAUNDERS. Yes, Mr. Rahall. I work for Peabody Coal Company at the Colony Bay strip. I have worked for numerous other coal companies, and I have been an operator for 25 years, a heavy equipment operator, and when the State overlooked or oversight, or what the reasons may be, and all the issues and violations that OSM has, I have been part of correcting those violations as a heavy equipment operator on the job.

Mr. RAHALL. I appreciate that. I do have other questions, but I want to get in the first round here to Mr. Quinn and Mr. Gardner and give them a chance to respond, so I will save the others for the second round.

Mr. Quinn, you take great pains in your statement to paint a picture of what the framers of SMCRA originally had in mind with respect to the relationship between OSM and a primacy State. I know you know the answer to this question off the top of your head, but I would like to ask you, who is the only person in this room who was a conferee on H.R. 2, the bill that became SMCRA?

Mr. QUINN. I have that conference report here, and that is you, Mr. Rahall.

Mr. RAHALL. Thank you. Now, while I agree with you that we intended for the States to engage in day-to-day administration of the act, once they achieve primacy, we also gave OSM the authority under certain prescribed conditions to issue NOVs and CO's against surface coal mining operations in primacy States. This was not only the intent of the conferees, but it was a matter explicitly set forth in SMCRA, particularly in sections 504 and 521.

You, however, seek to make the case that this was not what I and my colleagues intended by offering some selective passages from the Senate committee report on its version of H.R. 2, and by making note of some court cases.

On page 7 of your statement, for example, you refer to a case decided in the Western District of Virginia. Now, let me ask you, how many times has Judge Williams been upheld in the Fourth Circuit on SMCRA cases?

Mr. QUINN. Several, but he has been reversed but more often not on the substance of his decisions, but the fact that the court said that he did not have jurisdiction to rule on the question, and only D.C. courts did.

Mr. RAHALL. My information tells me the number of times that Judge Williams has been upheld in the Fourth Circuit on SMCRA cases is zero.

Mr. QUINN. That may be the case.

Mr. RAHALL. All right. Is not Judge Williams the very same judge who ruled early on that SMCRA was unconstitutional?

Mr. QUINN. That is correct.

Mr. RAHALL. And what did the Supreme Court have to say about that?

Mr. QUINN. That he was incorrect, that in fact the statute was not designed to commandeer the State prerogatives, that it offered them a choice to either accede to a Federal program or put in their own program themselves and run it.

Mr. RAHALL. The Supreme Court did not uphold the judge.

Mr. QUINN. That is correct.

Mr. RAHALL. All right. It hardly seems that Judge Williams' declarations are the best places to look for what the law says, and let us take the court case you refer to on page 4 of your statement.

The passage you quote states that local decisionmaking rests with the State, but what you fail to mention is that this does not mean that OSM cannot get involved if the State fails to enforce the law.

Moreover, I believe the same court also ruled that jurisdiction after primacy was not exclusive.

Mr. QUINN. Mr. Rahall, a review of that decision that I quoted demonstrates a noticeable absence of any NOV authority in their discussion. In fact, they noted that the Secretary has CO authority, and his primary oversight authority to ensure that the program that he approves is appropriate, and then after that, he is not to be involved in local decisionmaking, and explicitly not to be involved in permitting matters after the program is approved.

Ultimately, that court said that the recourse for OSM in view of lax State enforcement was to assume the takeover of all or part of that program to address those problems.

Perhaps, there is another part, and I did not put in my testimony that might be helpful on this point, Mr. Rahall, and it does come from the conference report you signed. There is a statement in there about the differences between the House and the Senate versions on enforcement, and I will quote it, "Another issue presented in the enforcement section of the legislation is the differing procedures by which the Secretary can enforce part of a State program. The House receded from its position that the Secretary could exercise this authority upon the finding of a State's effective failure to enforce, and the conference adopted the Senate's amendment requirement for a public hearing prior to such action by the Secretary."

In our view, that means that the difference of opinion was that prior to intervention in a primacy State, the Secretary was to make the finding and hold the public hearing to that effect, and then put everybody on notice of who the regulator would be in that State from there on out.

Mr. RAHALL. I will come back in my second round, or are you going to let me go on?

Mrs. CUBIN. Yes, we will go another round.

Mr. RAHALL. OK.

Mrs. CUBIN. As I have listened to this testimony and as I have paid attention to the three folks that are here opposing the bill, it occurs to me that maybe what you are opposed to is State primacy generally, rather than this bill, because you see, in the SMCRA legislation itself, it says that you have to exhaust all of the remedies that are available to you before the OSM becomes involved.

Now, that is exactly what primacy is, and I think what I have heard, at least from Mr. Judy and Mr. Saunders is that, that is what you are opposed to, that OSM didn't come in soon enough, that the State did the wrong thing.

So if the State did the wrong thing, then it is the State primacy that you must be opposed to, because that is what SMCRA says.

That is what the Federal law is, and that is what enables OSM to come in.

Would you just comment on that? It seems to me that is your problem, and you have a problem; there is no doubt about that. It seems to me that the problem is State primacy and it taking a year, not the bill which leaves all of the major remedies, any time there is a big problem, that OSM can force the mine to stop operating immediately; they can withdraw the permit which is undoubtedly what you would have liked them to do on day one when you saw there was a problem.

So Mr. Saunders, please.

Mr. JUDY. Madame Chairman, they did. I have it right here, cease fire. The coal corporation immediately started drilling their holes to continue their blasting. They went down the next day and talked to the SMB, the Surface Mine Board, and got temporary relief and went back blasting.

Mrs. CUBIN. What do you mean when you say they did? They stopped blasting, but when and why?

Mr. JUDY. When the State wrote a cease order for blasting, not to shut the operation down, but to quit blasting, until they did fix and repair the property and my home.

They completely ignored what the State said and went on drilling their holes to put their powder in——

Mrs. CUBIN. I don't want to cut you off, but the time that we are allowed is limited.

I think you have answered my question, but I think that just makes me a little more even convinced that it is the situation of State primacy that you are opposed to, rather than not allowing the OSM to issue NOVs and 10-day notices. That is just what it sounds like to me.

Let me ask Mr. Quinn some questions. In your testimony, you mentioned that the Office of Surface Mining has been working administratively to address concerns over the use of 10-day notices in an effort to remedy the problem of dual regulation, but you also made reference to the fact that this initiative does not address your concerns about the industry become victimized by Federal notices of violation when a dispute exists between the State and the OSM.

Can you tell us why you believe it is more important to resolve this issue legislatively than administratively?

Mr. QUINN. Yes. The 10-day notice initiative deals with the issue of when OSM will use a 10-day notice and send it to the State to communicate to them that they think a violation exists out there.

After the 10-day notice is issued, the State inspector goes out, looks at the situation, and makes a judgment about whether indeed a violation is present, and if so, he takes action under the State program, and then other times, he may decide that OSM has misconstrued the law or the facts of the case and said, we don't regard that condition as unacceptable under the permit or under our program.

The issue we are concerned about is what happens at that point in time when there is a disagreement? Our view is that the operator who is following the State instructions should not be victimized because OSM insists that its view is correct, and then takes enforcement action directly against that operator, that they should

work out those disagreements first, resolve it, and then inform the operator what the appropriate action at that time should be.

Oftentimes, perhaps OSM may concede that in fact that its assessment initially was incorrect.

Mrs. CUBIN. Thank you. You also mentioned that with respect to the regulation of public roads, that Federal rules leave to the States the decision as to what roads are part of the mine and properly regulated under State programs. It is my understanding that OSM also attempted to address this issue administratively.

Number one, could you tell us what your understanding of OSM's efforts to resolve the roads issue is, and would you please tell the committee, number two, whether or not you believe this fix would be temporary or whether it would require this kind of legislation to remedy the situation?

Mr. QUINN. I think Mr. Carter alluded to the fact that it has been addressed in Utah, and there is an agreement there, and I believe there are some disputes in several other States of how to apply the definition of coal mine operations to these public roads.

Mr. Uram alluded to the fact that this section 10 of the legislation really addresses a resolved issue. If that is the case, then I don't see why it should not be codified into the statute, just as Mr. Carter mentioned, then let us take the fruits of this agreement and solidify it for everybody's benefit later on.

Diplomatically, Mr. Carter did not mention the fact that they had the same agreement between Utah and OSM three years ago, and then after the fact, OSM decided that it could not live by that agreement.

We are a little bit skeptical that these agreements will have much shelf life, unless they are codified into law.

Mrs. CUBIN. Thank you. That is exactly the reason that I do bring this legislation forward.

I do have one last question of you, and it is to help me establish the need for the legislation, and I am speaking specifically now about the clean water section of the bill.

As you well know, one of the provisions in H.R. 2372 is intended to clarify who is exactly responsible for enforcing the Clean Water Act. Can you explain for the committee what specific problems you are familiar with that make this provision necessary?

Mr. QUINN. We operate under various permits, but essentially, we have our SMCRA permit and we have our NPDES permit. Our NPDES permit is issued under the Clean Water Act. That permit establishes certain effluent limitations that we have to abide by.

Early on in this program, OSM attempted to promulgate their own effluent guidelines, and a Federal court in D.C. told them that they had no authority to do that, that section 702 of SMCRA explicitly States that nothing in SMCRA amends, supersedes, or modifies the Clean Water Act or any State law administered under the Clean Water Act.

What we are concerned about is OSM inspectors going out, attempting to enforce NPDES permit requirements or effluent limitations when they have no authority, they do not issue those permits, and they certainly don't understand those permits.

We see this as duplication, and also at cross ways with respect to the SMCRA system versus the Clean Water Act system, and I

think the language you have in your bill would essentially try to establish again, that the Clean Water Act is the Clean Water Act. There are agencies who are authorized to administer those acts, and that SMCRA is SMCRA, and SMCRA agencies administer that.

We have no problem with what States are doing oftentimes at the State level where they are just trying to coordinate those two programs together for mining, and we think that is an appropriate way to look.

Since EPA administers the Clean Water Act and OSM administers SMCRA, we just don't see that same synergy there. At the State level, that has occurred, and it has worked out fairly well.

Mrs. CUBIN. I would like to reassure my colleague, Mr. Rahall that I certainly do want to work on some language that might satisfy any problem that you have in this clean water area also. It would be good if we could come together on that.

The last thing I want to say is that this hearing and the SMCRA legislation, OSM, all of these things were designed and initiated to protect the public health and the public safety, and this is just a little thing. It is coincidental, and I realize that, but the fact is that the last instance in which there was a fatality to a citizen, and it wasn't a miner—it actually was somebody who was driving by, occurred from coal mine blasting in Tennessee, and Tennessee is one of the States that doesn't have State primacy, and like I say, while I realize that you don't base anything on one case, it is somewhat coincidental, because I believe and I know in my State that the State knows how to enforce and knows how to administer these environmental laws, and they do it very well. They don't need the Federal Government standing over their shoulder, and the companies—a while ago, Mr. Rahall asked how would this bill benefit the citizens.

Well, the way it benefits is that they don't have to worry that their job is going to be shut down because there is a disagreement between the State and OSM. As a union leader, you are very concerned about jobs, Mr. Saunders, and because people disagree over whether or not there ought to be bluffs in Wyoming, it is not a good reason to put people out of their jobs even temporarily.

Thank you for being here, and I will move on to Mr. Abercrombie.

Mr. ABERCROMBIE. Thank you very much, Madame Chair. I want to refer to something. Mr. Bowman is still in the room, and I want to refer you to a point that he made, Mr. Quinn, and some of the others, Mr. Fitzgerald, about 521.

Take my word for it. I am doing this for illustrative purposes. I am not trying to again, trap anybody, but if you go to page 220, it talks about the Secretary, and this relates to what Mr. Judy was talking about, because if this hearing has convinced me of anything, maybe we should increase the powers of the Office of Surface Mining, not decrease or devolve it down to the States, because if we take the Chair's position that some States do things very well, and then they don't need it, I am perfectly willing to accept that.

But we are talking about what happens when you don't have something done very well? Most people obey the law. Most people don't mug people in the street. Most people don't rob people. We

need the law not for the people who are obeying the law. We need the law to come into effect when people don't obey it. That is when we need to have the police in the street and judges and courts.

My point here is that as I read this section 521, it says, and I guess I will refer this to Mr. Fitzgerald at this point with respect to Mr. Judy's situation. It says here, and I am quoting in part, when the Secretary finds, obviously, this is through inspection and so on, that there is a violation that creates an imminent danger to the health or safety of the public, or where there is significant, imminent environmental harm, that the representative of the Secretary shall immediately order a cessation relevant to the condition, practice or violation. I am thinking here about blasting.

Furthermore, it says that the Secretary is authorized to determine whether that condition, practice or violation has been abated or until modified, vacated, or terminated, in the Secretary's judgment. Further, that the Secretary, in addition to the cessation order, can impose affirmative obligations on the operator requiring him—this was obviously written in 1977, so that we aren't politically correct, to take whatever steps the Secretary deems necessary to abate the imminent danger of significant environmental harm.

Next page, the Secretary may request, and if you get trouble from the State, for example, where Mr. Judy's case was concerned or somebody comes in and gets a temporary restraining order, Mr. Fitzgerald—this is on page 222. The Secretary may requested the Attorney General to institute a civil action for relief, including a permanent or temporary injunction, restraining order, or any other appropriated order in the District Court of the United States for the district obviously where that takes place, on the basis that whatever has taken place, for example, a State mining board or whatever you referred to there has said to the mine, OK, you can go back and start blasting, go in an get an injunction against them, because it (a), violates or fails or refuses to comply with any order or decision of the Secretary under this act, or (b), and this is the most important point to me, interferes with, hinders, or delays the Secretary or his authorized representative in carrying out the provisions of this act.

Now, if you have State primacy, and you have got somebody in there with a little, what we call in Hawaii, a little hukihuki going on—I don't know what you call it, but I expect it is an equivalent phrase, and somebody was friends with somebody and went to high school and so on and so forth, if this is seen as delaying, the clear—not only authority but obligation of the Secretary and/or the representative of the Secretary under this act, maybe we need to clarify, perhaps with this bill, the primacy of the OSM to go in and see that the job gets done the way it is supposed to be done.

Mr. FITZGERALD. There was a case in Kentucky some years ago, and it is always said that a person who represents themselves has a fool for a client, but in this case, I filed a pro se appeal, because the State of Kentucky had been enjoined from shutting down acknowledged illicit mines, the Blue Gem mines, the very high quality, very good coal that was being illegally mined in Knox County, Kentucky.

The State was enjoined from taking action. OSM decided not to step in and take action, even though the State court judge was ap-

plying the wrong standards in enjoining the State. I appealed to the Interior Board of Land Appeals, and they determined that OSM had an obligation to step in promptly to abate the violation.

Under this bill, I would not be able to appeal to OSM to go to the Interior Board of Land Appeals, because that would be taken away. I would be unable to go to Federal court, to a less passionate forum in some cases, with an appointed judge to get this law enforced.

Mr. ABERCROMBIE. I understand that, and I am not saying this legislation—maybe we need to increase it.

But what is your observation on my observation that it appears to me as a nonattorney, as a lay person in this, that the Secretary already has the authority to step in at the point that Mr. Judy has brought forward about the State coming in and throwing what I call a sideswipe or a cross-check, blind-siding him. Why didn't the OSM step in at that point and say, look, you are delaying my order with your temporary restraining order, and ask the attorney general to go into Federal district court and overturn it?

Mr. FITZGERALD. I am not familiar with the details of Mr. Judy's situation, but short of an imminent danger, and that is the problem with the bill. There are a whole range of violations that occur——

Mr. ABERCROMBIE. No, this says delay.

Mr. FITZGERALD. I understand. The OSM has currently other tools available. It does not have to defer to a State court injunction, because a State court cannot bind the Federal agency in this regard.

Mr. ABERCROMBIE. All right.

Mr. FITZGERALD. They have other tools available now, and that is probably why they did not use them. I think OSM is investigation, if I understand, and will take appropriate action at the conclusion of their investigation.

Mr. ABERCROMBIE. In the meantime, Mr. Judy sits there, trying to be a law-abiding citizen.

Mr. FITZGERALD. I have not looked at the situation. We will certainly talk when this is over to see——

Mr. ABERCROMBIE. He is at the short end of the stick from everybody.

Mr. FITZGERALD. The problem, if I could just follow up, as Mrs. Cubin said, is under this bill, assuming that they have a blasting plan approved in their permit and there is not an imminent danger, OSM could not issue a notice of violation to tell them——

Mr. ABERCROMBIE. I understand.

Mr. FITZGERALD.—[continuing]. to apply different and more protective standards.

Mr. ABERCROMBIE. I understand.

Mr. FITZGERALD. They would go back and have to revise the permit.

Mr. ABERCROMBIE. Mr. Fitzgerald, I understand what the effect of this bill would be. What I am saying is that what I am concluding from this hearing is that if anything, it appears to me that the States have been pretty effective in making the OSM a little bit leery of taking them on, or being accused, perhaps, of being overly enthusiastic in their enforcement.

Mr. FITZGERALD. That has certainly been the case in Kentucky, where there has been less aggressive enforcement than there needs to be in some clear situations.

Mr. ABERCROMBIE. All right. Thank you very much, Madame Chairman.

Mrs. CUBIN. Certainly. I would like to put into the record without objection a letter of support of this legislation from the Wyoming State governor, the Department of Environmental Quality, and the Western Regional Council, which is an organization in Utah.

Mr. ABERCROMBIE. May I say, Madame Chairman, I don't have another question, but with respect to that request, I certainly don't have an objection.

To the degree that Wyoming has particular problems, rather than go after the whole legislation, I will put on the record right now, I would be happy to try to work with you to see to it that you get relief appropriate to Wyoming's circumstances, and hopefully, short of rewriting all the legislation, we will be able to accommodate the legitimate desires of Wyoming.

I will certainly try and do my best to see that happens.

Mrs. CUBIN. Thank you.

Mr. ABERCROMBIE. I know I would want the same consideration out in the far reaches of the Pacific.

Mrs. CUBIN. Thank you, Mr. Abercrombie, but I think what the testimony has demonstrated is that what people are objecting to is the State primacy provision of SMCRA.

Mr. Quinn, are you familiar with the Judy case at all?

Mr. QUINN. No, I am not, only what I have heard here this afternoon.

Mrs. CUBIN. Thank you. I don't have anything further. Mr. Rahall left, so I don't know if he does or not. We do have another vote, and so I would like to thank all of you for coming, and thank you for your testimony, and we would request that the committee be able to submit written questions to you.

Mr. FITZGERALD. Madame Chair, if you would indulge me, I neglected to ask that my written statement be included in the record as well as two letters that I sent to Representative Calvert in June and early July which included a second letter from Kentucky regarding the relative number of NOVs issued by the State and the Federal Government during that period. Thank you.

Mr. ABERCROMBIE. Madame Chair. I am sorry, you didn't get a——

Mrs. CUBIN. No, go ahead. Without objection, that will be entered into the record.

Mr. ABERCROMBIE. Madame Chairman, I am under the impression that Mr. Rahall did have a few more questions, which I presume he will submit in writing, and I think under your ruling there, he can do so, right?

Mrs. CUBIN. Absolutely.

Mr. ABERCROMBIE. Thank you.

Mrs. CUBIN. Thank you very much. I thank all of you for coming.

[Whereupon, at 1:38 p.m. the subcommittee was adjourned; and the following was submitted for the record:]

I

104TH CONGRESS
1ST SESSION

H. R. 2372

To amend the Surface Mining Control and Reclamation Act of 1977 to minimize duplication in regulatory programs and to give States exclusive responsibility under approved States program for permitting and enforcement of the provisions of that Act with respect to surface coal mining and reclamation operations, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

SEPTEMBER 21, 1995

Mrs. CUBIN (for herself, Mr. CREMEANS, Mr. NEY, Mr. MOLLOHAN, Mr. HANSEN, Mr. HAYWORTH, Mr. THORNBERRY, Mr. ALLARD, Mr. CALVERT, Mr. DOOLITTLE, Mr. POMBO, and Mr. COOLEY) introduced the following bill; which was referred to the Committee on Resources

---

A BILL

To amend the Surface Mining Control and Reclamation Act of 1977 to minimize duplication in regulatory programs and to give States exclusive responsibility under approved States program for permitting and enforcement of the provisions of that Act with respect to surface coal mining and reclamation operations, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Surface Mining Control and Reclamation Amendments Act of 1995".

SEC. 2. STATEMENT OF FINDINGS AND POLICY.

Section 101 of the Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. 1201) is amended—

(1) by striking "and" at the end of paragraph (j);

(2) by striking the period at the end of paragraph (k) and inserting "; and"; and

(3) by adding at the end the following:

"(l) a majority of the coal-producing States have developed programs that regulate surface and underground coal mining operations within their borders in an environmentally sound manner, taking into account the diversity in terrain, climate, chemical, and other physical conditions in areas subject to mining operations; and

"(m) duplication in regulatory programs should be avoided and States assume the exclusive responsibility under approved State programs for permitting and enforcement of the provisions of this Act with respect to surface coal mining and reclamation operations within the States.".

SEC. 3. FUNCTIONS OF OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT.

Section 201(c)(1) of the Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. 1211(c)) is amended to read as follows:

"(1)(A) administer the programs for controlling surface coal mining operations which are required by this Act;

"(B) review and approve or disapprove State programs for controlling surface coal mining operations and reclaiming abandoned mine lands;

"(C) except in a State with an approved State program—

"(i) make those investigations and inspections necessary to ensure compliance with this Act,

"(ii) conduct hearings, administer oaths, issue subpoenas, and compel the attendance of witnesses and production of written or printed material, and

"(iii) review and vacate or modify or approve orders and decisions, and order the suspension, revocation, or withholding of any permit for failure to comply with any of the provisions of this Act or any rules and regulations adopted pursuant thereto;".

SEC. 4. STATE PROGRAMS.

Section 503 of the Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. 1253) is amended by adding at the end the following:

"(e) With respect to a State with an approved State program—

"(1) the State program shall apply in lieu of this Act to surface coal mining and reclamation operations in the State; and

"(2) the provisions of this Act and the regulations promulgated by the Secretary pursuant to this Act shall not become effective with respect to surface coal mining and reclamation operations within a State with an approved State program until such time as the State has amended its approved State program and the permittee has been provided a reasonable time (as determined by the regulatory authority) to conform ongoing surface coal mining and reclamation operations to any revised or additional requirements under such amended State program.".

SEC. 5. FEDERAL PROGRAMS.

Section 504(b) of the Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. 1254(b)) is amended by striking "section 521" and inserting "section 521(b)".

SEC. 6. PERMITS.

Section 506 of the Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. 1256) is amended by adding at the end the following:

"(e) A surface coal mining and reclamation operation that is in compliance with the terms and conditions of a permit issued pursuant to this Act shall be deemed to be in compliance with the environmental protection standards of this Act and the approved State program or Federal program or Federal lands program pursuant to this Act, except that the regulatory authority may, pursuant to section 511(c) of this Act, require reasonable revisions of a permit to ensure compliance with this Act and regulatory program.".

SEC. 7. ENFORCEMENT.

(a) NOTICE FOR ABATEMENT.—Section 521(a)(3) of such Act (30 U.S.C. 1271(a)(3)) is amended by striking "or section 504(b)".

(b) SUSPENSION AND REVOCATION ORDER.—Section 521(a)(4) of such Act (30 U.S.C. 1271(a)(4)) is amended by striking "or section 504".

(c) STATE RESPONSIBILITY.—Section 521(a) (30 U.S.C. 1271(a)) is amended by adding at the end the following:

"(6)(A) Except as provided in subparagraph (B) and paragraph (2) of this subsection, the regulatory authority shall have the sole responsibility for issuance of a notice to the permittee or his agent of a violation of any requirement of this Act or any permit condition required by this

Act, and the suspension or revocation of any permit issued pursuant to a State program, which determination by the State regulatory authority shall be subject to administrative and judicial review in accordance with State law.

"(B) The responsibility for enforcement at any surface coal mining and reclamation operation of any provision of the Federal Water Pollution Control Act or any State law enacted pursuant thereto, or other Federal laws relating to preservation of water quality, including (but not limited to) compliance with effluent limitations and water quality standards shall rest with the regulatory authority approved by the United States Environmental Protection Agency under such water quality laws.".

SEC. 8. JUDICIAL REVIEW.

(a) ORDER OF ALJ.—Section 526(a) of the Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. 1276) is amended by adding at the end the following:

"(3) For the purposes of this section, an order of an administrative law judge in a proceeding conducted pursuant to section 554 of title 5, United States Code, shall be deemed a final decision of the Secretary subject to judicial review in accordance with this section.".

(b) ACTIONS RELATING TO STATE PROGRAM.—Section 526 of such Act (30 U.S.C. 1276) is amended by striking subsection (e) and inserting the following:

"(e) Action of the State regulatory authority pursuant to an approved State program shall be subject to judicial review by a court of competent jurisdiction in accordance with State law.

"(f) Where there is an approved State program, any action of the Secretary pursuant to section 521(b) shall be subject to judicial review by the United States district court for the district which includes the capital of the State whose program is at issue.".

SEC. 9. TIME LIMITATION.

(a) IN GENERAL.—Title VII of the Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. 1291 and following) is amended by adding the following new section at the end thereof:

"SEC. 722. TIME LIMITATION.

"An action, suit, or any other proceeding under this Act for the enforcement of any violation, fine, penalty, or forfeiture, pecuniary or otherwise, shall be barred unless commenced within three years from the date on which the violation first occurs.".

(b) TECHNICAL AMENDMENT.—The table of contents in the first section of the Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. prec. 1201) is amended by inserting after the item for section 719 the following:

"Sec. 720. Subsidence.
"Sec. 721. Research.
"Sec. 722. Time limitation.".

SEC. 10. DEFINITIONS.

Section 701(28)(B) of the Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. 1291(28)(B)) is amended by striking "and" at the end thereof and inserting the following: "For the purposes of this section, activities and areas do not include the construction, improvement, or use of a road that is either designated as a public road pursuant to the laws of the jurisdiction in which the road is located, or maintained under the authority of a governmental entity, and the road is constructed in a manner similar to other roads of the same classification within the jurisdiction and open to public use.".

Testimony of
Robert J. Uram
Director
Office of Surface Mining Reclamation and Enforcement
U.S. Department of the Interior
before the
Subcommittee on Energy and Mineral Resources
Committee on Resources
U.S. House of Representatives
November 9, 1995

Mr. Chairman and Distinguished Members of the Subcommittee:

I appreciate the opportunity to appear before you today to discuss H.R. 2372, a bill to amend the Surface Mining Control and Reclamation Act. The Administration opposes H.R. 2372, and my statement today sets forth the reasons why.

Before discussing the specific provisions of H.R. 2372 to which we object, I would like to provide some historic context for your consideration of this legislation.

The relationship of the States, the coal industry, coal field citizens, and the Office of Surface Mining has frequently been a rocky one in the 18 years since enactment of the Surface Mining Act. Some States resisted OSM's efforts to assure a level regulatory playing field as required by the Act, even unsuccessfully suing the Federal government over its constitutionality. The coal industry has legally challenged almost every major regulation proposed by OSM to implement the Act, as has the environmental community. To state that implementation of SMCRA has been contentious and litigious is to state the obvious. In fact, legal challenges by the States, industry, and environmental groups to OSM's regulatory program were so frequent that one attorney reviewing the title of the litigation in Federal District Court -- In re: Permanent Surface Mining Program -- facetiously stated that he understood the term to mean that the litigation itself was permanent.

But, despite the strife and turmoil, over the past few years a more important reality has begun to emerge, one frequently overlooked in this contentious history. And that is simply this: the Surface Mining Control and Reclamation Act is generally working. And it is

working in large measure, I think, because of the regulatory stability that has gradually come to the Federal/State relationship which is so integral to the Act. That relationship has been a difficult one -- more a marriage of convenience and necessity than one based on mutual affection and admiration. But it is a relationship that nonetheless is working.

It is working to assure that coal surface mining takes place in an environmentally safe manner, that all mines are properly reclaimed, that the States have primary enforcement and permitting authority, and that Americans who reside in West Virginia hollows have the same legal protections from abusive coal mining practices as Americans who reside in the Powder River Basin of Wyoming.

This evolving Federal/State partnership is based roughly on the following premise set forth in the Act: the States are the primary regulatory authorities, while the Office of Surface Mining assures that there is a basic, level regulatory playing field, and the Act is enforced in a uniform manner across State lines to assure all Americans equal protection of the law.

This Administration has articulated the nature of this relationship as our Shared Commitment with the States to assure the integrity of that protection. OSM promotes the concept of Shared Commitment so that ultimately State regulatory authorities can independently seek to carry out the requirements of SMCRA. We are in the business of seeing that lands are reclaimed, and we want on-the-ground success at the least possible cost. OSM and the States have been working together as teams to achieve these results.

What have we done together? Our Federal-State teams have redesigned and reengineered oversight from a process-driven system to a results-oriented system. We have substituted performance agreements worked out by consensus with each State for the Washington-driven mandates we used to use. We have remolded the contentious ten-day notice process into a system that will truly respect State judgments and end once and for all improper OSM second-guessing.

In many, if not all, other important areas of policy, we are working with States to find State-by-State solutions for State problems -- a Utah solution for a Utah problem, a Virginia solution for a Virginia problem. And where there is no problem, we don't create one.

Although many States may find the provisions of H.R. 2372 attractive because of the promise its proponents in the coal industry advertise of less interference from OSM, I believe that H.R. 2372 would instead undermine the progress made to date in the development of quality State programs, and in the confidence more and more coal field citizens have in the integrity of those State programs. For the simple fact is that were it not for OSM having the ability to use the enforcement tools which H.R. 2372 seeks to abolish, we would not see the quality State programs we have today. Instead, if H.R. 2372 were enacted, we will see coal industry representatives urging the States onward in a "race to the bottom" to weaken their enforcement and environmental protection programs.

Moreover, a potential and ironic unintended consequence of enactment of H.R. 2372 could be more Federal takeovers of State programs or portions of State programs where deficiencies are documented. Under the present Act, a graduated Federal response to deficient State compliance with the Surface Mining Act is used by OSM to insure basic compliance with the Act. OSM's NOV authority, ability to make inspections and investigations, investigate citizens' complaints, etc., are necessary components of that compliance scheme. However, if the ability of OSM to insure State compliance with the Act is confined to Federal takeovers authorized by Sec. 521 (b), it is likely that Federal takeover actions will be used more frequently than has been the case in the past.

In summary, then, we oppose H.R. 2372 because: it is unnecessary; it is likely to lead to the unraveling of effective State programs which have taken years to develop; it will abrogate guarantees provided coal field citizens that no matter which State they reside in, they will have the same basic protections and legal rights; it will lead to regulatory instability and more litigation; and it could ultimately result in more instances of Federal takeovers of State program components.

Our section-by-section analysis follows, and I will be happy to answer any questions you may have.

ANALYSIS OF H.R. 2372

SECTION 1. Short Title

This section provides the short title by which the bill, if passed, would be cited.

SECTION 2. Statement of Findings and Policy

This section would add two new findings to section 101 of SMCRA. The first states that a majority of States have environmentally-sound regulatory programs, while the second specifies that duplication in regulatory programs should be avoided and that the States should have exclusive responsibility for permitting and enforcement.

The proposed language erroneously suggests that OSM duplicates regulatory programs in primacy States. OSM does not duplicate State regulatory programs. In States with primacy, only the approved State program is enforced. The proposed section is therefore unnecessary. Section 101(f) of SMCRA already provides that the primary governmental responsibility for developing, authorizing, issuing, and enforcing regulations for surface mining and reclamation operations subject to SMCRA rests with the States. Section 503(a) already empowers States to assume exclusive jurisdiction over the regulation of surface coal mining and reclamation operations. Further, section 201(c)(12) already requires the Secretary to cooperate with other Federal agencies and State regulatory authorities to minimize duplication of inspections, enforcement, and administration of the Act.

SECTION 3. Functions of OSM

The revision to section 201(c)(1) of SMCRA appears to limit OSM's investigation, inspection, and enforcement authority. The changes seem to authorize the Secretary to take such measures only in situations in which there is no approved State regulatory program. Unlike existing section 201(c)(1), the proposed language, in setting forth OSM functions, does not include the authority to "issue cease-and-desist orders" and may jeopardize OSM's authority to issue "failure-to-abate" cessation orders.

The amendment seems intended to restrict OSM's conduct of inspections and its ability to take enforcement action in States with approved programs, even if citizens are unable to obtain relief from the States. If adopted, the proposed language could render OSM ineffective in protecting society and the environment from the adverse effects of surface coal mining.

Further, the language might not merely restrict inspections of coal mines; it could preclude investigations of alleged conflicts of interests, compliance with provisions of section 703 for employee protection, any kind of performance or financial audit, and evaluation of AML program requirements. Also, it leaves ambiguous the scope of the Secretary's authority to evaluate the adequacy of a State's implementation and administration of its approved program.

SECTION 4. State Programs

This section would add a new paragraph (e) to section 503 of SMCRA, the first part of which provides that it would be mandatory to apply the State program (in lieu of SMCRA) to surface coal mining and reclamation operations in the State. In most cases, OSM already adheres to this interpretation. However, there are important requirements of SMCRA (directly applicable to mining operations) which have no State counterparts and are directly enforced by the Secretary, even in primacy States, e.g., the employee protection provisions of section 703. Passage of this bill could invalidate the enforcement authority for such SMCRA requirements, and also could cause confusion and possible interpretational disputes.

The second portion of the proposed revision provides, in part, that no changes in Federal laws or rules may take effect in a primacy State prior to amending the State program. The proposed language is unnecessary because OSM, for the most part, already operates in this manner unless otherwise directed by Congress, such as in the Energy Policy Act of 1992 which mandated an October 24, 1992, effective date for revised subsidence protection provisions. In addition, some SMCRA requirements have an explicit effective date that is tied to the enactment of SMCRA itself (or to other Federal laws) and is unaffected by the date a State adopts them. Applying the language of this proposed legislation could result in requirements with widely varying effective dates among the States, thus delaying protections in some States, and leading to inconsistent application and decisions on what laws are in effect. SMCRA's regulations already provide that State surface mining law and regulations apply in lieu of SMCRA in States with approved programs, and the Federal rules at section 732.17 of the CFR provide that changes in State programs to implement changes to Federal law and regulations must be approved before they can take effect in the State.

The language also provides the permittee with a "reasonable time as determined by [each] regulatory authority" to revise the permit to conform ongoing operations with revised or additional requirements. Since regulatory authorities could have differing interpretations of the term "reasonable time," this could result in wide State-by-State variation for permittee compliance with these new requirements. It also could present even greater problems where permit revisions become necessary to implement new performance standards not typically included in permits.

SECTION 5. Federal Programs

In the event that a primacy State is not enforcing any part of its approved program, the language of the proposed legislation appears to restrict OSM's available enforcement options solely to the provisions allowing for Federal takeover under section 521(b). This certainly appears to eliminate OSM's authority to issue notices of violation in primacy States except by following the section 521(b) procedures to revoke State program approval or to withdraw State enforcement authority. The proposed language may force the Secretary into a choice between two options - do nothing or initiate the drastic and disruptive procedures for Federal takeover under section 521(b). Neither is an effective method for addressing most program violations.

SECTION 6. Permits

This section would add a new paragraph (e) to section 506 of SMCRA. The new paragraph provides that compliance with the terms and conditions of a permit shall be deemed compliance with all SMCRA-related environmental protection standards, subject to reasonable permit revisions in accordance with the procedures contained in section 511(c) of SMCRA. In other words, the permit, not the approved State program, would establish the criteria by which to measure compliance with the performance standards. This provision could preclude any direct State or Federal enforcement of environmental performance standards and could prevent enforcement of any performance standard not addressed in the permit. Only revision of the permit, a process which can take several months, would be left to correct flawed or obsolete permits.

A second problem is that, while the bill language appears to allow for permit revision to ensure compliance with all performance standards, it does not seem to allow for **immediate** permit revision or other measures by the regulatory authority to correct newly discovered deficiencies. Instead, the regulatory authority would be precluded from initiating enforcement action and apparently could consider requiring any revision of the permit plans, terms, and conditions only at mid-term review. Thus, such serious occurrences as failure of a reclaimed hillslope or a sediment pond that fails to meet effluent limitations could not be addressed immediately (unless the environmental harm is significant or imminent).

The addition of this provision also could increase the burden on regulatory authorities and the permittee by requiring more information and increasing the time for permit review. It also could result in greater permit preparation expense to the coal industry.

SECTION 7. Enforcement

This section certainly appears to revise section 521(a)(3) and 521(a)(4) of SMCRA to eliminate OSM's authority to issue a notice of violation, or to suspend or revoke permits on a mine-by-mine basis, in a primacy State except by following the procedures of 521(b) to revoke State program approval or withdraw State enforcement authority.

The section adding new paragraph (a)(6) apparently would establish that State regulatory authorities have sole responsibility for issuing notices of violation and for suspending or revoking permits, subject to administrative and judicial review in accordance with State law. As stated earlier, this proposed change seems to ensure that the Secretary cannot take enforcement action in a State that fails to properly administer its approved program and leaves the Secretary with only the option of doing nothing or of initiating the drastic and counterproductive procedures for Federal takeover of a State program under section 521(b). This paragraph also appears to preclude Federal appeal of the State regulatory authority's enforcement determinations or its decisions to suspend or revoke permits.

New subparagraph (a)(6)(B) clarifies that enforcement of Clean Water Act-related requirements and other Federal water quality laws is solely the responsibility of the NPDES permitting or other regulatory authority approved by the U.S. Environmental Protection Agency under the pertinent water quality law. With passage of this bill, operators would no longer be subject to OSM and State SMCRA enforcement authority of the daily maximum discharge limitations under the Clean Water Act, which could result in degradation of water quality. We believe that inspection under SMCRA provides an incentive for operators to maintain discharges in compliance. Removal of this incentive could result in operators receiving the much larger fines assessed under the Clean Water Act, i.e., up to $25,000 per day for each day of violation, as opposed to a $5,000 per day per violation fine under SMCRA.

More important are the impacts upon the environment. The prohibition on enforcing compliance with water quality standards will seriously cripple the regulatory authority's ability to protect water quality during the mining and reclamation process. The amendment could be interpreted to negate SMCRA's provisions protecting the hydrologic balance and preventing water pollution.

SECTION 8. Judicial Review

This proposed revision of section 526(a) of SMCRA is apparently intended to eliminate the appellate level of administrative review of agency actions, i.e., the Interior Board of Land Appeals (IBLA). Thus, a decision or order of an administrative law judge (ALJ) in a formal adjudicatory proceeding would be a final decision of the Secretary subject to judicial review.

The proposal could undermine consistent enforcement of SMCRA and subject both appellants

and OSM to *ad hoc*, non-precedential decision-making that could differ from ALJ to ALJ, location to location, and even from time to time. The IBLA is the entity within the Department now authorized to exercise the Secretary's review function and ensure the Department's uniform interpretation of SMCRA. By precluding appeals to the IBLA, a level playing field for OSM, the States, operators, and coal field citizens would be eliminated. The proposal would force parties, including coal field citizens, to pursue more time-consuming and costly relief in Federal district court. The resulting additional cases would burden the courts and the Department of Justice with work, much of which could be done more efficiently and economically by the Department of the Interior through the administrative review process.

In addition, it proposes deletion of the clause in section 526(e) which currently provides that the availability of judicial review (in State courts) of a State regulatory authority's actions will not limit a person's right to file suit in Federal District Court under section 520 of the Act. The result of this change would appear to limit citizen suits outside State courts and thus restrict the public's role in enforcing SMCRA and ensuring consistent enforcement.

Finally, this section would revise section 526 by adding a new paragraph (f), which provides that the Federal District Court of the district that includes the State capital has jurisdiction over any action to revoke State program approval or withdraw State enforcement authority. SMCRA currently is silent on the proper venue for judicial review of actions to revoke State program approval or withdraw State enforcement authority. Therefore, the impact of this change is uncertain.

SECTION 9. Time Limitation

This new section appears to provide that an administrative or judicial action concerning enforcement or alternative enforcement measures under SMCRA will not be allowed unless commenced within three years from the first occurrence of the violation. It is often difficult, if not impossible, however to determine when a violation first occurs. Using the "first occurrence" date, instead of the date a violation is discovered, could leave many violations completely unaddressed.

In addition, the proposed change would prevent the States and OSM from going back more than three years and holding operators, owners or controllers responsible for past violations, including bond forfeitures. It could significantly limit or eliminate the States' and OSM's ability to take enforcement action for violations or conditions or practices that may exist, but which do not become manifest for some time - often more than three years - such as slides, subsidence, water loss, hydrologic degradation and loss of productivity. In addition, some citizen suits could be precluded because more than three years would pass before it becomes clear that the regulatory authority is not going to take appropriate action to abate a violation. The proposed change also could result in operators attempting to hide violations until effective action by the regulatory authority is precluded.

Finally, the proposed amendment could be interpreted to restrict OSM from initiating action to recover AML reclamation fees more than three years from the time they were due. This will be far less time than the Federal government is afforded for recovery of other debts. As a result, the amendment could severely restrict the collection of fees for the AML Fund. The AML fund is used in response to emergencies in the coal fields and in grants of AML monies to the States to operate their program.

SECTION 10. Definitions (Exclusion of Public Roads)

This new section exempts roads designated as public roads and roads maintained under the authority of a governmental entity from regulation under SMCRA as surface coal mining operations. This will allow coal haulroads to be constructed without regard to prudent engineering design and construction specifications or inspection and enforcement requirements of approved regulatory programs. Road construction, location, and maintenance can have significant impacts on the environment, particularly upon streams and wildlife; and the nuisance factor associated with road dust is a major source of irritation and citizen complaints in coal field communities. Especially in mountains and remote areas, road construction can cause more environmental impacts than the mining operation itself. Finally, this provision appears to address issues from a now-resolved roads dispute in Utah and could, in other States, disturb settled policies, practices, and established case law concerning SMCRA. It could also require massive permit and bonding changes which, in turn, could result in major environmental problems.

Interstate Mining Compact Commission

459B Carlisle Drive
Herndon, Virginia 22070
Phone: 703/709-8654
Facsimile: 703/709-8655

Testimony of
Fred Bowman
Illinois Department of Natural Resources

On Behalf of

the Interstate Mining Compact Commission

Before the
Subcommittee on Energy and Mineral Resources
Committee on Resources
U.S. House of Representatives

November 9, 1995

Good Morning, Mr. Chairman and Members of the Subcommittee. My name is Fred Bowman and I am Director of the Office of Mines and Minerals in the Illinois Department of Natural Resources. With me today is Mr. Greg Conrad, Executive Director of the Interstate Mining Compact Commission. I am appearing today on behalf of the Interstate Mining Compact Commission, which is a multi-state governmental organization representing some 18 eastern and midcontinent mining states. Fourteen of the IMCC's member states operate federally approved programs for the regulation of surface coal mining and reclamation operations within their borders. We appreciate the opportunity to present our views on H.R. 2372, which would amend the Surface Mining Control and Reclamation Act of 1977 (SMCRA) by appropriately limiting the role of the federal government in primacy states.

Our position on this important piece of legislation is consistent with the testimony which we presented to your subcommittee last June, Mr. Chairman, a copy of which I am submitting for the record. H.R. 2372 would address an issue that has been problematic for the states and the Office of Surface Mining since the approval of the first state regulatory programs in 1981--federal enforcement authority in primacy states. The issue goes to the heart of the state/federal relationship and begs the question of who is in charge--especially in day-to-day implementation of the program. The states and OSM have differed on this issue both in the courts and in discussions that have been aimed at addressing the issue administratively. In both instances a satisfactory answer has not been forthcoming.

In a recent U.S. District Court decision upholding OSM's enforcement powers in primacy states, the court itself noted that "while the provisions set forth in section 521 may

not explicitly authorize the Secretary to issue an NOV [notice of violation] during an oversight inspection anytime he or she disagrees with the state response to a TDN [ten-day notice], the most logical statutory construction authorizes the Secretary, acting through OSM, to issue federal NOVs in primacy states". Characterizing the OSM regulation on federal NOV authority as a "permissible interpretation of SMCRA", the court went on to legitimize the rule. (Emphasis added) National Coal Association, et al. v. Uram, C.A. No. 87-2076 (Consolidated), September 16, 1994. Clearly the court had to struggle to invent a rationale to support the Secretary's regulation on federal enforcement authority and in doing so recognized that the Act did not explicitly authorize the Secretary to issue NOVs in primacy states--it was simply a "permissible and logical" statutory construction.

This issue has been the subject of litigation since 1985 and is still the subject of an appeal of the above-mentioned decision before the D.C. Circuit Court of Appeals in which all of the affected parties, including the states, are participating. In our view, this is a threshold issue that is ripe for Congressional attention and that should be addressed by Congress in order to alleviate the confusion and controversy attending state and federal enforcement authority. We can point to several examples of OSM overreaching its authority and issuing Ten-Day Notices and/or federal NOVs which raise little more than disputes about program or policy interpretation. As a result, permittees often find themselves placed in the middle of governmental haggling over policy and regulatory issues that appropriately belong within the confines of the government agencies themselves.

OSM addressed these very concerns when, in 1988, it promulgated a rule on the use of Ten-Day Notices in primacy states. In the preamble to this rule, OSM stated the following:

> Congress clearly intended operators to be responsible for complying with only one set of regulations--either state or federal, but not both. As a result, in primacy states the Act is implemented through the approved state program rather than directly. * * * If, in practice, jurisdictional reach disagreements arise, most likely these are the fault of either the Secretary or the state, and not the fault of the operator. * * * By this final rulemaking, OSMRE intends to allow a consistent and rational process to resovle disagreements and to avoid unnecessary issuance of a federal NOV to an operator merely because OSMRE and the state cannot resolve the disagreement between them on the eleventh day.

53 Fed. Reg. 26737, July 14, 1988.

The real issue from a day-to-day implementation perspective is the tendency of some OSM inspectors to overreach their authority concerning the use of TDN's and federal NOVs. We assert that if OSM is unable to restrain these instances of overaggressive and inappropriate behavior, the only answer is removal of the authority itself. We have not seen evidence of OSM's ability to constrain this behavior to date. Therefore, we believe Congress should resolve this long-standing statutory problem by removing federal NOV authority in primacy states. We have adopted a resolution supporting the removal of federal NOV authority in primacy states and I would like to submit a copy for the record.

What do we lose in such a scenario? Frankly, OSM will lose little of its ability to effectively monitor and then secure compliance with applicable state or federal regulations. If a serious, imminent harm situation would arise, OSM would still have authority to address the problem through the issuance of federal cessation orders. For programmatic concerns, it will still have at its disposal the state program amendment process, federal takeover of state programs or portions thereof, and grant conditioning (which the states believe should be used as a last resort because of its impacts on the effectiveness of state program implementation). These are the very procedures specifically designed by Congress when it enacted SMCRA to

address instances of state/federal differences of opinion or interpretation.

Again, OSM clearly recognized and attempted to address these very concerns in its 1988 rulemaking on Ten-Day Notices. In its response to comments that the states would be incapable or unwilling to adequately enforce their respective regulatory programs, OSM stated as follows:

> OSMRE disagrees with the comments that argue the federal government must have primary enforcement responsibility in primacy states. As enacted, the law allows the Secretary to give the lead to the states. The U.S. Court of Appeals succinctly described the Secretary's role: "Once a state program has been approved, the state regulatory agency plays the major role, with its greater manpower and familiarity with local conditions. It exercises front-line supervision, and the Secretary will not intervene unless its discretion is abused." In re: Permanent Surface Mining Regulations Litigation, 653 F.2d at 523 (1981).
>
> The law also provides mechanisms for resolving problems with state implementation of the program: Amendments to state programs (described in 30 CFR 732.17), federal enforcement of state programs, and withdrawal of federal approval for a state program (described in 30 CFR 733.12). With this final rule, OSMRE expects that use of 732 and 733 actions may increase, as the regulatory focus shifts from individual situations to a broader evaluation of a state's overall program. Such a shift in focus, and a willingness on the part of OSMRE to require program amendments and to process those amendments expeditiously, as well as ongoing program oversight, answers the concern that states will not effectively implement, enforce, or maintain their programs.
>
> At the same time, the likelihood of operators being given conflicting orders from state and federal officials should decrease, without hampering federal oversight of state implementation of the regulatory programs.

53 Fed. Reg. 26731, July 14, 1988

You should know, Mr. Chairman, that we have made concerted efforts to resolve the issue of federal enforcement authority in primacy states through the administrative process. In fact, the states submitted a comprehensive petition for rulemaking to OSM in 1993 that attempted to address many of the issues attending the use of TDNs in primacy states. It also

spoke to several aspects of OSM's rule on the use of TDN's that have arisen since the rule's promulgation in 1988. Given OSM's reluctance to pursue our suggested approach through formal or negotiated rulemaking, we withdrew the petition in early 1994. In this and every other instance, we continue to run up against the question of whether OSM should have "the last word" in light of the language of sections 521 and 504 of the Act. Legislation that clearly precludes federal NOV authority in primacy states will resolve this issue and bring closure to the question of who has what degree of regulatory and enforcement authority. We therefore urge you to provide much needed guidance on this nagging statutory issue that has irritated the federal/state relationship for years.

OSM will likely allude to the progress that has been made by a task force of state and federal representatives concerning the use of Ten-Day Notices in primacy states as well as the handling of citizen complaints that are received by OSM rather than by the states. The efforts of this dedicated group of government personnel have indeed borne fruit. We have seen several meaningful recommendations put forth that would go a long way to clarify federal intervention in primacy states, deference to state decisions, and the process for handling citizen complaints. Several concerns remain, however, including how and when OSM will implement these recommendations, whether a rulemaking will be required (or would be a more appropriate vehicle for resolving the issues) and the potential for any significant policy gains to be eroded by future OSM administrations. This latter concern is of particular importance as we have encountered this very outcome in the past. Benefitting from the benevolence and enlightened thinking of one OSM director has not always guaranteed such success in the future regardless of the political affiliation of the particular Administra-

tion. Furthermore, the TDN task force initiative never resolved the underlying issue of federal enforcement authority in primacy states but instead focussed on the initial procedures leading up to the initiation of federal enforcement.

OSM may also point to the achievements of another federal/state task force which has been looking at federal oversight of state programs. Again, while significant strides have been made in redefining oversight to be more meaningful, productive, and performance-oriented, the jury is still out concerning how the approach negotiated by the task force will work in the field. Several states are poised to begin working with their respective OSM field offices to flesh out the new approach through the negotiation of state-specific performance agreements. It will be several months before we see the results of these efforts and, in any event, we do not expect the new approach on oversight in and of itself to resolve our concerns on enforcement authority.

Some will argue that any lessening of OSM's presence in the field or opportunity for oversighting the states will result in a "race to the bottom" by the states as they either seek on their own to scale back their respective regulatory programs or are unable to stand against the ground swell of support by outside interests to reform state programs by weakening environmental performance standards and restricting inspection and enforcement activity. As the Louisville Courier-Journal editorialized last summer: "Without a strong federal presence, states will succumb to industry pressure, returning the coal fields to the uneven regulatory patchwork that produced the abuse that spawned the 1977 law."

Mr. Chairman, this scenario makes little sense in light of the 18 years of experience under the SMCRA regulatory program. The fact is that several states have had to struggle

with budget cuts and organizational adjustments over the past few years and in every case, the states continue to receive high marks for their performance in OSM's own oversight reports. Even in the face of fiscal belt tightening, the states continue to operate first-rate regulatory programs that protect the environment, are responsive to coal field citizens, remediate abandoned mines and assure that industry has the permits necessary to meet our Nation's coal needs. What the states seek is the continuing technical and financial support from the federal government to allow us to pursue the goals and objectives of SMCRA with a minimum of duplicative and unproductive federal interference. To the extent that the legislation before your committee furthers this objective by clarifying the roles of the states and federal government concerning enforcement authority, we believe that the surface mining program will continue to prosper.

Thank you for the opportunity to present this testimony. I would be happy to answer any questions you may have or to supply answers for the record.

RESOLUTION

INTERSTATE MINING COMPACT COMMISSION

BE IT KNOWN THAT:

WHEREAS, the Surface Mining Control and Reclamation Act of 1977 provides: "Because of the diversity in terrain, climate, biologic, chemical and other physical conditions in areas subject to mining operations, the primary governmental responsibility for developing, authorizing, issuing, and enforcing regulations for surface mining and reclamation operations subject to this chapter should rest with the States." (Section 101(f)); and

WHEREAS, the Act further provides that each state assumes exclusive jurisdiction over the regulation of surface coal mining and reclamation operations within their borders following approval by the Secretary of the Interior of a State program demonstrating its capability to carry out the Act; and

WHEREAS, States have assumed and maintained the regulatory responsibility under the Surface Mining Control and Reclamation Act in 23 out of 26 coal producing states; the State's programs and capabilities have matured over the years; and the States are administering these programs in an effective and high quality manner; and

WHEREAS, the states remain concerned about due respect for state primacy and about the continuation of dual enforcement; and

WHEREAS, the question of federal enforcement authority in primacy states should be addressed by Congress in order to alleviate the confusion and controversy attending state and federal enforcement authority;

NOW THEREFORE BE IT RESOLVED:

That the Interstate Mining Compact Commission endorses and supports legislation which clarifies federal enforcement authority in primacy states under the Surface Mining Control and Reclamation Act and which clearly reiterates the intent of Congress that the Act be enforced by the states pursuant to their approved regulatory programs.

Issued this 27th day of September, 1995

ATTEST:

Gregory Conrad
Executive Director

Testimony of
The Utah Department of Natural Resources
Ted Stewart, Executive Director

Submitted to
U.S. House of Representatives
Committee on Resources
Subcommittee on Energy and Mineral Resources

November 9, 1995
Washington, D.C.

Mr. Chairman, members of the committee, I appreciate the opportunity to address you in support of H.R. 2372, the Surface Mining Control and Reclamation Amendments Act of 1995. These amendments will clarify the proper roles of the Office of Surface Mining and the primacy states, will codify judicial and administrative interpretations of unclear provisions of the law, and will result in more environmentally effective and fiscally efficient implementation of the coal regulatory program.

Last June, Ted Stewart, Executive Director of the Utah Department of Natural Resources, testified before this subcommittee that the Utah coal regulatory program is achieving the purposes of the Surface Mining Control and Reclamation Act ("SMCRA"). Utah coal operators mined over 24 million tons of coal last year, while operating within the stringent requirements of the Utah regulatory program. Although virtually all of Utah's coal is mined by underground methods, significant contemporaneous reclamation is being accomplished, and coal mining areas are being put to productive post-mining uses. Mr. Stewart also testified that several long-standing conflicts between Utah and the federal Office of Surface Mining ("OSM") were making progress toward resolution, through improved management at OSM and a better relationship between OSM and the State. Those problems, however, have not been completely resolved, and the underlying causes of those problems have not been addressed, being rooted in the language of the organic legislation of the coal regulatory program itself, SMCRA.

It is axiomatic that a successful regulatory program cannot have two masters. Both OSM and the primacy states have important roles to play in implementing the regulatory program. Unfortunately, the present structure of the coal regulatory program makes those federal and state roles duplicative and competing, at the expense of the regulated community, coalfield citizens, the environment, consumers of coal-generated electricity and the taxpaying public at large. Duplication of roles in the coal regulatory program has not only been a waste of scarce public resources, but has actually been counter-productive in that it creates inter-agency controversy which diverts time and resources from the real work of the program.

It has been said that the changes proposed by H.R. 2372 would eliminate federal involvement in the coal regulatory program. This is simply not the case. OSM's direct enforcement authority in imminent harm situations remains unchanged. OSM will continue to conduct oversight of state primacy programs, will continue to require amendments to state programs to keep them no less effective than the federal rules, and will continue to have the ability to take back state programs which fail to perform. The amendments proposed would simply provide a clear allocation of enforcement responsibilities between primacy states and OSM. Primacy states will undertake

compliance action for all violations, and OSM may issue federal violations in imminent harm situations if the state has not yet acted.

The effect of limiting federal enforcement to imminent harm situations might best be evaluated by examining the effectiveness of federal enforcement in non-imminent harm situations. In Utah, federal enforcement has not only been ineffective and expensive, it has been counterproductive environmentally. Since May of 1993, OSM has taken five direct federal enforcement actions against Utah operators. Of the five violations, the first three were vacated by the Department of the Interior's own administrative law judges. Number four was upheld and number five is pending decision on appeal. In each instance, OSM cited the operator for a practice or condition specifically approved by the Utah program and incorporated in the operator's coal permit. Each federal violation was based on a disagreement between OSM and Utah over interpretation of Utah's program language. It must be emphasized that none of the violations concerned adverse off-site environmental impacts.

The first and second violations arose out of a dispute between OSM and Utah concerning the definitions of "Approximate Original Contour" and "Highwall," two key terms in the regulatory program. In those cases, Utah found that the operator had achieved approximate original contour and had eliminated all highwalls and that the sites were ready for Phase I reclamation bond release. OSM wrote violations asserting that such features as road cuts were "highwalls" and that a safety berm constructed to prevent rockfalls into a populated area should be removed to achieve "approximate original contour." The administrative law judge disagreed and struck down the two federal violations.

The third violation arose out a dispute between OSM and Utah concerning what steps are required to "minimize" erosion at an active mine site. Utah convened a technical work group to evaluate the situation and propose mitigation techniques. Although invited, OSM declined to participate in the work group. After the operator had implemented the work group's recommendation, OSM cited the operator for following the direction of the Utah program. Again, the administrative law judge struck down the violation, finding that the operator had, indeed, minimized erosion at the site.

The fourth and fifth violations arose out of a dispute between OSM and Utah concerning the jurisdictional reach of the regulatory program. Both concerned coal handling and processing equipment located at power plants. Since the facilities were argued by OSM to be unpermitted coal mining operations, the operators were faced with "imminent harm" cessation orders by programmatic definition, and risked shutdowns of their power plants. In both cases, Utah did not require permitting of the facilities because the Utah program specifically exempts coal preparation activities located at the point of ultimate use. Notwithstanding the exemption, one operator obtained the permit demanded by OSM in order to avoid being caught between the Utah program and OSM. Two days later, OSM issued the operator a cessation order anyway, arguing that Utah had not properly recalculated the reclamation bond at the time of permit issuance. Violation number four was upheld on appeal.

In violation number five, the coal processing facilities in question are located at the power plant, a number of miles from the three mines which supply coal to the plant. The operator obtained temporary relief from the cessation order issued by OSM and is awaiting a decision on appeal.

Not one of the five violations concerned fly rock, water pollution, air pollution or any safety or environmental hazard. All five arose out of interagency disputes over practices specifically authorized by the Utah program and the terms of the operator's coal mining permits. Direct federal enforcement in Utah has not helped protect the citizens or the environment. Worse, it has diverted scarce resources away from other, productive work by OSM, Utah, and Utah coal operators. The potential for these types of conflicts is not the only problem with duplicate regulatory authority. The cost of maintaining two separate, redundant compliance programs is one which taxpayers should not have to bear. The solution is to amend the law to clearly segregate the roles of OSM and the primacy states, and restore the balance of primacy delegation which SMCRA intended.

There is another aspect of H.R. 2372 which is of great importance to the State or Utah and, I would suggest, to many other states as well. Section 10, Definitions, would exclude from the jurisdiction of the coal regulatory program bona-fide public roads under the control of units of federal, state or local government.

In February of this year, the Office of Surface Mining sent a letter to Utah, pursuant to Title 30, Part 733 of the Code of Federal regulations asserting that Utah had failed to require the permitting of certain public roads which fell under the SMCRA definition of surface coal mining operations. The question whether and under what circumstances public roads fall within the jurisdictional reach of SMCRA has been fodder for a series of federal lawsuits and failed rulemaking attempts since 1983. Utah Assistant Attorneys General and Department of the Interior Solicitors reached agreement on the present state of the law and regulations as they apply to public roads. That agreement was memorialized in a letter from Utah to OSM dated July 3, 1995 and a response letter from OSM dated July 24, 1995, both of which are attached to this testimony.

Section 10 of H.R. 2372 would adopt the essence of the agreed-upon statement of the law as it applies to public roads, and would codify the exemption from regulation of bona-fide, open access, multiple use public roads and highways which are either owned by or maintained under the authority of, legally constituted public entities. This provision would not allow exemption for roads which are public in name only, or for roads which were deeded to public entities in order to avoid regulation, but would define an unclear provision of SMCRA whose lack of clarity has consumed countless public hours and resources.

The coal regulatory program created by SMCRA has provided great benefit to the environment, the citizens and the coal mining community. There are, however, flaws in the structure of the regulatory program which are the products of a duplication of the responsibilities and authorities of the federal OSM and those of the primacy states. As well, the lack of clarity in the definition of the jurisdictional reach of SMCRA has been an expensive and contentious problem. When the source of a programmatic problem is the underlying structure of the program, Congress should not hesitate to correct the flaw. The Surface Mining Control and Reclamation Amendments Act of 1995 will consolidate the gains made recently in interpretation of the coal regulatory program, and will prevent future counter-productive duplication of effort.

Thank you for your time.

Michael O. Leavitt
Governor
Ted Stewart
Executive Director
James W. Carter
Division Director

State of Utah
DEPARTMENT OF NATURAL RESOURCES
DIVISION OF OIL, GAS AND MINING

355 West North Temple
3 Triad Center, Suite 350
Salt Lake City, Utah 84180-1203
801-538-5340
801-359-3940 (Fax)
801-538-5319 (TDD)

July 3, 1995

Rick Seibel, Regional Director
Jim Fulton, Denver Field Office Division Chief
U. S. Department of the Interior
Office of Surface Mining, Western Support Center
1999 Broadway, Suite 3320
Denver, Colorado 80202-5733

Re: Utah Section 733 Letter; Permitting of Roads

Gentlemen:

In light of the discussions and correspondence between the Division of Oil, Gas and Mining and the Office of Surface Mining ("OSM") since the informal conference in this matter, I am writing to clarify Utah's policy with regard to the permitting of public roads which may be used for, or related in some way to, coal mining and reclamation activities. Aside from the present disagreement regarding permitting road policy, the Utah Act and implementing regulations are approved by OSM and have been determined to be no less stringent than those of SMCRA. 30 U.S.C. § 1255.

Utah acknowledges that, under its approved definition of "affected area," there exists no blanket exemption from regulation for public roads. Utah recognizes, therefore, that some public roads may be subject to the permitting requirements of the Utah Act. Utah believes, however, that it is best suited to interpret its program, and to decide whether a particular road falls within the definition of "affected area." Since there is little substantive guidance in this area, the State will interpret its program by reference to such authorities as the court's decision **In Re Permanent (Flannery)** as well as conflicting IBLA decisions, such as **Harman Mining** and **W. E. Carter.**

Coal mining permits are required for all roads (public or private) that are constructed, reconstructed or used exclusively for coal mining and reclamation activities. Utah fully recognizes that the quantity of public use of a road is not the exclusive consideration to determine whether it is exempt from regulation. As a result, upon a finding by the State that a road is a bona-fide public road as defined by the approved regulations, Utah will rely on the definition of "surface coal mining operations" under U.C.A. § 40-10-3(18), 30 U.S.C. § 1291(28) and "affected area," U.A.C. Rule R645-100-

200 and 30 C.F.R. §701.5, to determine whether an exemption from regulation is in order. If the operator can demonstrate to the satisfaction of the Utah regulatory authority that a particular road is not included in the definition of "surface coal mining operations," as explained in the pertinent preambles to the publication of the implementing federal rules and as interpreted by the courts, then Utah will not regulate the road.

Thus, a public road which was not constructed, reconstructed or used exclusively for coal mining and reclamation activities; i.e., a multiple use, open access public road, may not be required to be permitted if a) it was properly acquired by the governmental entity (not deeded to avoid regulation), b) it is maintained with public funds or in exchange for taxes or fees, c) it was constructed in a manner similar to other public roads of the same classification, and d) impacts from mining are not significant under the definition of "affected area" and "surface coal mining operations."

Utah recognizes that arrangements sometimes exist between coal companies and the entities which govern public roads used by such companies, whereby maintenance of the road is done in part by the coal companies. Utah believes that such arrangements are not the most important focus of inquiry; rather, coal mining usage and the associated impacts of such usage are the critical area of focus. A public road maintained by a coal operator or permittee should be examined as to:

1. whether the maintenance is occasioned primarily by the environmental impacts of coal mining operations on the road;

2. whether the maintenance is routine and similar to that which would be performed by the county or land management authority absent the agreement of the permittee or operator to do it; and

3. whether the maintenance agreement with the public entity is an arms-length arrangement, such that the essence of the requirement that maintenance be carried out with public funds is met.

For example, if a public land management agency stipulates that, as a condition of a special use permit, the permittee is responsible for maintenance of certain existing roads used by the operator, the fact that such roads are not maintained with public funds for the duration of the operation would not automatically subject those roads to regulation if the effect of mining use on them is relatively slight. Similarly, if state or local governments or public land management agencies require mine operators to construct road improvements or contribute road maintenance funds or services as a

prerequisite for granting the permits and approvals necessary for the mining operation, the stipulation does not, by itself, render all such existing roads subject to regulation under SMCRA.

Utah believes that it, as the regulatory authority, is in the best position to make such determinations, and will decide, based upon these factors, whether such roads are public and whether the coal mining usage and impacts fall within the Utah program definitions of "surface coal mining operations" and "affected area."

We believe that this clarification addresses all of OSM's concerns while allowing the state of Utah to exercise its discretion in interpreting and administering its approved regulatory program. I trust this clarification will provide the basis for OSM to determine that Utah's implementation of its regulatory program is no less effective than the federal program, and that OSM may find the inquiry of the Section 733 letter satisfactorily answered.

We look forward to resolution of this issue and a continuing productive partnership with OSM in implementing Utah's coal regulatory program

Very truly yours,

James W. Carter
Director

jbe
cc: R. Uram, Director
Office of Surface Mining
H:733RESOL.LTR

United States Department of the Interior

OFFICE OF SURFACE MINING
Reclamation and Enforcement
Washington, D.C. 20240

JUL 24 1995

Honorable Michael O. Leavitt
Governor of Utah
Salt Lake City, Utah 84114-0601

Dear Governor Leavitt:

Over the past few months, the Office of Surface Mining Reclamation and Enforcement (OSM) and the State of Utah have been working together to resolve differences over the permitting of coal haul roads in Utah. I am pleased to report that we have resolved this matter to our mutual satisfaction. This is a good demonstration of how OSM's Shared Commitment Policy is providing results.

On July 3, 1995, the Utah Department of Natural Resources Division of Oil, Gas and Mining clarified its policy on the permitting of public roads which may be used for, or related to, coal mining and reclamation activities. We agree with this clarification.

As a result, I am terminating the proceedings under 30 CFR 733.12 which were initiated by our letter dated February 7, 1995. Our approval of Utah's program remains intact, and Utah will retain full authority to implement and enforce all aspects of its approved program.

We appreciate the involvement of James Carter of the Division of Oil, Gas and Mining and Executive Director Ted Stewart of the Department of Natural Resources and Energy for bringing closure to an issue that has been under review for many years. As we continue with our shared commitment to the implementation of Utah's approved program, Rick Seibel, Regional Director of OSM's Western Regional Coordinating Center, will continue to work with your staff on this and other issues of mutual interest.

Sincerely,

Robert J. Uram
Director

STATEMENT OF

HAROLD P. QUINN, JR.

SENIOR VICE PRESIDENT AND GENERAL COUNSEL

NATIONAL MINING ASSOCIATION

Before the

SUBCOMMITTEE ON ENERGY AND MINERAL RESOURCES

of the

COMMITTEE ON RESOURCES

U.S. HOUSE OF REPRESENTATIVES

NOVEMBER 9, 1995

WASHINGTON, D.C.

Good morning, Mr. Chairman and Members of the Subcommittee. My name is Harold Quinn, and I am Senior Vice President and General Counsel of the National Mining Association (NMA). The members of NMA produce almost 70 percent of our nation's coal from mines located in every coal producing region. The NMA and its members have been involved from the outset in the development and implementation of the regulatory program under the Surface Mining Control and Reclamation Act of 1977 (SMCRA).

It can be said, without any serious dispute, that SMCRA has been largely successful in meeting its overall purpose to strike a balance between the protection of our environment and our Nation's need for coal as an essential source of energy. Indeed, coal mining today constitutes a temporary land use whereby lands used for coal mining are routinely restored after mining to the same or better uses than before mining. At the same time, the coal industry supplies an increasing part of our Nation's energy needs, and contributes directly and indirectly about $110 billion to our Nation's economic activity.

These achievements have not been easy for an industry operating in a competitive marketplace and under a demanding regulatory regime. Although the industry has mastered the prescriptive demands of SMCRA, it continues to seek more efficient ways to produce a competitively priced product and advance innovative reclamation practices. However, the coal

industry's future endeavors and investments remain in constant jeopardy under OSM's approach to oversight which fosters regulatory uncertainty.

The Surface Mining Control and Reclamation Amendments Act of 1995, H.R. 2372, addresses the principal cause of this regulatory uncertainty by clarifying the original intent of the 1977 Act to place with the states the day-to-day authority for the regulation of coal mining operations. The regulatory regime under SMCRA places a premium upon sound premine planning to satisfy prescriptive standards and an exacting permitting review process. Once approved, the operator's permit constitutes the benchmark for compliance with state laws and policies. However, this compliance equation is severely compromised under the Office of Surface Mining's (OSM) view of its oversight role. Neither the permit nor the operator's faithful adherence to state laws and policies provides any sanctuary from the second-guessing and interference by the federal agency. It is of no moment that the operator has invested millions of dollars in meeting the state's SMCRA program. Under OSM's approach, we must ultimately satisfy a federal inspector's view of the state program. In short, the coal industry must serve two regulatory masters every day, and for every ton of the 1 billion tons of coal produced, each year. This is not what Congress intended when it offered states the primary role to implement SMCRA and exclusive jurisdiction to regulate coal mines once it attains that primary role.

The source of this tension and conflict can be traced back to OSM's historic skepticism of the states' capabilities to advance SMCRA's goals. SMCRA set-forth a two-phased implementation scheme whereby OSM and states would initially share concurrent authority for enforcement of SMCRA until the states gained approval of their state programs and assumed the role of the day-to-day regulator. The state primacy scheme under SMCRA was succinctly described by the United States Court of Appeals:

> Under a state program, the state makes decisions applying the national requirements of the Act to the particular local conditions of the state. The Secretary is initially to decide whether the proposed state program is capable of carrying out the provisions of the Act *but is not directly involved in local decisionmaking after the program has been approved.*

In Re: Permanent Surface Mining Regulation Litigation, 653 F. 2d 514, 519 (D.C. Cir. 1981).

At this point, it was expected that OSM would recede to an oversight role to monitor state performance. This critical distinction between the state's role to monitor operator performance and OSM's role to evaluate state performance has been subverted by OSM's desire to perpetuate the initial program's dual regulatory scheme. This duplication and conflict occurs daily through OSM's direct intervention by means of enforcement actions against operators adhering to state permits and policies with which OSM disagrees. Rather than resolve these disagreements with the states,

OSM victimizes operators with federal notices of violation although the operator is following the instructions of the on-the-ground regulator -- the state.

We have long asked where does such authority exist in SMCRA for this system of duplicative and conflicting regulation? The answer -- by OSM's own admission -- is that no such authority exists. When the OSM authorized itself, by rule, to serve in this duplicative role, the agency readily acknowledged that SMCRA does not authorize this approach, but believed nonetheless that Congress left a statutory "gap" that the agency should fill. 44 Fed. Reg. 15302 (March 13, 1979).

Of course, the absence of federal authority to issue notices of violation in primacy states was not an inadvertent gap, but instead a purposeful part of the state primacy, or federalist, scheme of regulation under SMCRA. The absence of any explicit statutory authority in § 521(a)(3) of SMCRA should have been enough for OSM to realize the unmistakable statutory intent to confer upon the states the exclusive role of permitting mines and monitoring their compliance with those permits. Any doubt is quickly removed upon consultation of the legislative history which instructs that:

> In order to prevent federal-state overlap, the federal inspector is only to use his authority under section [5]21(a)(3) where the Secretary is the regulatory authority.

S. Rep. No. 128, 95th Cong. 1st Sess. 90 (1977).

The prevention of such overlap is critical to providing regulatory certainty as Congress recognized in 1977 when it concluded that "mine operators need to know which regulators -- Federal or State -- they must follow at any given time." S. Rep. No. 128 at 72.

The problems with OSM's approach to state primacy were accurately forecasted 15 years ago by the then Governor of Wyoming, Ed Hershler, who, on behalf of the National Governors Association, testified before Congress that "the States do not believe that OSM is committed to the delegation of primary program authority to the States." Oversight -- The Surface Mining Control and Reclamation Act of 1977: Hearings Before the Senate Committee on Energy and Natural Resources., 96th Cong., 1st Sess. 10 (1979). We see no reason to alter this prognosis as long as OSM clings to the view that it may intervene at any time to disturb state decisionmaking when a state program is in full force and effect. As a federal court recently observed:

> While the idea of federalism is often viewed as an archaic notion, it is the foundation upon which our Constitution rests. In enacting SMCRA, Congress attempted to maintain the fragile balance between the federal and state governments established by the founders. *It is this balance which OSM has upset with its trampling of the state's right to enforce its own laws.*

Fincastle Mining, Inc., v. Babbitt, 842 F. Supp. 204, 209 (W.D. Va. 1993).

H.R. 2372 will restore this important balance as well as real meaning to state primacy. OSM's recourse for lax state implementation of a program remains what it has always been -- proceedings under § 521(b) to substitute federal enforcement for all or part of the state program or, if necessary the displacement of the state program with a federal program. This process provides coal operator's with the certainty they need in order to know who is the regulator at any given time, and protects the states' prerogatives against the whims of federal inspectors attempting to commandeer local decisionmaking.

H.R. 2372 also recognizes the maturity of state programs and state experience under primacy over the past fifteen years. OSM's early skepticism over the states' commitment and capabilities should have vanished long ago. The Vice President's National Performance Review noted the friction between state and federal regulators under SMCRA, but recommended that "the federal oversight role should take maximum

advantage of states' expertise in mine regulation developed since SMCRA was passed." Creating a Government That Works Better & Costs Less (Department of the Interior) at 9 (September 1993). Earlier this year, President Clinton outlined for the National Governors Association his administration's goal to dramatically restructure the relationship of the federal and state governments by shifting more responsibility to the states. H.R. 2372 is consistent with this objective and provides the Department of the Interior the opportunity to fulfill the President's goal.

OSM has touted its recent initiatives to review the use of Ten-Day Notices as the solution to our concerns over dual regulation. Although we do not doubt the sincerity of their efforts, this initiative does not address our concerns about becoming victimized by federal notices of violation when a dispute exists between the state and OSM. Moreover, the agency has had a rule in effect since 1988 that was intended to keep mine operators out of the middle of such disputes while providing greater deference to state decisions. In promulgating this Ten-Day Notice rule, OSM stated that it would address most of the industry's and states' concerns over OSM interference and second-guessing of state decisions. However, since that rule was issued, mine operators have been victimized more frequently as federal notices of violation increased substantially every year from 17 in 1988 to 114 in 1994. This record hardly comports with the agency's

prediction that the rule would result in fewer federal notices of violation as it deferred to state decisions, and used other programmatic means to resolve disputes between OSM and the states.

OSM has suggested that without the authority to intervene daily through notices of violation issued directly to mine operators in primacy states, their only options will be to either to take over the entire state program for isolated incidents, or sit by and allow several alleged violations to persist. This view is inaccurate and discloses a fundamental misapprehension of the law and regulations. First, the agency's rules provide various tools for OSM to address disputes between the states and OSM without coal operators becoming pawns in these struggles. The rules provide OSM with options ranging from a request for state program amendments to the substitution of federal enforcement for that *part* of the state program OSM contends is not being enforced by the state. More importantly, OSM may initiate these proceedings but, after hearing from the state and public, may decide to terminate the process if it is satisfied that the disagreement has been resolved satisfactorily. In other words, flexibility exists for OSM to tailor its response to the scope of the dispute while protecting the operator's right to prior notice as to what rules apply to their operations.

As far as OSM's contention that it lose flexibility to address isolated

violations, this position rests precariously upon the premise that the federal inspector's view is always free from doubt. OSM's enforcement activities typically do not involve the states' unwillingness to enforce their programs, but differences of opinion on whether a condition or practice violates the state program. A sample of cases illustrates this point:

- OSM insisting that final grading of the land must replicate the exact original contours, although the statute calls for the return to its approximate original contours.

- OSM closing down coal preparation facilities located at utility power plants for failure to have a SMCRA permit even though the state program and federal rules explicitly exempt preparation plants located at the site of the coal user from SMCRA regulation.

- OSM notice ordering an operator to cease donating waste rock from its development activities to the state Department of Transportation for use as road base for county roads, and instead requiring the operator to disturb and permit new areas to dispose of the rock in a fill.

- Two years after meeting with the state and operator to discuss remediation of a mine drainage problem and not objecting to the operator's proposal to use fly-ash, OSM issued a citation requiring the operator to remove all fly-ash from the permit even though the state approved this measure, it was successfully remediating the mine drainage problem, and the Soil Conservation Services advised that fly-ash was an acceptable soil amendment.

- Issuance of a NOV to a mine for failure to eliminate highwalls at an underground coal mine despite the fact that the areas in question were not highwalls. A

federal ALJ found that OSM's action was taken on the basis of an assessment by federal inspectors who had no knowledge of the premining contours of the land.

- Almost two years after OSM agreed with a state decision that the movement of mining equipment on a public road did not require a SMCRA permit, OSM issued a citation ordering the operator to stop all activity. An administrative law judge found that the enforcement action was motivated by the OSM field office's displeasure with headquarter's original decision; and, the citizen complaint that purportedly caused OSM to revisit the issue was actually based on information furnished by the OSM employees themselves.

- OSM issues notices of violation for the same circumstances previously cited by the state agency but overturned on state administrative or judicial review. OSM has essentially appointed itself to oversee not only state regulatory authorities, but the states' judicial systems as well.

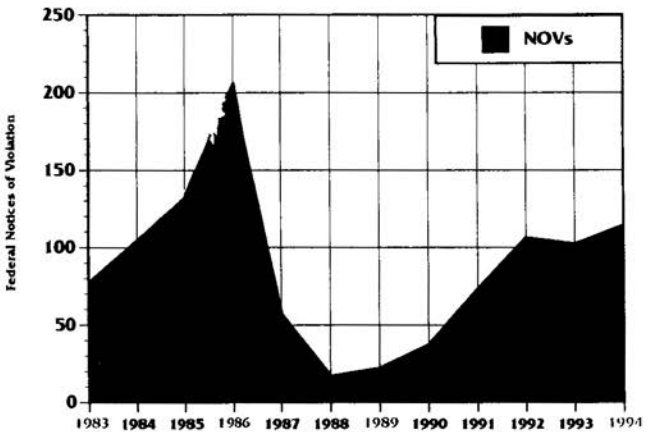
These examples of OSM intervention do not disclose circumstances of state inaction or lax enforcement. Instead, they demonstrate disagreements over the application of program requirements to local conditions as well as the tendency of federal inspectors to substitute their opinion for that of state decisionmakers. These disputes have little to do with protection of the environment, and much to do about whose view prevails on how to achieve that goal. The common denominator, however, remains the mine operator placed at risk in this climate of regulatory uncertainty.

H.R. 2372 also provides greater regulatory certainty by codifying several well established principles. Changes to federal rules do not apply in primacy states until adopted by amendments to the state program. This is consistent with longstanding practice as well as the precedent that in primacy states, the state program, and not SMCRA, establishes the requirements for coal mine operations. The legislation also recognizes that permits apply the program requirements to the conditions and circumstances at the mine. The permit remains the operator's benchmark for compliance until changed in accordance with the procedures set forth in SMCRA and state programs for permit revisions. SMCRA also provides that nothing in that law amends, modifies or supersedes the Clean Water Act or state programs approved pursuant to that Act. Accordingly, the responsibility for enforcing the Clean Water Act rests with those agencies with the authority to administer those programs and not the Office of Surface Mining. The federal rules leave to the states the decision as to what roads are part of the mine and properly regulated under state programs. However, OSM has continually intervened and forced operators to permit public roads as part of their operations. The legislation provides clarification on this important issue and affords states the flexibility for regulating those roads where SMCRA standards are appropriate and necessary.

Finally, those subject to regulation are entitled to timely notice and a fair opportunity for a hearing whenever they become the subject of enforcement actions. The legislation encourages prompt notice of matters considered violations by requiring the commencement of enforcement proceedings within three years from the date of the alleged violation. Such limitation periods are a common part of our jurisprudence in order to protect against the initiation of stale claims, and to afford persons a fair opportunity to defend themselves while the evidence remains available, fresh and probative. Moreover, those subject to enforcement action deserve prompt resolution of their appeals. The legislation will eliminate an unnecessary level of administrative review, and allow operators to seek relief in court after exhausting one administrative appeal rather than the two levels now required under OSM's rules. The second level of appeal presently required is not mandated by the statute, and has caused a backlog of appeals languishing for several years without a decision.

The Surface Mining Control and Reclamation Amendments Act of 1995 recognizes the need for updating the existing law in view of eighteen years of experience, the capabilities of the states, and the industry's need for greater regulatory certainty in order to satisfy a demanding regulatory program.

OSM NOVs in Primacy States, 1983-1994



Year	NOVs
1983	77
1984	104
1985	132
1986	205
1987	57
1988	17
1989	22
1990	37
1991	73
1992	106
1993	102
1994	114

SOURCE: OSM Annual Reports and OSM Fiscal Year Budget Justification Documents

OSM State Program Evaluation Years correspond with the mid-year, e.g., 1993 would be July 1, 1992-June 30, 1993. The ten-day notice rule was issued at the commencement of the 1989 evaluation year.

STATEMENT OF

BLAIR M. GARDNER

VICE PRESIDENT-EXTERNAL AFFAIRS AND SENIOR COUNSEL

ARCH MINERAL CORPORATION

Regarding H.R. 2372

"Surface Mining Control and Reclamation Act Amendments of 1995"

Before the

SUBCOMMITTEE ON ENERGY AND MINERAL RESOURCES

of the

COMMITTEE ON RESOURCES

U. S. HOUSE OF REPRESENTATIVES

NOVEMBER 9, 1995

WASHINGTON, D. C.

Mr. Chairman and members of the Subcommittee, my name is Blair Gardner. I am Vice President - External Affairs and Senior Counsel with Arch Mineral Corporation. Our company was founded in 1969 and is headquartered in suburban St. Louis, Missouri. Through our independent operating subsidiaries, we mined and marketed over 28 million tons of coal in 1994. Our coal is produced from both surface and underground mines in five different states and in each of the three major coal producing regions in the United States. The reclamation issues which our company has confronted range from mining in the high desert, semi-arid conditions of Southern Wyoming, to restoring the rich, prime farmlands of Southern Illinois, to the technical challenges of large scale, mountain top removal mining in Central Appalachia. Our subsidiaries have won numerous awards and commendations from state agencies and organizations. Four times the U.S. Department of the Interior has recognized our operations with the Office of Surface Mining's Excellence in Reclamation awards, most recently in October of this year.

I have participated in and observed the development of the federal Surface Mining Control and Reclamation Act of 1977 for more than 16 years. As an attorney in private practice with the former Pittsburgh law firm of Rose, Schmidt, Dixon, Hasley, Whyte & Hardesty, I participated in drafting the regulations which became the Pennsylvania permanent program. I served as the former Field Solicitor in the U.S. Department of the Interior Pittsburgh Field Office for two years from 1983 until 1985. I joined Arch Mineral Corporation in October, 1985 where I serve in both legal and executive capacities. I have tried numerous cases before both state and federal administrative tribunals involving issues arising under SMCRA . Our company is honored to participate in this hearing.

Arch Mineral Corporation supports the modest procedural reforms expressed in H.R. 2372. The reforms expressed by this bill are consistent with the principles enacted by Congress in the original 1977 Act: first, to internalize on coal producers the external economic and social costs of mining; and second, to impose nationwide environmental performance standards which must be achieved in the mining and reclamation of coal. These goals have not been achieved easily or without conflict. Nevertheless, in a time in which our nation is producing in excess of 1 billion tons of coal annually, reclamation now occurs as a natural and integral step in the process of extraction and processing. So routine is reclamation as part of the mining sequence that it is the failure, not the act, of reclamation which is considered exceptional. This progress could not have been achieved in the absence of the federal Surface Mining Act.

H.R. 2372 represents an important reform. It attempts to clarify and redefine a basic issue of jurisdiction over day to day legal enforcement in the states which have elected to exercise primary regulation of the coal industry. The bill reflects an important reality: the reason for the success of current reclamation does not arise because of the Office of Surface Mining, Reclamation and Enforcement. The success is a result of state efforts supported by strong federal statutory law.

Two things have occurred since the inception of SMCRA to promote sound reclamation practices. First, the pressures of the marketplace over the last decade have been relentless. Measured in real dollars, coal sells for less today than it did in 1977. Companies which attempted to conduct their operations with little regard for the environmental consequences of their activities simply are no longer in our business. Measured both by the number of producing coal mines and by the number of entities mining coal, the structure of the coal industry has changed markedly since the passage of SMCRA.

Second, the states have become much more aggressive in their enforcement of state law enacted pursuant to SMCRA. It is frequently, but incorrectly assumed, that the states required no reclamation prior to the passage of SMCRA in 1977. This simply is untrue. Pennsylvania passed a series of increasingly restrictive measures dating back to the 1950's. Wyoming had enacted a reclamation law before Arch Mineral began to produce coal in that state in 1972. Illinois likewise had adopted measures to avoid the worst environmental effects of coal mining. Although the states achieved varying degrees of success in their respective programs, each of the major coal mining states was actively enforcing state laws upon the passage of SMCRA.

The 1977 Act is significant for a different reason. It provided a uniformity in the performance standards which had to be achieved during the course of mining, while also providing a consistency in the permitting and enforcement of the laws across the nation. This imposition of a national system of standards imposed a "floor" on the environmental standards below which the states could not descend. SMCRA also provided a guaranty that the law would be enforced by providing the potential for the federal government to assume direct authority in states which did not meet the requirements of the law.

No major coal mining state has failed to adopt an approved state program as authorized by the Surface Mining Act. OSM has become the regulatory authority in only two states - Tennessee and Washington - which produce only about 0.7 percent of the nation's coal. The difficult task of daily enforcement is, and always has been, the duty of the states. No one suggests that the states have performed flawlessly. On the whole they have performed competently. More importantly, their performance has improved as they have gained experience in implementing the state programs approved under SMCRA.

Moreover, the states have normally been in the forefront of promoting innovative and exceptional reclamation. Two operating subsidiaries of Arch Mineral Corporation have won the Excellence in Surface Mining award given annually by the Office of Surface Mining since 1987. Numerous other state awards have been issued by state agencies. The exceptional reclamation, in addition to the routine work, performed in our company has been the product of state, not OSM, efforts.

Several examples demonstrate the lead which state agencies have taken in promoting exceptional reclamation. One division, Arch of Illinois, has conducted surface mining in Perry and Randolph Counties in Illinois since 1972. In 1986 it secured a permit to mine through a perennial stream called Pipestone Creek. In its permit Arch of Illinois proposed to permanently restore a stream to its nearly original locations and configuration. This meant far more than simply digging a ditch and releasing water to flow in it. Arch of Illinois proposed to reconstruct the stream across the last pit excavated by its Denmark surface mine, increase the sinuosity of the stream bed, install areas of ripples and rapid water flow and intersperse them with longer stretches of meandering stream in which the water velocity was slower. Riparian areas were created in which seasonal wetlands would exist. More than 20,000 feet, almost four miles of stream channel, was reconstructed in this fashion.

This consensus example of innovative and outstanding reclamation was recognized by OSM in 1993. It occurred, however, because of the interest of the Illinois Department of Mines and Minerals. This state regulatory authority, now reorganized as part of the Illinois Department of Natural Resources, lead other state agencies to arrive at a consensus about the best environmental values which could be achieved by the final reclamation of the mine. It was assisted by the careful research and studies conducted over many years by a small group of scientists at Southern Illinois University at Carbondale. The final reclamation plan was designed and engineered by a creative and thoughtful group of engineers at Arch of Illinois. Ultimately, it was executed by the skillful equipment operators who work at our mines. OSM played no part in this achievement.

Just last month OSM recognized another example of innovative reclamation. Our Cumberland River Coal Company's Ridgeline Mine was awarded the 1995 Excellence in Surface Mining prize. This was particularly gratifying because this mine extracts coal immediately adjacent to a pristine watershed located in the Robinson Forest, a 10,500 acre tract of second growth forest owned by the University of Kentucky.

This mine has been highly controversial. The permit to mine the property was issued after a petition to designate the property unsuitable for mining was received by the Kentucky regulatory authority. We presented evidence in that proceeding that surface mining could be conducted without impairing the water quality of that stream. Our mining has accomplished that goal. Moreover, by creating a large pond with nesting areas for waterfowl, we have increased the diversity and numbers of wildlife in the forest.

A similar accomplishment by Arch's Catenary Coal subsidiary can be identified in West Virginia. The recently completed Ten Mile Fork Reclamation Project has eliminated the major source of acid mine drainage in the Cabin Creek watershed in Kanawha County. A seam of coal below Catenary's R. E. Samples Mine had been mined by underground methods for more than 20 years between the 1950's and the early 1970's. Acid

drainage from a coarse refuse area remaining from this mine created a major source of acid drainage for Cabin Creek, a tributary of the Kanawha River. The West Virginia Division of Environmental Protection encouraged Catenary, as part of its engineering for the surface mine permit for the Samples Mine, to suggest ways in which reclamation of this abandoned site could be accomplished.

Catenary's mining engineers proposed to use alkaline overburden material from the areas above the abandoned site as material which could be used to cover the acidic refuse. Utilizing an engineered blasting design, this overburden was deposited on the reclamation area below the Samples Mine. Durable sandstone from the Samples Mine was used to create the drainage ditches at the perimeter of the reclamation area. A wetlands area has been created at the very bottom of the site which will use bioremediation methods to attempt to control remaining acidic drainage. The entire project has met the same standards used by DEP in its reclamation of qualifying Abandoned Mined Land sites.

Catenary was able to pay for the reclamation project through the mining of additional tons of coal which were otherwise unrecoverable under its original mining plan, and through savings in the haulage of overburden material which was used as the cover for the Ten Mile Fork site. No expenditures from the West Virginia appropriation of AML funds was required. Moreover, the cost of the project to Catenary was at least half of what the DEP would have had to spend had it undertaken the work. OSM played no role in the concept, design or approval of the project.

A final example can be found at our Arch of Wyoming subsidiary. The selective retention of a highwall near Hanna, Wyoming has promoted the return and increased the population of golden eagles, hawks and owls in that part of the state. Initiated in the early 1980's as an "experimental practice" authorized under §711 of SMCRA, the project enjoyed the broad support of the Wyoming Department of Environmental Quality, the state Game and Fish Commission, and the U.S. Fish and Wildlife Service. Although recognized by the Wyoming DEQ for being an innovative example of reclamation designed to improve wildlife habitat, OSM refused to consider it for national recognition. Despite requests by the Wyoming regulatory authority to amend its state program to ease permitting of such sites, OSM has refused to authorize any liberalization of such highwall features unless the permittee can prove that such bluffs were originally present.

Although the experience of Arch Mineral Corporation may not reflect that of other coal mining companies, we can identify no positive contribution by OSM to these achievements. We acknowledge the continuing critical need for federal authority as provided by SMCRA. The reforms envisioned by H.R. 2372 in no way impairs the functioning of OSM as the authority of the Act. Quite the opposite is true.
These reforms would aid all parties with an interest in proper enforcement of SMCRA including the public, the states as the primary regulators, the federal agency with

oversight authority, as well as the nation's mining industry. In broad terms these reforms fall into three categories: jurisdiction, additional performance standards, and due process. If enacted, reforms in these areas would have the effect of eliminating redundancy, increasing certainty and promoting more innovative reclamation.

Jurisdictional Reforms

Reforms in the jurisdictional features include such matters as ending dual enforcement, providing better reviewability by federal courts, eliminating uncertainty and some aspects of dual review in the permitting process, and providing more certainty and accelerating the decision making in amending state programs. Each of these changes is necessary. Each is addressed by H.R. 2372.

At the conclusion of the interim program and at the time that the first permanent programs were being approved in the states, OSM became reluctant to identify the scope of its authority. This occurred notwithstanding the language of §503 and §521 of SMCRA which appears to define OSM's jurisdiction in such states in purely residual terms. This difficulty in defining roles between the state and federal authorities has had several consequences. Operators have been placed in the middle of what are truly jurisdictional disputes between the two governments. Uncertainty is created for the permittee if legal standards which apply to its operations are in question. Finally, the process of modifying state programs, even in those situations in which the changes are occasioned by the distinctive differences in climate and terrain in the states, have been painfully slow. Each of these issues could be improved by more clearly defining the jurisdiction of the state regulatory authorities and OSM.

Dual Enforcement

Except in the situation of an imminent danger to public health and safety, which experience over the last 15 years has shown to be rare, there is no justification for OSM and the states to exercise concurrent enforcement authority over a surface mining site. If the state regulatory authority fails persistently to enforce the provisions of the approved program, OSM has other options such as noting such failures in its annual evaluation, or assuming unilateral authority to enforce all or part of the state's program. The system which has emerged is one in which OSM pays lip service to the statutory provisions of primacy, but invariably concludes that the states have exercised erroneous judgments about enforcement issues. The issues over which the federal and state agencies may differ may be petty. Nevertheless, the current practice of OSM to second guess state enforcement decisions imposes enormous uncertainty on the coal operator. H.R. 2372 proposes amendments to §503, §504 and §521 of the Act which will eliminate OSM's enforcement authority to issue notices of violations in non-imminent harm circumstances in states enforcing approved programs. This will not affect OSM's authority to enforce the law in situations presenting a danger to life or immediate harm to property.

Reviewability

Judicial review of OSM actions is limited under current law in two respects: what decision can be reviewed and where the judicial review may occur. Section 8 of H.R. 2372 amends the statute in both of these respects. First, §526 will be amended to authorize a permittee which has received a final OSM decision to seek review directly before the U.S. District Court for the state in which the operation is located. Second, the state regulatory authority would have the ability to seek review of an OSM decision in the state in which the decision has effect. This is particularly true of any enforcement actions which OSM seeks to undertake. The effect of such a change would be to give both individuals and the states assurance of a truly independent and impartial review of OSM decisions which the current law does not provide.

Permitting

H.R. 2372 proposes to amend §506 by adding a new subsection (8) which will state explicitly that the terms and conditions of an operator's permit incorporate the performance standards of SMCRA and the state programs adopted thereto. This would resolve an ongoing theoretical dispute which has existed for many years about the precise standards of the permit, regulations and statute which an operator must meet. It is the view of the industry that the permit expresses each element that must be met in order for the operator to be in compliance. Such a change should also provide that an operator should have a reasonable period in which to modify its permit to conform to new standards adopted by OSM and the states. All of these changes would promote certainty in the administration of the Act by both the state and OSM. They will also clarify the duties of mine operators under the law. In addition to the changes already contained in the bill, additional matters are appropriate for consideration by this committee.

Environmental Performance Standards

The coal industry has generally demonstrated that the environmental performance standards found at §515 and §516 can be attained. The only reason for modifying these standards is to add new requirements which experience with the Act suggests will be useful to the environment.

Wetlands

After 18 years there can be no disagreement with the observation that the creation of new wetlands generally serves a highly beneficial function. One of the benefits of mining, particularly in the Midwest, is the ability of surface mining operations to create wetlands as a final product of reclamation. These wetlands can be of many types, such as lakes or seasonally inundated lands. The inclusion of water bodies augments well established categories of approved post-mining land uses such as wildlife habitat

or recreation. Coal operators should not be limited in merely replicating existing watercourse or bodies. Instead, there should be an explicit change in §515(b) to affirm that wetlands are a useful and approved addition which may be considered by the operator in designing an approvable reclamation plan.

Remining

Significant areas of Northern and Central Appalachia have been mined since bituminous coal mining reached commercial scale in the years before the Civil War. Many acres have been abandoned, and some now contribute to ongoing discharges of water which degrade streams and rivers. In some instances the surface of lands over abandoned workings are unstable. Congress should consider how the 1977 Act could be amended to encourage coal operators to remine these areas in a way which would address some of these problems, while recognizing that in some cases, complete reclamation to the standards now required of newly lands may not be commercially feasible.

Due Process

The most controversial issues which have plagued OSM over the 18 years of its existence have centered on essential questions of due process. That the agency generally has been found to have met minimal constitutional standards of due process is beside the point. The fact is that SMCRA imposes strict liability on coal operators so that the intent which an operator possesses in the commission of a SMCRA violation is irrelevant. This legal reality has bred a deep cynicism among many operators who perceive that genuine effort to comply with the law is meaningless because the level of care exercised in an operation does not make one less guilty of a violation once it occurs.

Arch Mineral Corporation does not advocate amending SMCRA to make it a fault based statute. Congress was well within its authority to impose strict liability on operators when it enacted the Surface Mining Act in 1977. Nevertheless, changes can be made now which will impart greater fairness to enforcement and more equitably allocate evidential burdens when enforcement actions are undertaken by the agencies.

Identifying the appropriate party to hold a permit

Over 18 years OSM has failed repeatedly to raise and resolve one fundamental question: who is required under SMCRA to hold the mining permit? The failure to answer this one question has lead to failed enforcement, the promulgation of regulations to define ownership and control, the creation of the Applicant Violator System, and the employment of persons to punish persons in 1995 for actions taken over a decade ago.

SMCRA does not specify who, among a chain of companies which may be involved in a mining transaction, must hold the permit required by §506(a) of the Act. To illustrate, in Central Appalachia a small farmer may have leased or sold in fee mineral property to a large landholding company which in turn leases a portion of the leasehold to a large mining company which may employ contract miners to actually extract the coal for the larger company. In this illustration, any one of the parties could theoretically hold the permit. Generally, the contract miner has held it and herein lies the enforcement problem which has plagued OSM. Instead of asking who the law should require to obtain the permit, OSM has attempted to discern, generally as a matter of corporate law, who controls whom. The fact that neither the courts nor the writers of legal treatises have ever been able to arrive at a satisfactory answer to this question has not stopped OSM from trying.

The result has been the ownership and control rule (30 CFR §773.5) and the Applicant Violator System. In combination these two devices probably have come as close to the imposition of a bill of attainder as this country has witnessed since the end of World War II. A preferable solution would be for §506(a) to be amended to require that the person who combines both the economic interest in real property together with the operating interest to develop the property be required to obtain a surface mining permit. This would not eliminate the use of contract miners if this was the preferred manner of extracting coal. It would, however, affix liability directly on the party most able as a legal and economic matter to control the decisions and consequences of mining.

The sanction imposed by the Applicant Violator System should be prospective only

In October, 1988 OSM adopted a regulation which represents the most reaching exercise of regulatory authority which it has attempted under SMCRA. In adopting a definition of the phrase "ownership and control" (53 FR 38868, October 3, 1988) OSM announced that based upon the occurrence or existence of past facts, which may or may not have ever been proven, an individual would be deemed liable for the SMCRA violations of another if either person owned or controlled the other. This interpretation is based upon two sections of the 1977 Act, §507(b) and §510(c). The violations on which an ownership or control determination could be made are of two types: environmental violations which were uncorrected, or monetary claims which were unpaid. Although OSM has created an administrative proceeding in which to challenge the ownership and control finding, the accused is effectively required to prove innocence of matters which may have occurred years before without the benefit of persons or records which are necessary to present a case.

The consequence of being found in an ownership and control is to be placed on the Applicant Violator System. This is a computerized data base utilized by all of the state regulatory authorities in addition to OSM. Once placed in the AVS, one cannot receive a permit to mine. Moreover, since OSM will not grant a permit conditionally

and allow an accused to challenge a determination, one generally must undertake whatever remedial action is ordered by the agency and then initiate a challenge.

Assuming the constitutionality of this system, its reach is unquestionably retroactive to events and facts which occurred many years before the promulgation of the regulation. Much of the unfairness of this system could be avoided by limiting its application to matters arising after the adoption of the rule.

The regulatory authority should not be able to make an ownership and control decision as an administrative determination

Under the procedural system adopted by OSM to determine ownership and control matters, the agency begins the process by notifying a party of a presumed ownership and control determination. The party then has a limited time, sometimes 30 days, in which to respond with documents or other evidence to refute the presumption. At the end of the review, which in one case involving Arch Mineral Corporation lasted more than 21 months, OSM determines that its presumption has not been rebutted, the party will be placed on the AVS and all new permits will be denied. The accused then has an opportunity to have the OSM decision reviewed before an administrative law judge. In that hearing OSM need do nothing more than present a minimal prima facie case at which point it will be presumed to be correct and all evidential burdens shift to the other party.

Substantial fairness would be imposed in this area if OSM would be required to try these matters in the first instance before an administrative law judge. In this process the agency would be required to gather its evidence after discovery, present it to a neutral fact finder, and carry the normal burdens of proof routinely required of a litigant. Its conclusions would carry no presumption of correctness.

Finally, no person should be placed on the AVS until the final decision of the administrative law judge is entered. This will ensure that OSM will not coerce a party to settle a disputed ownership and control allegation merely to enable the party to remain in business. Instead, any meritorious matter will be brought to trial before the sanction is imposed by the agency.

A statute of limitations should apply to OSM's collection of delinquent civil penalties and AML fees

The U.S. Court of Appeals for the District of Columbia Circuit decided 3M Company. Browner, 17 F. 3d 1453 in March, 1994. In that case the court concluded that the traditional five year statute of limitations imposed by 28 USC § 2462 applied to the EPA in a civil penalty proceeding arising under the Toxic Substances Control Act. Congress should amend SMCRA to impose this same rule of law to govern OSM's collection of civil penalties and AML fees.

Much of the debt now carried on OSM's books arose from mining violations committed more than 15 years ago. Except through the practice of finding ownership and control links in which OSM is now engaged, this debt will not be collected and the agency should no longer be permitted to pretend that it will. The policy justifications and reasoning of the Browner decision are no less applicable in the context of SMCRA.

Conclusion

Arch Mineral Corporation is pleased to have participated in this hearing. The specific criticisms made of the Office of Surface Mining, while pointed, have been intended as constructive. Our company perceives that an economically healthy and productive coal industry cannot exist in the United States if the public is suspicious and mistrustful of the process and standards which we must meet to protect our nation's land and water resources. For this reason it is in the interest of the coal industry as well as the public to address the items presented before this Subcommittee.

In addition, this testimony has not been intended as a partisan criticism of any administration. The problems identified and the mistakes made by OSM have arisen in both Republican and Democratic administrations. The ideas offered by Arch Mineral are intended to improve the administration of the law and the performance of reclamation.

We thank the Subcommittee for the opportunity to be here today.

STATEMENT OF MR. DICKIE JUDY
Before the Subcommittee on Energy and Mineral Resources
November 9, 1995
Hearing on H.R. 2372

My name is Dickie Judy, and I am a resident of Boone County, West Virginia. I am opposed to H.R. 2372 because it would eliminate the authority of the federal Office of Surface Mining to take enforcement actions against coal operators in situations where the State fails to uphold the law. I take this position based on my own personal experiences, which should serve as an example of why we still need OSM in the coalfields.

The reason I oppose HR 2372 is because :

* I finished my home in Sept 1994 at which time I had a pre-blast survey done at the request of the West Virginia Department of Environmental Protection (DEP) at the new dwelling as well as the older dwelling .

*Shortly after the pre-blast survey was preformed, AT Massey (Elk Run Division) began blasting operation.

*A¢ this time there were no seismograph machines on my property.

* The blasting operations starting destroying my home and continued for the next four months.

* The water supply was hindered and the coal company "As a Good Neighbor" provided a water treatment system that is costing me approximately $24 a week.

* I called the coal company and was told they were in compliance with the law.

* At this time, I called DEP and they wrote a notice of violation to the Elk Run Division for damages outside of a permit area.

* Then the DEP issued a cease order to shut down blasting operations.

* The company immediately went and got a temporary release to resume blasting from the Surface Mining Board.

* A hearing was held with the Surface Mining Board to determine the damage cause by the blasting. However, the hearing pertained only to what qualifications were needed to be a witness for the coal company. The pre-blast survey was never acknowledge as evidence. One board member, during our testimony, excused himself to go to a "Birthday Party".

They also allowed the coal company to correct evidence outside of the board room.

*** At the end of the hearing the Board stated the problem was caused by settling both homes at the same time. The older home was built in 1892??**

*** Anyone having to go to court to fight a coal company would have trouble finding representation due to conflict of interest since the attorney's have previously and most are currently working for the coal companies.**

*** Since the hearing, the OSM have become involved and are currently investigating.**

*** The need for OSM in the coalfield is extremely important because they have more qualified people working and more knowledge and updated equipment that will prevent the coal companies from taking over and continuing to damage land owners' property.**

*** I feel that if the OSM is eliminated, that there will be more violence in the coalfield resulting from individuals fighting for their rights.**

***Due to action of the coal company, my insurance was canceled stating bad risk due to blasting in the area. I also lost income from renters at the older home. I am in the process of selling lots from my property due to the hardship.**

*** If they do away with the OSM, I will move to a state that has no coal !!**

National Citizens' Coal Law Project

A Project of the Kentucky Resources Council, Inc.
Post Office Box 1070
Frankfort, Kentucky 40602
(502) 875-2428
(502) 875-2845 fax
e-mail: FitzKRC@aol.com

Statement of Tom FitzGerald, Director, National Citizen's Coal Law Project
Kentucky Resources Council, Inc.
Before the Subcommittee on Energy and Mineral Resources
November 9, 1995

Chairman Calvert, Representative Cubin, other distinguished members of the Subcommittee:

My name is Tom FitzGerald, and I am Director of the Kentucky Resources Council, Inc., a non-profit organization providing free legal and technical assistance to Kentuckians on air, waste, water, and to citizens across the nation on coal mining issues through the National Citizen's Coal Law Project.

I am here to ask that you do not dismantle the framework of an Act that has helped to lift the environmental burdens of coal mining from the backs of downhill and downstream neighbors and to make elimination of those impacts a cost of doing business. A continued federal presence in a collaborative *and* when necessary a regulatory mode, has been pivotal in providing some meager justice for surface landowners and neighbors. The elimination of the NOV authority, the creation of a permit compliance exemption, severe restriction of public access to the federal courts and administrative processes contained in H.R. 2372, coupled with the harsh reductions in the federal inspection and enforcement budget, will set back the implementation of this law, and will rekindle the anger and cynicism of coalfield residents towards the coal industry and government.

This bill dramatically curtails both in the role of the Secretary of Interior, and the rights of coalfield residents. Beyond stripping OSM of the ability to issue notices of violation where the state has failed to act or justify inaction, the bill **breaks the promise** that Congress made to coalfield residents in 1977 that although the states would be granted primary authority to implement the law despite their abysmal record, a continued federal presence and meaningful citizen access to federal forums would assure that the historic burdens of coal mining would not be reimposed on their shoulders.

The bill is a coal lawyer's dream. Rather than settling the question of inspection and enforcement authority, the bill creates new ambiguities in the

base inspection and enforcement authority of OSM, and creating opportunities for mischief for those who will seek to exploit those ambiguities in the future.[1]

The relationship among the states, OSM, industry and the public in the Act was not one crafted on a lark, but rather was a deliberate and thoughtful allocation of authority and accountability crafted out of a Congressional recognition that, without a federal floor of environmental performance standards, continued public involvement through federal administrative forums and the courts, and a continued oversight role by the Secretary of Interior, the states would retreat to their tendency to underregulation, and the destructive forces of interstate competition would continue to spiral downward the regulation of mining.[2]

In Kentucky, our state program implementation has stabilized after a tumultuous first decade, is being fairly implemented for the most part, and where disagreements concerning program implementation are largely resolved in a collaborative manner. Kentucky's experience attests to the fact that OSM's presence is a necessary deterrent against abuse.[3] The precipitous decline of

---

[1] For example, while it has been suggested that the bill does not alter the authority of the Secretary to issue "imminent harm" cessation orders, in fact the bill creates a conflict between the inspection authority of the Secretary under Section 517 of the Act and the imminent-harm cessation order authority of Section 521, and the more fundamental grants of authority under Sections 101 and 201 of the Act.

Specifically, while Section 517 of the Act provides that the Secretary shall make such inspections as are necessary to evaluate the administration of approved state programs, the proposed revision in Section 3 of the bill amends Section 201(c)(1) to eliminate the Secretary's authority in states which have approved state programs, to "make those investigations and inspections necessary to ensure compliance with this Act[.]" The limitations on the Office of Surface Mining under this section, which is the grant of authority to the Office of Surface Mining, is in conflict with Section 517(a).

Section 3 of the bill also eliminates the ability of the Secretary to "conduct hearings" or to "review . . . orders and decisions, and order the suspension, revocation, or withholding of any permit for failure to comply with any of the provisions of this Act or any rules and regulations adopted pursuant thereto[,]" in states with approved programs, creating conflicts with other sections of the Act including the procedures for withdrawing state program approval, which requires the holding of hearings in the state.

Finally, while proponents claim to not be altering the "imminent harm cessation order" authority, the phrase "issue cease-and-desist orders" is removed from Section 201(c)(1), creating a conflict with Section 521. Also, the elimination of the investigation and inspection authority could be construed to mean that OSM would not have authority to respond to an imminent harm complaint.

[2] It has been suggested that federal enforcement authority creates conflict. There is conflict inherent in the relationship between the coal industry and the surface landowners, a conflict over the extent to which the environmental costs of "doing business" must be internalized, or be borne on the backs of those who live downhill and downstream in lost water supplies, diminished economic opportunity, fouled air, and unsafe roadways. Hamstringing OSM and restricting public access to federal forums in those few cases where federal intervention is needed and has been used, will worsen rather than salve that conflict.

[3] During the late 70's and early 80's, Kentucky saw *and failed to control* efforts by the unscrupulous to avoid environmental responsibility by abusing the exemptions to the law,

the Kentucky state program, and the rehabilitation of that state program reflect the wisdom of Congress in providing for a continued role for citizens and the Secretary.[4] This bill threatens to erode that progress, and causes me great concern for that reason.

What is the effect of this bill?

The most significant effect will be to reward those who refuse to pay their AML bills, and those who seek to avoid responsibility for the abuses caused by their contract mines.

Of the NOVs written in oversight, the vast majority have been for non-payment of Abandoned Mine Land (AML) fees from delinquent operators who believe that they need not play by the rules, and for ownership-and-control linkages. Imposing a 3-year statute of limitations and elimination of NOV authority will compromise OSM's efforts to collection AML fees from the deadbeats and reward those operators whose contract miners violated the law. Those who didn't shirk their responsibilities will suffer, as will the public, for each of these sites has neighbors, and each of those neighbors is being forced to pick up the tab for someone else's indifference to the law.[5]

---

including the notorious "on-site construction" exemptions, hundreds of illicit two-acre mines which were strung together by larger companies using false business entities, and hundreds of false "coal exploration" notices. These actions were to cause significant environmental disturbance, hardship to individuals whose homes and water supplies were damaged by landslides and illegal mining discharges, and also economic damage to legitimate, responsible operators.

[4] The Kentucky regulatory program that was approved in 1982 was in significant crisis by 1986, with hundreds of observed violations unwritten, many enforcement orders unenforced, penalties uncollected, and outlaws granted new permits despite the existence of past uncorrected violations. Through a settlement agreement developed jointly by industry, environmental groups, the state and OSM, and through the collective efforts of the state administration, new federal funding, and a strong federal oversight role, we turned the Kentucky state program around to the point where it is one of the best, if not the best, in the nation.

[5] The provision insulating a permittee from enforcement action except for violation of his permit, compromises the public's interest. The issuance of a permit is a mechanism for translating and outlining legal obligations - it is not a surrogate for continued compliance with the law and regulations. The provision will deprive the state regulatory authority and OSM of the ability to timely intervene where, through inadvertence or because of unforeseen circumstances, the permit and plans contained in the permit prove inadequate to protect public health and safety.

For example, a blasting plan is developed and approved which proves insufficient to prevent structural damage to adjoining residences. Under the bill, the regulatory authority would be precluded from issuing a notice of violation mandating immediate compliance with a more protective blasting standard while the permit was revised. Assume instead that the permittee has improperly represented that he has the legal right to enter and mine a property, and in fact does not, or there is a conflict in the chain of title. Under the bill, the regulatory authority could not require cessation of mining while a permit revision was submitted to delete the offending area from the permit, or to require the permittee to provide further support for the claimed right to mine.

The permit shield provision is an open invitation for abuse by those who could fail to fully disclose information relating to property or coal ownership, or relating to acid mine potential or

What of the removal of OSM's NOV authority? Ask Muriel Smith in Perry County, whose ex-husband signed a waiver allowing a sediment pond to be built directly above her home. The state claimed that looking behind the waiver would be adjudicating a "property rights dispute" (as if issuing the permit were *not).* It took five years for me to vindicate her rights in the state Court of Appeals. *But for* the existence of NOV authority, she would have had to live below that high-hazard sediment pond. Instead, utilizing her right to request a federal inspection, the pond was ordered removed immediately.[6]

Ask Ollie McCoy about whether OSM should have a continued oversight inspection and enforcement role. After the state declined to take action against J & H Coal Company for a landslide that was tearing her home apart on a hillside directly below the elevation of a coal seam which had been underground mined by the company, Ollie asked OSM to intercede and convinced OSM to bring their technical resources to bear on the problem - resources that the state did not have available. Ollie's home was destroyed and her life and that of her grandchildren disrupted before any action could be taken, but eventually the coal company *was* issued a federal NOV and took corrective action. The case vividly reflects the continued necessity for a federal presence capable of grappling with the difficult technical issues that the state lacks the resources to address.

Mr. Chairman, what am I to tell the next Ollie McCoy? That Congress has removed both OSM's authority to force the responsible company to act short of an imminent danger, and stripped bare the budget that enabled OSM to conduct the physical investigation linking the mine to her landslide?

And what am I to tell the next Anderson family if you close the doors to the federal courthouse - the Andersons who, after winning a trial court verdict that underground mining had ruined their water supply, had that verdict overturned by the state judge who reasoned that since there were 140 other families in the

---

any other site condition, on the assumption that if "caught," no enforcement action would be taken and the worst that would occur is that a permit revision would be ordered.

It is of no consequence that the damage to the rights of innocent third-parties and to the public's land and water resources arises from an inadequate mining and reclamation plan, or from a failure to follow that plan. A violation of the substantive performance standards should in either case be promptly corrected through issuance of appropriate enforcement orders, and the permit should not be used as a shield from prompt compliance with the law. The state and federal agencies must have authority to respond to violations of environmental performance standards, whether related to permit defects or failure to follow the permit. A permit revision is one curative measure but by itself is often insufficient to abate that harm.

[6] Under the "permit shield" provision in Section 6, because the state failure to have required a sufficient waiver would be considered a "permit defect," Ms. Smith would have had to suffer with the sediment pond for the five-year period or until the state reopened the permit for mid-term review. Both the state and OSM would be precluded from issuing an enforcement order demanding that interim measures be taken until such time as the permit could be revised.

same locale who had their water wells ruined and who might sue the coal company in the future, to uphold an award would "render coal mining economically impossible" and on that basis, threw out the jury's nuisance award. Do I tell them that their access to a sometimes more impartial or dispassionate federal forum before an appointed judge has been taken from them, and that their access to the Interior Board of Land Appeals for redress when OSM declines to take inspection or enforcement action has also been extinguished?

And what do *I* do next time wildcat miners enjoin the state from taking enforcement action to close their illegal mines? It took a *pro se* appeal to the Interior Board of Land Appeals in *FitzGerald v. OSM* to convince the Secretary to issue an NOV where the state had been enjoined by a state court judge (who had not properly applied the standards for injunctive relief under the Act) from closing the wildcat mines.[7]

Mr. Chairman, there has not been advanced a compelling and legitimate reason to upend this law in such a dramatic and dangerous manner. We are not here because industry lacks a mechanism for addressing the 29 notices of violation that were issued nationally from January 1994 through September 1995 arising from OSM field inspections in states with approved state programs. There exist administrative and judicial mechanisms to curb any alleged overreaching. The mere handful of anecdotes alleging ham-handed federal overreaching that have been amassed in 18 years are tribute to the wisdom of this body in crafting the Act's structure.[8]

It would appear instead that OSM's authority is at risk more because OSM is holding some in industry accountable for their AML debts and the violations caused by their contract mines. Of the few field enforcement conflicts that do arise, most stem from a failure of OSM to have developed national rules to address certain key regulatory issues, including regulation of roads, contemporaneous reclamation, permitting areas with acidic overburden, coal

---

[7] The elimination of the level of appellate review provided by the Interior Board of Land Appeals effectively cuts off citizen access to review of federal agency inspection and enforcement decisions. Coupled with the elimination of public access to federal courts contained in Section 9, the bill will reward abuse of the mining law, since in the relatively few instances in which the public has appealed to the IBLA and the courts, it has largely been in instances where there has been significant non-compliance with the law by a state agency or operator, a condition that adversely affects the legitimate coal industry and public alike.

[8] If we are to rend the fabric of this Act to address a handful of allegedly duplicative enforcement cases, then please come to Kentucky before you decide to move forward, and visit those people who have seen the effect of too much deference shown the states, and those cases where the states quietly welcomed OSM intervention. Come meet Ollie McCoy, or Greg Newsome, who awaits my call back home tomorrow concerning the landslide above his property caused by a cut-and-run two- acre mining company improperly allowed by the state to escape responsibility.

exploration, and temporary cessation of operations. More clarity at the national level would result in much less conflict at the implementation level.[9] [10]

Mr. Chairman, it is not too much for those who live downhill and downstream to expect that the law will be fully and fairly obeyed, but it has not always been. It is not too much to expect that when there are violations, they will be promptly and completely corrected. But they have not always been. It is certainly not too much to expect that when the states fail, through inadvertence or design, to properly discharge their mandatory obligation to conform the administration of the state program to the Act and Secretary's regulations, that the Secretary will

---

[9] The provisions of the bill which exclude "public roads" from the ambit of the Act follow the flawed logic that was highlighted by Judge Flannery in his rejection of that exclusion. The Act was intended to address the impacts of coal extraction, including the use or construction or alteration of roads for haulage or access. It is the environmental consequences associated with the use of the road by the coal operation, not the public, that should determine whether the road is within the Act's ambit.

The public road amendment as proposed in H.R. 2372 is in fact even weaker and more open to abuse than the definition that was rejected by Judge Flannery. The amendment would categorically exempt from the scope of the Act the construction, improvement, or use of roads that are either designated as a public road under local law or maintained under the authority of a governmental entity and the road is constructed similarly to other roads in that jurisdiction. The OSM definition required designation as a public road and maintenance by a public agency - the switch to "or" invites a resurgence of the massive abuse of the public road exemption that occurred in Kentucky, where operators excluded private haul roads from mining operations by obtaining a letter from the County Judge Executive or other local official stating that the road was a "public road," even though it saw little or no public use.

Exemplary of the problem with excluding roads based on mere designation as a public road, instead of focusing on the coal use of the road, is the W.E. Carter case, IBLA 87-770 (October 18, 1990) where the mining company sought to use as a haul road a private road that was within prohibited distances from residences, and after failing to prove "valid existing rights" to the haul road, convinced the local county to accept the road as a "public road." The mining company's engineer was also the county road engineer. See attached *Brief for Petitioners* in the state court case, and the IBLA decision.

[10] The lack of necessity for the removal of NOV authority was highlighted in the comments of the Commonwealth of Kentucky on the proposed bill. I am proud of the independence and maturity reflected in the decision by the Commonwealth not to join with the IMCC in this matter. By letter dated November 3, 1995, the head of the state regulatory authority stated that "[K]entucky does not endorse the changes in law proposed in H.R. 2372. . . . We have found that the law's provisions for dealing with citizen complaints properly recognizes and respects the primacy of state decision making, but still provides for checks and balances from our federal counterparts. This system, properly implemented, effectively promotes increased public confidence in environmental enforcement. While any system is subject to abuse, we have found that with sufficient leadership from the state and federal partners, the current system works well."

Former Commissioner of Surface Mining Dave Rosenbaum in his letter of June 30, 1995 to the Interstate Mining Compact Commission, noted that in Kentucky's view "this issue is largely much-a-do about nothing. For the OSM evaluation period ending June 30, 1994, OSM received, in Kentucky, 89 citizens' complaints; my Department received 1298 citizens' complaints. During the same time, OSM wrote 124 non-eminent-danger notices of violation in Kentucky, while my Department wrote 1599 notices of violation. The June 27, 1995 testimony describes the exercise of federal enforcement authority in primacy states as "empowerment" gone awry. With OSM writing 14 NOVs while my Department write 1600 NOVs, it does [not] appear that this is an example, at least in Kentucky, of this phenomena."

be there to protect the innocent and to hold the states and the mining company accountable in a prompt, efficient and effective manner. Yet under this bill, that will not occur.[11]

[11] The author wishes to incorporate by reference into the record of this public hearing the prior letters to Chairman Calvert, dated June 27, 1995 and July 7, 1995, and the letters of Commissioner David Rosenbaum to Greg Conrad dated June 30, 1995 and of Secretary Phillip Shepherd to Greg Conrad, dated November 3, 1995 indicating the opposition of the Commonwealth of Kentucky to H.R. 2372.

National Citizens' Coal Law Project

A Project of the Kentucky Resources Council, Inc.
Post Office Box 1070
Frankfort, Kentucky 40602
(502) 875-2428 / (502) 875-2845 fax
e-mail: FitzKRC@aol.com

June 27, 1995

Hon. Ken Calvert, Chair
House Subcommittee on Energy
and Mineral Resources
House of Representatives
Washington, D.C. 20515

Dear Representative Calvert:

I am writing this letter for inclusion in the record of your Subcommittee's hearing on the implementation of the 1977 Surface Mining Control and Reclamation Act (Act). I understand that the House Subcommittee on Energy and Mineral Resources will be considering amendments to the 1977 Act to remove the authority of the Secretary of Interior, through the Office of Surface Mining Reclamation and Enforcement (OSMRE) to issue Notices of Violation (NOVs) under Section 521 of the federal Act where there is an approved state regulatory program, and where that state fails, after notification from OSMRE, to take appropriate action to cause the violation of that approved program to be corrected, or fails to show "good cause" for not having taken such action.

I am writing as Director of the Kentucky Resources Council, Inc., a non-profit environmental advocacy organization which, through its National Citizen's Coal Law Project, provides legal assistance, representation, and advice to coalfield residents on the full and fair implementation of the 1977 mining law. The Council, which has been active on surface coal mining issues since 1984, believes that the maintenance of the federal oversight function of the OSMRE is as vital to full and fair implementation of the law in 1995 as it was in 1977. On behalf of the Council and its members in Kentucky's coalfields, I urge you and the Subcommittee *not* to so hamstring the OSMRE in its efforts to assure a "level playing field" among the states in environmental protection by removing NOV authority from the agency.

In 1977, when the Surface Mining Control and Reclamation Act was passed, Congress understood that the creation of a national "floor" of federal environmental standards and a uniform permitting system were needed to end the widespread abuses of land and people that were then occurring under state mining regulatory programs. Congress created the federal Office of Surface Mining Reclamation and Enforcement, and required that states who wanted to regulate coal mining within their borders adopt state laws and regulations meeting the federal standards. Congress knew that in turning the primary responsibility for day-to-day regulation of coal mining back over to the states, some states might slip back to their historical patterns of non-enforcement. The House Committee on Interior and Insular Affairs, which drafted the 1977 mining law, explained the need for a continued federal role in enforcement once the state programs were approved:

> 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. The committee believes, however, that the implementation of minimal Federal standards, the availability of Federal funds, and the assistance of the expertise of the Office of Surface Mining Reclamation and Enforcement in the Department of Interior, will combine to greatly increase the effectiveness of State enforcement programs operating under the act. While it is confident that the delegation of primary regulatory authority to the States will result in adequate State enforcement, the committee is also of the belief that a limited Federal oversight role as well as increased opportunity for citizens to participate in the enforcement program are necessary to assure that the old patterns of minimal enforcement are not repeated.

The D.C. Circuit Court of Appeals described the relationship between the Secretary of Interior and the states in the case of *In Re: Permanent Surface Mining Regulation Litigation (*en banc), 653 F.2d 514 (D.C. Cir. 1981), cert den. 102 S.Ct. 106 (1981), underscoring the balance of authority and accountability intended by Congress:

> Our own examination of the Act and its legislative history reveals a very different congressional assessment of the tradition of state surface mining regulation. The legislative history contains significant expressions of congressional dissatisfaction with state mining regulation practices:
>
> > [D]espite claims from some quarters that state reclamation laws have improved so significantly that Federal mining standards are no longer needed, the hearing record abounds with evidence that this is simply not the case. For a variety of reasons, including the reluctance of the State to impose stringent controls on its own industry, serious abuses continue.
>
> H.R. Rep. No. 218, 95th Cong., 1st Sess. 58 (1977) reprinted in [1977] U.S. Code Cong. & Ad. news 593, 596. Congress preferred to leave primary governmental responsibility with the states "because of the diversity in terrain, climate . . . and other physical conditions in areas subject to mining operations," . . . but skepticism about the states' willingness to implement the federal program justified the Secretary's continuing oversight role.
>
> > While it is confident that the delegation of primary regulatory authority to the States will result in adequate State enforcement, the committee is also of the belief that a limited Federal oversight role as well as increa-

> sed opportunity for citizens to participate in the enforcement program are necessary to assure that the old patterns of minimal enforcement are not repeated.
>
> H.R. Rep. No. 218, 95th Cong., 1st Sess. 129 (1977), reprinted in [1977] U.S. Code Cong. & Ad. News 5933, 661.
>
> Congress announced its willingness, "wherever necessary, [to] exercise the full reach of Federal constitutional powers to insure the protection of the public interest through effective control of surface coal mining operations." Act Section 102(m).
>
> * * * *
>
> Thus, the legislative history of the Act, the declarations of congressional purpose it contains, and the allocation of authority it creates between the Secretary and the states confirm that Congress was not interested in perpetuating the existing tradition of state mining regulation, and that Congress saw the need for both federal standards ***and federal oversight to guarantee an effective change. Congress did not withhold powers that the Secretary might require in his efforts to safeguard federal interests.***

In Re:, supra, 653 F.2d at 520-521. (Emphasis added).

Throughout the legislative history a significant skepticism was expressed on the part of Congress over both the ability and will of the states to properly implement SMCRA. In the area of enforcement, Congress expressed a particular concern:

> 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.

S.Rep. No. 128, 95th Cong., 1st Sess. 90 (1977); H.R.Rep. No. 218, 95th Cong., 1st Sess., 129 (1977). In order to assure full and fair implementation of the Act, both the public and the Secretary were accorded continued roles in the *enforcement* of state approved programs.

Having worked for twenty-two years on mining-related issues, and having seen firsthand the destructive effect of the interstate competition in environmental quality, where one state lowers standards or fails to rigorously enforce the law out of concern that it will be undercut in the marketplace by another state, and having seen the corrosive effect of uneven enforcement of laws within states, I urge your careful consideration of the testimony of coalfield residents that will come before your Subcommittee, and respectfully request that you do not remove from OSMRE an important tool in achieving the Congressional goal of establishing a nationwide program to assure

that the rights of surface landowners are "fully protected" and that surface coal mining operations are conducted so as to protect the environment. Act, Section 102.

In your deliberations, I would request that your consider these points:

1. The use of federal enforcement authority is already sufficiently bounded by measures that minimize conflict between the state and federal agencies, and which result in resolution of many conflicts without necessity for actual issuance of the NOV.

OSMRE has developed procedures implementing Section 521, which provide an opportunity for state regulatory authorities to seek internal agency review of any proposed issuance of NOVs, allowing for dialogue between the state and federal agency concerning the existence of a violation and appropriate measures to be taken, and minimizing conflict in the implementation and oversight of approved programs. These procedures provide ample checks on the issuance of NOVs in oversight, and serve to identify programmatic problems in a manner that is timely and which minimizes disruption of the programs.

The alternative, in the absence of NOV authority, is that OSMRE will be forced into use of more disruptive mechanisms, such as partial or complete program withdrawal, to identify and seek redress of programmatic and site-specific failures of state program implementation.

2. The use of federal NOVs has been limited, but the possibility of issuance of such actions serves as a deterrent, and also provides a mechanism for assuring that the public will not be injured during the pendency of resolution of state and federal conflicts concerning appropriate implementation of the protections of the 1977 Act.

* The case of Muriel Smith is a classic example. After the state of Kentucky issued a permit to Smith Brothers Coal Company allowing construction of a water impoundment 100 above the home of Muriel Smith, she objected to the state that she had not signed a waiver as is required for any mining activities within 300 feet of an occupied dwelling. As the joint owner of the home and the individual with the sole legal right of occupancy, she believed that she, and not her ex-husband who signed the waiver, should be the one who determines whether to waiver the protections of the law.

The state agency dismissed her claims as a "property rights dispute," and after seeking unsuccessfully to have the state hold a hearing on her complaint, she pleaded with OSMRE to review the matter. A federal NOV was issued, and the pond was removed.

Four years later, the state Court of Appeals ruled on behalf of Ms. Smith, finding that the state agency's handling of the matter "is seriously flawed. Its 'hand off' policy of noninvolvement is in direct conflict with the spirit of Chapter 350[.] . . . We agree with the appellant that to hold otherwise would 'gut the protection of KRS 350.085(3).'" Smith v. Natural Resources and Environmental Protection Cabinet, Ky.App. 712 S.W.2d 951 (1986).

Without NOV authority at the federal level in this case, Ms. Smith would have been forced to endure for four years the burden of an improper sediment structure improperly located immediately

uphill from her home, with the attendant risk of wash out or catastrophic failure of the structure, and the impairment of value and use of her land.

3. Federal enforcement authority is needed to address those instances where states decline to act based on limited investigation, or simply err as a matter of fact or technical inexpertise, to detect and act upon a violation of the approved state program.

* The case of Ollie McCoy also reflects the need for continued federal enforcement authority. After the state declined to take enforcement action based on a limited (and as it turned out on more detailed investigation, erroneous) investigation, OSMRE was persuaded to issue an enforcement action against J & H Coal Company for correction of landslides caused by impounded water within former underground mine workings, which caused significant damage to two homes and forced the relocation of one family. After extensive investigation, an enforcement action demanding that the coal company restore the damaged land, repair or replace damaged homes, and immediately relocate the residents of the homes threatened by the slide, was issued by the OSMRE. Absent federal NOV authority, the only recourse for OSMRE would have been to wait until conditions worsened to an imminent harm to life or limb, or significant imminent environmental harm, before taking direct action to require abatement of the harm.

4. In the absence of federal NOV authority, the relationship among the states, OSMRE and the industry will be marked by more conflict and less predictability, since remaining tools for federal oversight are *more* intrusive and less proactive.

The optimal course of action in implementation of approved state programs is one in which the rules are clear, the actions of the state and federal agencies are predictable, replicable, and are perceived as even-handed within and among the states. While the full and fair implementation of the law has not been achieved, the failures are ones not of a structural nature, but rather flow from lack of consistent management of the agency.

The removal of the NOV authority leaves the agency with less tools to address identified problems before they rise to the level of programmatic deficiencies. The issuance of "Ten-Day notices" to the states, and the more infrequent NOVs, serve to identify and to stem problems early. Absent such powers, OSMRE will be reduced to watching problems worsen on a site-specific basis, or across a state program, to the point where more drastic intervention is needed. This is far less efficient, from a regulatory and an industry standpoint, and will enhance the inherent conflict between the state and federal agencies.

Conclusion

The enforcement of approved regulatory programs by the individual states has improved somewhat over the past 17 years, and this improvement is in part directly attributable to the continued OSMRE oversight presence in states with approved programs. The Commonwealth of Kentucky, for example, has markedly improved the implementation of the approved mining program since 1986, when I participated in the filing of a lawsuit challenging the systemic failure of the state to properly implement and administer the state program.

In 1986, the picture in Kentucky was bleak indeed:

* state inspectors systematically failed to issue NOVs for all violations observed on minesites;

* state inspectors routinely ignored more violations than were cited;

* the state failed to assess penalties, to take alternative enforcement actions against the worst violators, and failed to deny or revoke permits for individuals with outstanding violations.

After the implementation of a three-year settlement agreement, the state performance improved dramatically and remains generally better to this day. But it took the combined efforts of the public, the courts and the federal agency to "turn around" the state program from the miasma that it was mired in some 4 years after state program approval. A pivotal component of that settlement was the enhanced involvement of the federal OSMRE in day-to-day oversight of the settlement.

While we have progressed from 1976, it is important to note that we have not come that far from a time when state program implementation in a state such as Kentucky was dysfunctional. The destructive economic and political forces that resulted in the abysmal state of the Kentucky state program in 1986 are still at play in 1995.

The history of implementation of the Act has been marked, inevitably, by some conflict. The coal industry vigorously opposed the enactment of the 1977 law, and has consistently resisted the federal role in overseeing the implementation of approved state programs. Despite the implication that the federal oversight role is no longer needed, the reality is that, now as in 1977, the continued presence of the federal OSMRE with field enforcement capability, is needed to assure that the "old patterns of minimal enforcement are not repeated."

Thank you for your consideration of these comments.

Sincerely,

Tom FitzGerald

Tom FitzGerald
Director

cc: Hon. Neil Abercrombie
Members, House Subcommittee on Energy & Mineral Resources

National Citizens' Coal Law Project
A Project of the Kentucky Resources Council, Inc.
Post Office Box 1070
Frankfort, Kentucky 40602
(502) 875-2428 / (502) 875-2845 fax
e-mail: FitzKRC@aol.com

July 7, 1995

Hon. Ken Calvert, Chair
House Subcommittee on Energy
and Mineral Resources
House of Representatives
Washington, D.C. 20515

Dear Representative Calvert:

I am writing this supplemental letter for inclusion in the record of your Subcommittee's hearing on the implementation of the 1977 Surface Mining Control and Reclamation Act (Act). I have earlier submitted written testimony, by letter dated June 27, 1995 to the House Subcommittee on Energy and Mineral Resources concerning proposed amendments to the 1977 Act that would remove the authority of the Secretary of Interior, through the Office of Surface Mining Reclamation and Enforcement (OSMRE) to issue Notices of Violation (NOVs) under Section 521 of the federal Act where there is an approved state regulatory program, and where that state fails, after notification from OSMRE, to take appropriate action to cause the violation of that approved program to be corrected, or fails to show "good cause" for not having taken such action.

I have read the testimony submitted and orally presented by Mr. Robert Dolence, which purports to be "on behalf of Honorable Tom Ridge, Governor of Pennsylvania *and the Interstate Mining Compact Commission.*" (Emphasis added). I am writing this supplemental letter in part to clarify that the testimony that Mr. Dolence stated and submitted was "on behalf of . . . the Interstate Mining Compact Commission," **did not** reflect the unanimous endorsement of all member states of the Interstate Mining Compact Commission.

The Commonwealth of Kentucky, which is consistently one of the major coal-producing states in the nation, did **not** endorse the testimony of Mr. Dolence, and does not agree with the position presented to your Subcommittee as that of the fourteen member states of the IMCC who operate federally-approved state regulatory programs.

I have attached the letter of Mr. Rosenbaum to the Executive Director of the IMCC, Mr. Gregory Conrad, which reflects the position of the Commonwealth of Kentucky that:

> * Far from being a case of "overreaching its authority," the issuance of Ten-Day Notices is perceived by the Commonwealth as being a "convenient communication tool" which in the vast majority of cases results in a resolution of the issue among the agencies without issuance of a federal Notice of Violation.

* That the description of federal enforcement authority as "empowerment gone awry" is off the mark, since in Kentucky, a state which receives more Ten-Day Notices than any other state, OSM wrote 14 NOVs while the state wrote 1600 during that same period.

* That any "confusion and controversy" over the day-to-day implementation of the federal Act and state program is "very likely self-inflicted" and cannot be laid at the doorstep of federal enforcement authority.

The posture of the IMCC that the use of federal enforcement authority is "empowerment gone awry," is, in the view of the state agency that has had perhaps the most difficult job among the coalfield states in implementing the Act, and as much federal enforcement as any other state historically, "much ado about nothing." The federal enforcement role is carefully bounded by the federal regulations that provide for dispute-resolution mechanisms and safeguards against abuse. It is an authority sparingly used, but which serves as an important check and balance against the historical fiscal and political forces that can cause precipitous decline in state approved programs, as was the case in Kentucky during the early 1980's.

The IMCC characterization of the federal enforcement authority as "empowerment gone awry" is a direct slap at the residents of the coalfields who have borne in loss of life and limb, in their damaged homes, lost water supplies, and in other ways, the burden of the historic failures of the states to properly regulate the human and environmental consequences of surface coal mining. That the IMCC continues to attempt to undercut federal oversight is not surprising, since it has in recent years actively and unsuccessfully sought to limit citizens' rights to federal enforcement, and appears to have lost sight of the need for assuring equitable enforcement of mining laws among states was important to effective environmental protection:

> Such variables as soil structure and composition, physiography, climatic conditions, and the needs of the public make impracticable the application to all mining areas of a single standard for the conservation, adaptation, or restoration of mined land, or the development of mineral and other natural resources; but justifiable requirements of law and practice relating to the effects of mining on land, water, and other resources may be reduced in equity or effectiveness unless they pertain similarly from state to state for all mining operations similarly situated.

Interstate Mining Compact, Article 1.

This compact, adopted in Kentucky in 1966, recognized a principle that the Congress incorporated into the 1977 law - that in order to prevent the destructive interstate competition in environmental degradation that has marked the regulation of coal by the states, a national program giving due recognition to regional differences but assuring a level "playing field," was desirable. It is as desirable and necessary today.

I appreciate the opportunity to clarify any misunderstanding that the Subcommittee might have concerning the testimony of Mr. Dotence and what states were being represented that day, and to convey the position of the Commonwealth of Kentucky which, through a combination of a strong

federal enforcement presence, federal and state funds, federal technical assistance, and a commitment from the state executive and legislative branch, has improved its performance significantly in recent years. Kentucky recognizes what the IMCC apparently does not - that the limited presence provided by OSM in the coalfields, while marked with occasional tension, is important in assuring that the coal industry internalizes environmental costs rather than shifting them to the backs of downhill and downstream neighbors; and that the federal presence fulfills the Congressional role.

For every case of "overreaching" claimed by IMCC, there are many cases where this limited use of federal enforcement, and the issuance of ten-day-notices, has well-served the role of assuring that the public does not suffer the consequences of non-enforcement of state programs. A law and relationship among sovereign governments that was carefully crafted, has finally stabilized after a decade of instability, and is functioning in large part as envisioned by Congress, should not be lightly amended based on such anecdotal testimony and inflated rhetoric.

Thank you for your consideration of these comments.

Sincerely,

Tom FitzGerald
Director

cc: Hon. Neil Abercrombie
Members, House Subcommittee on Energy & Mineral Resources

PHILLIP J. SHEPHERD
SECRETARY

BRERETON C. JONES
GOVERNOR

COMMONWEALTH OF KENTUCKY
NATURAL RESOURCES AND ENVIRONMENTAL PROTECTION CABINET
DEPARTMENT FOR SURFACE MINING RECLAMATION & ENFORCEMENT
FRANKFORT KENTUCKY 40601
DAVE ROSENBAUM
COMMISSIONER

June 30, 1995

Gregory E. Conrad, Executive Director
Interstate Mining Compact Commission
459B Carlisle Drive
Herndon, Virginia 22070

Dear Greg:

Last week in Pittsburgh, I provided you with some brief notes on the draft testimony which had been prepared for the Subcommittee on Energy and Mineral Resources meeting on June 27, 1995. This week, I reviewed the final testimony and found it to be significantly improved. There are a couple of points in the testimony about which I would comment from Kentucky's perspective. I accept that the points given in the testimony are perhaps representative of the positions of most of the IMCC member states. However, as you and I have chatted in the past, we in Kentucky have a somewhat different and perhaps unique perspective on the Ten-Day-Notice/federal enforcement in primacy states issue.

I believe that Section 521 of the Act provides for the issuance of Ten-Day-Notices by OSM when they believe that a violation of the Act may be occurring. Frankly, I view the Ten-Day-Notices as a convenient communication tool. I believe that my Department receives more Ten-Day-Notices than any other primacy state. We deal with each one of those Ten-Day-Notices and respond to the Office of Surface Mining. In the vast majority of cases, OSM agrees with our response and that settles the issue. Although not embodied in the testimony, I continue to be troubled by the Ten-Day-Notice task force recommendation that, under some circumstances, OSM might conduct the federal site visit prior to notifying the state and providing the state an opportunity to respond directly to them. In my judgement this is a core primacy issue. If OSM has reason to believe that a violation of the Act is occurring in Kentucky, my Department, as the state regulatory authority, should be given an opportunity to address the issue.

With regard to federal non-eminent-danger enforcement authority in primacy states, which was the centerpiece of IMCC's recent testimony, I believe that this issue is largely much-a-do about nothing. For the OSM evaluation period ending June 30, 1994, OSM received, in Kentucky, 89 citizens' complaints; my Department received 1298 citizens' complaints. During that same time, OSM wrote 14 non-eminent-danger notices of violation in Kentucky, while my Department wrote 1599 notices of violation. The June 27, 1995 testimony describes the exercise

of federal enforcement authority in primacy states as "empowerment" gone awry. With OSM writing 14 NOVs while my Department wrote 1600 NOVs, it does appear that this is an example, at least in Kentucky, of this phenomena. I agree with the statement on page 3 of the testimony that "there continues to be confusion and even controversy at the day-to-day implementation level." Much of this confusion and controversy is very likely self-inflicted. Of the confusion and controversy that can be laid on OSM's doorstep, little of this grows from their issuance of non-eminent-danger NOVs.

I hope that this statement of Kentucky's perspective will be helpful. Again, I congratulate you on the significant improvements in the testimony beyond the earlier draft which I reviewed.

Sincerely,

Dave Rosenbaum
Commissioner

DR:kmc

PHILLIP J. SHEPHERD
SECRETARY

BREATHITT C. JONES
GOVERNOR

COMMONWEALTH OF KENTUCKY
NATURAL RESOURCES AND ENVIRONMENTAL PROTECTION CABINET
OFFICE OF THE SECRETARY
FRANKFORT KENTUCKY 40601
TELEPHONE: (502) 564-3350

3 November 95

Greg Conrad, Executive Director
Interstate Mining Compact Commission
459B Carlisle Drive
Herndon, Virginia 22070

Dear Greg:

I am writing to ensure that there is no misunderstanding as to the Commonwealth of Kentucky's position regarding the recent resolution adopted at the annual meeting endorsing H.R. 2372 as currently proposed. As Commissioner Carl Campbell has noted in his discussions with you, Kentucky does not endorse the changes in law proposed in H.R. 2372.

While we recognize that the Ten Day Notice (TDN) process is subject to abuse if federal officials use poor judgment or fail to communicate with state officials, we do not believe that this problem would be remedied by the changes proposed in the law. We have found that mutual efforts at better communications between OSM and our Department of Surface Mining, Reclamation and Enforcement (DSMRE) have greatly diminished any problems in this regard in Kentucky. We believe that changes in statute of the kind proposed in H.R. 2372 are more likely to exacerbate than to solve the problem.

We have found that the law's provisions for dealing with citizen complaints properly recognizes and respects the primacy of state decision making, but still provides for checks and balances from our federal counterparts. This system, properly implemented, effectively promotes increased public confidence in environmental enforcement. While any system is subject to abuse, we have found that with sufficient leadership from the state and federal partners, the current system works well. We believe changes of the nature proposed in H.R. 2372 would be counterproductive in the long run.

Please do not hesitate to contact me if you have any questions regarding our position on this matter.

Sincerely,

Phillip J. Shepherd

J. Nathan Noland, President
OFFICE (317) 638-6997
FAX (317) 638-7031

INDIANA COAL COUNCIL, INC.
701 HARRISON BLDG. - 143 W. MARKET ST.
INDIANAPOLIS, INDIANA 46204

November 17, 1995

The Honorable Ken Calvert
Chairman, Energy and Mineral Resources Subcommittee
1626 Longworth House Office Building
Independence and New Jersey Avenues, SE
Washington, D.C. 20515

Dear Chairman Calvert,

The Indiana Coal Council, Inc. ("ICC") respectfully submits the following written testimony regarding HR 2372, a legislative hearing on which was held November 9, 1995, before the House Energy and Mineral Resources Subcommittee of the House Resources Committee. The ICC requests that this letter be made part of the record of that hearing. The ICC is a trade association representing approximately eighty-five percent of Indiana's coal production. The association was formed to foster, promote, and defend the interests of Indiana's coal producers, coal reserve holders, and other business entities related to Indiana's coal industry.

By way of these comments the ICC joins with the National Mining Association ("NMA") in their comments presented at the hearing on November 9, 1995 and further requests that any written comments submitted by NMA be incorporated and made a part of these comments.

We fully support the amendments to the Surface Mining Control and Reclamation Act ("SMCRA") as introduced by the Honorable Barbara Cubin and incorporated in HR 2372. We believe the amendments clarify and reinforce the original intent of Congress to give those states with primacy the exclusive jurisdiction to enforce SMCRA. The amendments will eliminate expensive and time consuming duplication of enforcement and clarify the respective role of the federal Office of Surface Mining ("OSM") and the states for citizens as well as coal operators.

In addition to the amendments to SMCRA presently contained in HR 2372 the ICC supports further amendments to the ACT to clarify what responsibilities coal operators have to protect historic properties. Currently coal operators in Indiana and other states are routinely being required to survey lands included in a permit

application for historic sites that are not listed or eligible for listing under the National Preservation Act ("NHPA"). We strongly believe this was not the intent of Congress under the NHPA or SMCRA.

In 1966 when Congress passed the NHPA it required that a State Historic Preservation Officer ("SHPO") be appointed for each state and for the SHPO to survey the state for important historic sites. The NHPA further required federal agencies to consult with the SHPO's before undertaking or approving projects which could harm important historic sites.

In 1977 Congress passed SMCRA bringing all United States surface coal mines into a comprehensive regulatory program to be administered by the states and Indiana was granted primacy in July of 1982. Section 507 of SMCRA requires permit applications to show "significant known archeological sites" within the area to be mined. A regulation adopted under SMCRA, 30 CFR 773.13, required SHPO's to be notified of pending permit applications and allowed to comment.

Prior to 1987 SHPO's in several midwestern states, including Indiana, invariably commented on permit applications by stating that the area contained in the permit application had never been surveyed and recommended that the coal operator be required to survey the proposed permit area prior to permit issuance. During this time frame most state regulatory authorities, including Indiana, did not require further archeological surveys.

In 1987 OSM adopted a new regulation providing that states may require permit applicants for surface coal mining permits to perform archeological surveys. However, the preamble to the new rule made it clear that OSM expected the states to justify any decision not to require the permit applicant to perform recommended surveys.

Finally in 1992 the NHPA was amended to broaden it's application by revising the definition of "federal undertaking" and to give the Advisory Council on Historic Preservation ("ACHP") rulemaking authority. The revised definition of "undertaking" still requires that the activity to be directly licensed, or funded by a federal agency. Permits issued by primacy states under SMCRA are neither licensed or funded by OSM. The ACHP has proposed rules to require state permit issuing agencies to either follow SHPO's recommendations completely or submit to a lengthy "consultation" process. The practical effect would give SHPO's a blank check to delay coal mining permits indefinitely.

As a part of these comments we are submitting Selected Case Studies of Indiana Coal Company's Compliance with Historic Preservation Issues Under the Federal and Indiana State Surface Mining Law. The study shows that coal operators have expended thousands of dollars to survey lands for archeological resources, many times delaying permit application decisions for many months,

and no sites have been found that could be listed or determined eligible for listing under the NHPA.

Also as a part of these comments we are submitting a proposed amendment to HR 2372, which would correct and clarify the respective roles of the coal mining permit applicant, the state regulatory authorities, SHPO's, the NHPA, and SMCRA. The proposed amendment reverses the regulatory impact from the 1992 amendment to the NHPA as it affects surface coal mining. The proposed amendment further clarifies that coal operators are required to protect those sites that are listed or have been determined elgible for listing under the NHPA. Indiana coal operators recognize the duty to protect those sites.

If Congress is sincere in their efforts to reform the regulatory process the proposed amendment to HR 2372 should be considered. The ICC is prepared to submit any additional information you or any member of your Committee requests and further we are willing to testify regarding the importance of including the proposed amendments during mark up of HR 2372.

We appreciate the opportunity to submit these comments for the record.

Sincerely yours,

J. Nathan Noland

cc: Congresswoman Barbara Cubin
Congressman Frank Cremeans
Indiana Congressional Delegation

SELECTED CASE STUDIES OF INDIANA COAL COMPANY'S COMPLIANCE WITH HISTORIC PRESERVATION ISSUES UNDER THE FEDERAL AND INDIANA SURFACE MINING LAW

[redacted] - In August of 1994 this coal company submitted a permit application containing 609 acres to the Indiana Division of Reclamation (DOR). After a review of the application DOR required the company to survey 300 acres of land to determine if there were any sites that may be eligible for listing under the federal Historic Preservation Act. The company hired a consultant approved by Indiana's Division of Historic Preservation (DHPA) to perform the work. The consultant completed the survey and the company submitted a report to DOR in December of 1994. The DHPA notified the company in March of 1995 that the report was unacceptable because items were omitted such as a "Natural Area/Environmental Setting" section. The consultant is contacted and 20 more days of study and field work are required even though the consultant indicated that this type of additional work has never been required by DHPA before. Final report submitted to DHPA on March 27, 1995.

Survey Results: No significant or potential sites encountered or studied.

Total Cost of Studies: $5100.

[redacted] - In October of 1993 this coal company submitted a permit application containing 675 acres to DOR. The company had made a records search prior to submission of the application and the DHPA recommended the company survey 290 acres because there were two reported sites within the proposed permit. A survey report was submitted by a consultant to DHPA in April of 1994 on part of the area surveyed. The DHPA reviewed the report in mid-May and after requiring several changes to the report (eg. misspellings and items not required by DHPA in previous reports) approved no further study. A second area surveyed by the consultant was completed and a report forwarded to DHPA in July 1994. The report identified five additional sites, but the DHPA approved no further study of the area. A third area in the permit was approved for no further study by DHPA in July of 1995. The studies took approximately a year and one-half to complete.

Survey Results: No significant or potential sites encountered or studied.

Total Cost of Studies: $10,274.

[redacted] - This company currently has a permit amendment request containing 998 acres under review by DOR and the DHPA on an area adjacent to the above described permit area. A study on 330 acres was required by DHPA. To date no significant or potential sites have been encountered.

Estimated Cost of Study: $15,000.

[redacted] - In February of 1994 this company submitted a major permit application containing 460 acres to DOR. In order to expedite the permit review the company reviewed DHPA records prior to submittal and found no sites that were listed on the National Register. However, the DHPA required 350 acres to be surveyed because one site was reported within the permit area and one site had been reported within 1,000 feet of the permit area. A major state University was contracted to perform the surveys and completed their report in June of 1994. The DHPA took over two months to review the report and did so only after repeated calls to their office. The DHPA responded finally and to the surprise of the operator and contractor DHPA demanded that several areas be surveyed again. DHPA also required grammatical and typographical errors in the University report to be corrected prior to final review. The amended report and additional surveys were completed and even though the contractor recommended no further study the DHPA required additional studies in four areas. The mine agreed to amend mining plans to forestall mining the subject area until final approval by DHPA. In February of 1995 the DHPA finally agreed no further studies were required.

Survey Results: No significant sites were encountered or studied.

Total Cost of Studies: In excess of $20,000.

[redacted] - In the spring of 1993 this company filed a permit application containing 8454 acres with DOR. After almost one year of review by DOR the company was required to survey 4442 acres to determine if any sites were present that may be eligible for listing. In March of 1994 a state University was contracted by the company to complete surveys on 790 of the 4442 acres. In August of 1994 the consultant completed a report on 192 acres and the report was submitted to DOR. In October the company learned that the DHPA still had not seen the report so a duplicate was submitted directly to them. The first response to the report was received on November 28, 1994, but it took until May 11, 1995 to obtain a final approval from DHPA for no further studies. A second report on remaining acres was submitted to DHPA on April 5, 1995 and the company received DHPA first response on July 5, 1995. Final approvals are still pending.

Survey Results: No significant sites were encountered or studied.

Total Cost of Studies: $15,000.

[redacted] - Over the last three years this company has submitted several mining permit applications totalling more than 15,500 acres to DOR. Over 6,000 acres were required to be surveyed by the DHPA. To date over 5,000 acres have been surveyed and reports submitted to DHPA. This company has experienced the same frustrations as other company's with DHPA review and approval of survey reports. Additional surveys were required by the DHPA although the contracted consultant did not recommend additional study.

Survey Results to Date: No significant sites were encountered or studied.

Total Cost of Studies to Date: $101,821.

Estimated Remaining Costs: $99,000.

PROPOSED HISTORIC PRESERVATION AMENDMENTS TO SMCRA

Section 507 Permit Applications

507(b) (13) delete "& significant known archeological sites"

507 add new paragraph (b) (18) as follows:

> "(18) a listing of any sites or properties within the area to be affected which are included in the National Register of Historic Places as determined pursuant to Section 101(a) of the National Historic Act of 1966, as amended [16 U.S.C. Section 470a(a)9]."

Section 522 Areas Unsuitable for Mining

522(e) (3) replace "publicly owned park or places" with "publicly owned park or publicly owned historic site".

Section 702 Other Federal Laws

Amend Section 702 (30 U.S.C. 1292) by adding a new paragraph (e) as follows:

> "(e) Actions by a state regulatory authority pursuant to an approved state program shall not be considered to be Federal undertakings subject to the National Historic Preservation Act of 1966, as amended (16 U.S.C. 470-470W-6)."

National Mining Association

Harold P. Quinn, Jr.
[illegible]

November 16, 1995

The Honorable Ken Calvert
Chairman, Subcommittee on Energy and Mineral Resources
of the Committee on Resources
U.S. House of Representatives
1626 Longworth House Office Building
Independence & New Jersey Avenues, S.E.
Washington, D.C. 20515

Dear Representative Calvert:

During the November 9, 1995, Subcommittee hearing on H.R. 2372, the Surface Mining Control and Reclamation Amendments Act of 1995, Rep. Cubin asked my opinion on the need to address in that legislation the issue of SMCRA regulation of public roads in view of the recent resolution of that issue in Utah. James Carter, Director of the Utah Department of Natural Resources' Division of Oil, Gas and Mining, had testified that he viewed Section 10 of H.R. 2372 as still necessary to provide regulatory certainty on this issue. In my response to Rep. Cubin's question, I concurred with Mr. Carter's view, and noted that OSM had previously repudiated a similar settlement with Utah several years ago and that OSM had raised the same public roads issue in other states despite the absence of a consistent or coherent policy within the agency itself.

I wish to provide the Subcommittee with several documents which demonstrate that this issue is not limited to Utah and that OSM, even in the absence of a coherent policy, continues to second-guess state policies and permitting decisions. The first document is a transcript of an informal conference OSM conducted in Utah earlier this year on the public roads issue. Mr. Carter's remarks at that conference provide the most cogent explanation of the history of the public roads issue. Mr. Carter also describes OSM's repudiation of a prior settlement agreement between Utah and OSM to resolve federal litigation on this issue. In view of OSM's past behavior, our skepticism over any representations that the issue has been resolved is not misplaced.

The second document is correspondence between OSM's Kentucky field office and the Kentucky regulatory authority related to a pending state administrative proceeding over the regulation of public roads. Although in the letter the OSM field office purports to officially defer to the pending state proceeding, the field office correspondence goes on for more than ten pages to describe what it believes should be the state policy on this issue. The dubious nature of the field office's recommended policy is amply disclosed by its illogical conclusion that while existing federal policy is anything but clear and the rules leave a wide-range of discretion to states to make decisions, site-specific decisions are "rather clear-cut." I also enclose a copy of a letter to OSM from the Western Kentucky Coal Association questioning the propriety of OSM's interference in state permitting decisions in general, as well as this specific case since a state administrative proceeding is pending.

Finally, I enclose a copy of recent correspondence from Colorado responding to OSM's demand that the state revise its program as it relates to the exemption of public roads from regulation under the Colorado SMCRA program. Colorado responded that the issue is less clear than OSM maintains, and makes note that H.R. 2372 would address the issue. To this end, Colorado concludes that it would be inappropriate to change its state laws until action is taken on the pending federal legislation.

I would appreciate your placing these documents in the hearing record for H.R. 2372.

Sincerely,

Harold P. Quinn, Jr.
Senior Vice President and
General Counsel

○

ISBN 0-16-052476-8