



PEER

WHITE

PAPER

Number Seventeen, \$5 U.S.

EMPTY PROMISE

**Twenty Years of Failure in
Federal Strip Mining Regulation**

**A Special Anniversary Report by
the Employees of the
Office of Surface Mining**

August 1997

About PEER

Public Employees for Environmental Responsibility (PEER) is an association of resource managers, scientists, biologists, law enforcement officials and other government professionals committed to upholding the public trust through responsible management of the nation's environment and natural resources.

PEER advocates sustainable management of public resources, promotes enforcement of environmental protection laws, and seeks to be a catalyst for supporting professional integrity and promoting environmental ethics in government agencies.

PEER provides public employees committed to ecologically responsible management with a credible voice for expressing their concerns.

PEER's objectives are to:

1. **Organize** a strong base of support among employees with local, state and federal resource management agencies;
2. **Inform** policy makers and the public about substantive issues of concern to PEER members;
3. **Defend** and strengthen the legal rights of public employees who speak out about issues of environmental management; and
4. **Monitor** land management and environmental protection agencies.

PEER recognizes the invaluable role that government employees play as defenders of the environment and stewards of our natural resources. PEER supports resource professionals who advocate environmental protection in a responsible, professional manner.

For more information about PEER
and other White Papers that cover a variety of issues, contact:

Public Employees for Environmental Responsibility
2001 S Street, N.W., Suite 570
Washington, D.C. 20009-1125
Phone: (202) 265-PEER • Fax: (202) 265-4192
E-Mail: info@peer.org
Website: <http://www.peer.org>

About This Report

This PEER white paper documents the intentional, long-term efforts to undermine the Surface Mining Control and Reclamation Act (SMCRA) by the very officials sworn to uphold it—the leadership of the Office of Surface Mining Reclamation and Enforcement (OSM) and the Department of Interior. As a consequence, the promise of SMCRA has never been realized and the OSM today is a demoralized and marginalized agency.

Empty Promise is written by employees of OSM. PEER contacted nearly every current employee to solicit their input to this project. Their resulting comments, submissions and interviews were then woven together into this report.

This PEER white paper is part of a special effort to commemorate the twentieth anniversary of the enactment of SMCRA. As part of that effort, PEER has reached out to OSM “Pioneers,” employees who began service with OSM at its inception. The perspective of the Pioneers was especially helpful in assessing the effect the early years of the agency had on its later years and continuing through to the present.

The OSM employees who contributed to this report have been promised confidentiality and will remain anonymous. This arrangement not only protects them from retaliation but focuses attention on their message rather than the identity of the messengers.

This white paper is being issued at the time new, untested leadership assumes the helm at the OSM. It is our hope that this report will assist the new director in understanding the history and dynamics of the agency she will head.

PEER wishes to thank the Citizens’ Coal Council for their wholehearted cooperation and assistance in preparing this report. This white paper could not have been completed without the research, interview skills and hard work of Vanessa Hopgood of the George Washington School of Law.

PEER is proud to serve conscientious public employees who have dedicated their careers to the faithful execution of the laws protecting this country’s natural resources.

Jeffrey Ruch
PEER Executive Director



I. Executive Summary

According to its own employees, the U.S. Office of Surface Mining Control and Reclamation (OSM) is being obstructed from enforcing elemental environmental safeguards against the devastating effects of strip mining for coal. As a consequence of agency management's pattern of improper inaction, thousands of streams are polluted to the point of being biological dead zones. Hundreds of thousands of acres ranging from Appalachia to the Southwest deserts remain open pits, leaching acids and other toxins while posing a health and safety hazard to the surrounding, mostly poverty stricken communities.

Internal obstruction of OSM began shortly after the enactment of the Surface Mining Control and Reclamation Act (SMCRA) and continues to this day. Surprisingly, however, the record of the **Clinton Administration on strip mining enforcement is worse than the records of the Reagan and Bush Administrations.**

The environmental consequences of this failure to redeem the promise of SMCRA has been stark:

➤ despite the law's requirement of contemporaneous reclamation, virtually none of the hundreds of thousands of acres strip mined in the West have been reclaimed. As of 1996, **less than 1 percent of the 120,000 acres strip mined in Colorado has been reclaimed and not one acre of the more than 90,000 acres of stripped Native American lands has been reclaimed.**

➤ 12,000 miles of American streams are contaminated with iron, manganese and sediment from abandoned strip mines which have not been cleaned up, leaving nearly 600 coal waste dams and causing more than 1500 landslides. Many of these abandoned strip mines have festered for years despite a billion dollar surplus in the fund dedicated to their remediation.

The extent of these problems has actually accelerated during the Clinton Administration because the regulation of coal strip mining has repeatedly been traded away under

industry pressure. Rather than a resuscitation of OSM under Interior Secretary Bruce Babbitt, there has been regression. Under Clinton's appointees, OSM has:

➤ cut inspections nationally by over half from prior years, and in many areas the reductions have been more dramatic. According to its own records, **OSM conducted no inspections in Wyoming, Pennsylvania, Colorado, Utah, Alaska and Iowa in the first five months of 1996.**

➤ the quality and thoroughness of inspections has also significantly declined. In some instances, watching a videotape prepared by a mining company constitutes an inspection. In other instances, a "drive-by" or "fly-by" of a site is marked as a completed inspection.

➤ the inspection force has been cut by half in the largest reduction-in-force in agency history. The layoff targeted field enforcement staff, thereby doubling the ratio of managers to employees within OSM despite the stated goal of Vice President Gore's National Performance Review to trim the supervisory ranks of federal service.

In an effort to accommodate Western governors, the Clinton Administration has defanged federal oversight of state surface mining programs. The extent of rule bending has become so blatant that one OSM employee suggested that the agency's motto should be changed to "Let's Make a Deal." As a result of new Clinton policies:

➤ "Ticket Fixing," where citations of violations are withdrawn by OSM managers over the objections of enforcement staff, is rampant, particularly on Indian lands where federal inspectors retain direct authority.

➤ states are allowed to choose which federal standards they wish to be graded upon and are further allowed to conduct self-assessments.

➤ renewed flooding during July of 1997 in Buffalo Creek, West Virginia, site of the 1972

Office of Surface Mining

surface mining disaster which cost 125 lives and led to the enactment of SMCRA, drew no federal inspection despite repeated community requests.

Compounding the environmental problems at OSM, woefully inadequate regulation of mine blasting has wreaked havoc on neighboring communities, and in some instances rained death on unsuspecting victims killed by flying rock. Rather than update their blasting limits, OSM managers are content to search for other explanations, officially blaming an unrecorded earthquake for structural damage to a Pennsylvania home, and chiding Indians for the shoddy constructions of hogans damaged by mine blasting.

The poverty of most coal mining areas in this country has fostered a scrappy but outgunned

citizen movement, which includes several tribal groups whose lands are being radically affected by huge strip operations in the Southwest. The plight of tribal groups, whose water supplies, livestock and homes have been directly affected by this massive scale of mining has not drawn intervention by federal officials. In fact, the Department of Interior's Office of Environmental Justice was deemed duplicative by the Secretary and closed.

This employee-authored report is being issued on the twentieth anniversary of the enactment of SMCRA. At the same time, a new appointee, Kathleen Karpan, is slated to assume the duties of Director of OSM. PEER hopes that these two events shall be the occasion to reassess the federal record of strip mining regulation so that the promise of SMCRA may be finally realized.

Definitions

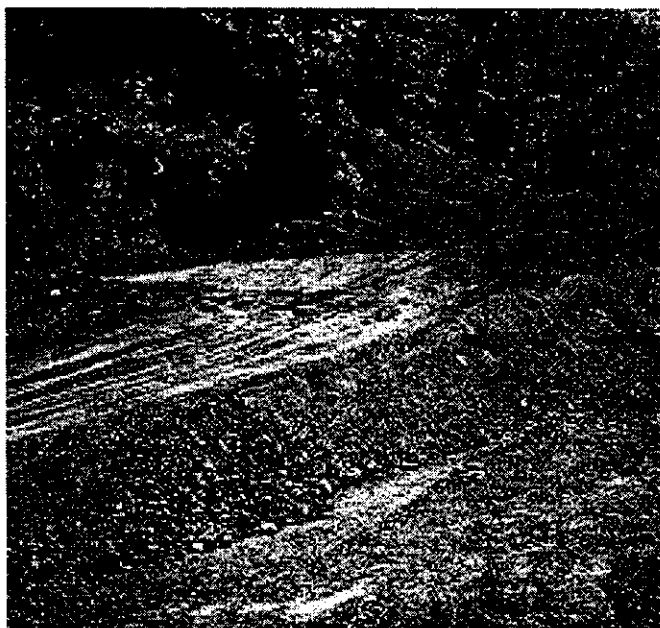
Note: These definitions are drawn entirely from the OSM publication "Surface Coal Mining Reclamation: 15 Years of Progress, 1977-1992"

- acid mine drainage: any water with a pH less than 6.0 draining from a coal mine. Water is often orange-colored because of the presence of oxidized iron.
- area mining: a surface mining method that is carried on in level gentle rolling topography on relatively large tracts of land. Active area mine pits may be several miles long.
- bucketwheel excavator: a continuous digging machine that uses a rotating vertical wheel with buckets for large-scale stripping and excavating.
- dragline: an excavating machine, usually used in large flat areas that drags a bucket (which holds up to 220 cubic yards of material) toward the machine cables, loads it with spoil, and then hoists the boom up to 350 feet long, allowing the machine to excavate wide benches by depositing spoil hundreds of feet away from the highwall.
- highwall: the cliff-like excavated face of exposed overburden and coal in a surface mine.
- impoundment: a pond or other water-holding structure or depression, formed naturally or artificially built.
- permit: a document issued by the regulatory authority that gives approval for the operation of a surface coal mine under conditions set forth in SMCRA and the implementing regulations.
- sedimentation pond: an impoundment constructed on the mine site to remove solids from surface water before the water leaves the permit area.
- subsidence: ground surface depressions and cracks that develop above and underground mine after coal is mined and the mine roof and overlying rock material sag or collapse.

II. The Promise

King Coal and Strip Mining

Energy generated by coal-fired power plants currently supplies over half the nation's electricity needs. Since 1970 the demand for coal has almost tripled among electric utilities because of its low cost relative to other energy sources. Of the more than one billion tons mined domestically in 1996, forty-three percent came from Appalachia, sixteen percent from the Midwest and Interior Region, and forty-one percent for the West. Production in the west has quadrupled since 1970. Coal deposits can be found in thirty-eight states and on a number of Native American Reservations. Currently, twenty-three states and three tribes have active coal operations on their lands.



Contour Mining. Typically used in the more mountainous terrains of the East.

In the early 1970's, strip mining overtook underground mining as the predominant method of coal extraction in the United States. As the largely under regulated industry

grew, the United States witnessed one of the most stunning accumulations of environmental abuses the country had seen. By the mid-1960's nearly one million acres of mined lands had been abandoned by coal companies. According to a Final Environmental Impact Statement issued by the Office of Surface Mining Reclamation and Enforcement in 1979, abusive surface mining practices were responsible for the loss of 264,000 acres of cropland, 135,000 acres of pasture and 127,800 acres of forest.



Area Mining. Typically used in the relatively flat terrains of the West and Midwest.

There are five main strip mining techniques: area mining, open pit mining, contour mining, auger mining and mountaintop removal. Geologic and economic considerations dictate which method is used in a given location.

Office of Surface Mining



Augur Mining. Used in conjunction with contour mining to extract an exposed coal seam.

Strip mining operations all share some basic steps. Mine operators start by removing vegetation and digging up the topsoil with bulldozers and other machines. Next, the overburden, the sub-soil and rock layers covering the seam is blasted with explosives and removed using bulldozers, shovels, bucketwheel excavators or draglines. These machines can reach massive proportions especially at larger operations in the West.

After removal of the overburden, the coal seam is broken into manageable pieces with the use of explosives. The coal is hauled away from the deposit by truck and conveyor belt. The run-off from mining operation is usually collected in sedimentation ponds so that it does not clog up streams and rivers. Once the coal has been extracted, the overburden, or spoil, is used to fill in the mined areas and to return the land to its approximate original contour. Excess overburden is dumped into a fill. The topsoil is then replaced and compacted to ensure that the land will be stable and free from erosion. Finally, the operator seeds the topsoil with vegetation of the kind the land sustained prior to mining in order to return it to its original state.

When conducted recklessly strip mining can reduce the fertility of soil, pollute water sup-

plies, erode neighboring lands, drain underground water reserves, destroy wildlife, tear apart roads and damage homes and other structures. Surface mining is a very disruptive process, but its impacts on people and the environment can be mitigated by the use of proper mining practices, reclamation of land once mining has finished, and the prohibition of mining in sensitive or unreclaimable areas. Under current technology, all of these things are feasible on most lands where coal is mined.

The demand for national strip mining legislation was demonstrated to the country when in 1971 over a dozen bills on the subject were introduced in Congress. There was wide



Mountaintop Removal. As an alternative to contour mining of a slope, the entire top of the mountain is removed.

variation among the bills, ranging from proposals to abolish strip mining altogether to proposals for only nominal regulation. None of these bills made it through Congress.

In 1972 an event galvanized the drive for regulation of strip mining when a coal waste dam in Buffalo Creek, West Virginia failed killing 125 people.

In the aftermath of the Buffalo Creek tragedy, two moderately worded coal regulation bills passed Congress twice in the early 70's only to be vetoed by President Ford. While campaigning in 1976, Jimmy Carter made a promise to the public that if he became president he would sign a bill like the one vetoed by President Ford in 1975.

“SMCRA”

On August 3, 1977 President Carter signed the Surface Mining Control and Reclamation Act (SMCRA) into law, culminating a generation long campaign by coal field citizens and environmental groups to pass a law providing comprehensive, uniform, workable standards to govern the surface mining operations of the coal industry and protect those who lived near them. It was one of the most bitterly contested environmental statutes to pass Congress in the 1970's. At the signing ceremony President Carter stated “I'm concerned with some of the features that had to be watered down during this session to get it passed, but I think that this provides us with a basis on which we can make improvements on the bill in years to come.”

“Surface mining” includes the surface effects of both strip and underground mining.

The intent of Congress in passing the Act was to establish a strong federal regulator which would ensure strip and underground mines were operated and reclaimed in a safe and environmentally sound manner, in addition to addressing the reclamation of thousands of ravaged mine sites abandoned prior to the enactment of SMCRA. The Office of Surface Mining Reclamation and Enforcement (OSM) was created within the Department of Interior to administer the Act. OSM is charged with ensuring mining operations meet minimum standards of health, safety and environmental protection. SMCRA contains over one hundred environmental performance standards. Its mission is set out clearly in Section 102 of SMCRA. The first sentence explains that it is the purpose of the Act to “establish nationwide program to protect society and the environment for the adverse effects of the surface coal mining operations.” This nationwide program is to assure:

“[T]he rights of surface landowners...are fully protected from such operations;...that surface

mining operations are not conducted where reclamation as required by this Act are not feasible...that adequate procedures are undertaken to reclaim surface areas contemporaneously as possible with the surface coal mining operations...that appropriate procedures are provided for public participation in the development, revision and enforcement of regulations, standards, reclamation plans, or programs established by the Secretary [of the Interior] or any state under this Act....”

Under SMCRA, states are to play a large role as the local and primary enforcers of the Act. Before they could assume this role, however, they had to construct a state program that would provide standards and regulations “no less stringent than” those contained within the Act. This was an essential premise of SMCRA because many of the abuses perpetrated by the coal industry prior to 1977 were derived from “the states inability to be effective regulators in the face of the coal industry's economic and political power.” Prior to the Act, coal companies that did not wish to remediate pollution and other hazards caused by their operations would merely threaten to relocate to another less restrictive state. This maneuvering by coal companies resulted in a strong downward pull on regulation, providing the incentive for state officials to promulgate weak regulatory laws or to ignore stringent ones. By providing national standards, it was hoped that SMCRA would eliminate the leverage that companies held over the states and end bargained non-enforcement.

SMCRA was dubbed “The Promise” by coal field citizens who hoped that strip mining would finally take place in a responsible manner; one that would not scar their landscape, destroy their water, endanger their health and destroy their chances for a sustainable economy. This account of the Office of Surface Mining documents a history of betrayal of both the citizens and dedicated employees who have tried to realize the promise.

The Twig is Bent: OSM's Early Years

Excluding the first three years of the agency, the Office of Surface Mining has been racked by a history of uncertainty for inspectors and employees in the field. From its inception OSM has been a beleaguered agency; under constant

Office of Surface Mining

attack from states and the coal industry. During the heady days after SMCRA's passage, many of the college-educated sons and daughters of coal field families joined OSM to carry out the Act's mandate and ensure that conscientious mining would now take place within their communities. Under the Carter administration, employees received the clear message from superiors that they were to build a strong federal presence in the fields through full and fair implementation of the law. During the first two years important accomplishments were made. Over 1000 illegal "wildcat" mines were shut down. Citizens also began to see changes in their local landscapes as reclamation work was carried out for the first time.

As a new agency, OSM had to be built from the ground up. The budget was not allocated for seven months after the Act was passed. The first entrants into the agency worked at a frantic pace trying to hire employees, write regulations, inspect mines, draft administrative manuals and make sure they were meeting the Act's mandate all with a skeletal staff and insufficient budget. Intense political pressure from states and industry exacerbated the situation. In order to start carrying out the Act, OSM began to draft interim regulations. These would stay in place until the agency could craft a permanent program.

Before the agency even got on its feet it faced major challenges. Coal associations, individual operators and state governments tried delay implementation of the law through intense lobbying of Congress. Opposition also came in the form of lawsuits challenging both the constitutionality of the Act and regulations written pursuant to it. Dozens of lawsuits were filed against OSM in 1978 alone, with the states of Indiana, Illinois and Virginia among those who participated in these legal attacks.

Constitutional challenges to the Act failed, but suits concerning interpretation of SMCRA had differing results leading to additional delays in the enforcement of the law. When Walter Heine, the original director of OSM, sent inspectors out for the first time he wasn't even sure whether they could legally issue cessation orders. Inspectors had to engage in bluffing contests with mine operators to convince them that OSM had the power to back up its citations. In the early years, inspectors received numerous threats and some were even physically attacked. Despite all

these problems, their efforts were bringing measurable improvements to the coal fields, especially in Appalachia.

OSM was a very energetic agency in its early years, despite having only 200 inspectors to monitor mines across the nation. This momentum changed quickly, however, with the approach of the 1980 presidential election. Ronald Reagan was elected into office on a pro-business campaign promising "regulatory relief" to industry. Once in office, President Reagan kept his promise.

President Reagan began reining in agencies designed to protect the environment, particularly those within the Department of Interior. One manifestation of the attack could be seen in the agency budget requests which were well below those proposed under President Carter.

While in office, Reagan pushed for policies that would be accommodating to the states and amenable to industry's bottom line. Under his direction, enforcement of SMCRA went from a policy of strict compliance, to "negotiated compliance;" a barely disguised euphemism for minimal enforcement. Even before his inauguration, some OSM personnel began to modify actions to avoid antagonizing the incoming Republican administration.

According to a U.S. Department of Justice report, a measurable sign of this self-censorship was evident in the inspection and enforcement statistics during this time. Enforcement figures experienced a sharp drop even in light of the fact that states were beginning to assume responsibility for federally approved programs. The number of federally issued cessation orders numbered 1,633 in 1980. The year of Reagan's inauguration the figure dropped to 618. The next year there were only 195. If ten-day notices were added to these totals, citations issued to a state for non-enforcement, the number came to 563. Yet at this time the United States had thousands of active mines.

Even where enforcement action had been initiated, the follow through was lacking. By 1982, OSM had also only collected about twenty percent of the fines its inspectors had assessed against transgressing companies.

Shortly after the inauguration, Reagan's Secretary of the Interior, James Watt held a "town

meeting" for Interior employees at which he explained the new policy of "regulatory relief." Those who felt they could not work for such a program were publicly invited to search for other employment. It was at that point relations between political appointees and OSM field employees first began to deteriorate.

In keeping with the presidential program, the Reagan administration deliberately undercut OSM by placing people who had been opposed to the creation of the agency in top level positions within the agency. A complete turnover in OSM leadership was accompanied by drastic budget and personnel cuts aimed at the heart of the agency; the inspection and enforcement operations. Twenty-nine percent of employees cut were inspectors and field staff.

The other branch of "regulatory relief" involved gutting three years of regulations promulgated under SMCRA since its passage in 1977. Although periodic revisions are normal, by mid-1981 the administration and the coal industry had targeted 89 rule sections for deletion, 329 sections for revision, 112 sections for combination with other sections, and 12 new sections for addition to the programs. The main targets were sections reinforcing OSM's strong state oversight role and the broad public participation provisions. A new regulation was promulgated during this time called "state window" regulation. It replaced the requirement that state regulations be "no less stringent than" than the federal program with the subjective standard that they be "no less effective than" it.

OSM was then reorganized in a way to render it ineffective a mere four years after it had been created. In a nonsensical division of labor, the related functions of permit review and mine inspection were separated into different offices in 1982. Large "Technical Centers" located distant from the field in major urban centers became responsible for approving and reviewing the adequacy of mine permits while OSM field offices were assigned the job of carrying out inspections. Inspectors had to confer with the technical center when they discovered a permit defect leading to violations of the Act. This arrangement created overlapping and conflicting field directives to the detriment of consistent regulation.

Another policy was instituted at this time whereby Washington approval was required before any litigation could be brought against a transgressing coal operator or state. Cessation orders were also required to be cleared through headquarters first. Centralization of power within OSM led to increased latitude for the states.

Things continued in much the same way under President Bush. The director of OSM during the Bush administration, Harry Snyder, was cited by many employees as the perfect example of what was wrong with OSM leadership. During a House Appropriations Committee oversight investigation conducted in 1992, allegations surfaced that Snyder had intervened in at least 25 inspection and enforcement actions on behalf of coal operators. One of the most egregious instances



Harry Snyder. OSM Director under President Bush.

was Snyder's agreement with Jackson Valley Energy Partner to reclassify a mine's output from coal lignite to a noncoal substance, thereby removing the mine from OSM jurisdiction.

Snyder created an atmosphere of intimidation at OSM by habitually calling Field Office Directors

and employees after business hours with instruction antithetical to OSM policy and its legislative mission. Under his directorship, inspectors were reticent to cite violations for fear of losing their jobs. Transfers were used as a means of retaliation. Enforcement and inspection numbers remained low during his tenure. Mismanagement of the agency was blamed for creating a "paralyzed environment, in which inspectors 'look for signs' on how they are to conduct their inspections," according to Congressional investigators.

This investigation revealed an agency that had been plagued by management and morale problems throughout its twelve years of Republican

Office of Surface Mining

leadership. The major problems cited included the proliferation of managers, the susceptibility of field office directors to political pressures, and the questionable location of field offices away from the mines they were assigned to regulate. When traveling into the field, directors were more concerned with meeting with state and industry representatives than with their employees. Additionally, roughly forty percent of OSM employees were located in Washington, D.C. An additional twenty percent

The Clinton Years

After twelve disheartening years of Republican leadership, OSM employees looked to the Democrats for relief. During the 1996 presidential campaign, Bill Clinton and Al Gore represented themselves as staunch supporters of the environment and promised theirs would be an administration of change. Employees believed these new promises and thought they would finally be free to do their jobs.



Interior Secretary Bruce Babbitt. Pictured at July 1993 Citizens' Coal Council summit.

On April 23, 1993, the new Interior Secretary, Bruce Babbitt, reinforced this belief at a mass meeting organized specially for OSM employees. Babbitt told the 400 member audience:

"I'm going to adopt you...I guarantee that as long as I'm in charge of this department they're not going to be bullying you, and they're not going to be pushing you around, and they're not going to be blaming you and making life miserable for you, because your job is the law. And my job is to provide

were located in the Technical Support Centers in Pittsburgh and Denver, leaving only forty percent of employees in the field, many of which were managers.

In sum, the agency was too unbalanced to carry out its mission of preventing environmental and health problems. It lacked the inspection staff necessary to motivate the states to develop and enforce strong regulatory programs.

A report initiated by Secretary Bruce Babbitt when he took over as head of Interior in 1993 described the agency as "dysfunctional." The findings, echoing the earlier Congressional reports, indicated that "[t]he agency ha[d] been systematically undermined during previous administrations, which supported the production of coal to the detriment of the other mission of the agency — to regulate the coal mining industry and to insist on reclamation of mined lands."

you with the space and political support to do just that. And I'm promising you today that's exactly what I intend to do."

Once in office, President Clinton was faced with the task of appointing directors for two politically charged agencies, the Office of Surface Mining and the Mine Health and Safety Administration (MSHA). The MSHA appointment was made first. Clinton named J. Davitt McAteer, a candidate supported by unions and citizen groups, to head MSHA. The coal industry was very vocal in its opposition to this appointment and redoubled their efforts to affect the OSM nomination.

As a consequence of the industry lobbying campaign, OSM was left without direction for almost a year while President Clinton agonized over his choice.

Clinton had been considering two candidates since the spring of 1993, Bruce Boyens and Robert Uram. Boyens was supported by the United Mine Worker's of America, the Citizens' Coal Council (a grass-roots network of small landowners and coal field activists with thirty-eight member organizations), Native American groups, the Sierra Club and other environmental groups

Boyens had worked as a coal miner before joining OSM in 1978 and was only the second person to be hired by the agency. He was assigned to direct regional inspection and enforcement operations in Kentucky, Tennessee, Alabama and Northern Georgia. Policies and regulations drafted in his office influenced virtually all of the OSM's final national policies. His region conducted the most vigorous enforcement, yet was the least criticized. Boyens left OSM when James Watt became Secretary of the Interior. Since that time he has been working as an attorney representing labor unions and citizen groups.

Robert Uram had worked for OSM as an attorney, first in headquarters and then in New Mexico. Uram left OSM in 1984. He spent the next ten years representing coal companies and other energy industry clients.

In November 1993, President Clinton finally made his choice. Uram was nominated as a concession to the coal industry. OSM employees were astounded. When the Democrats had promised change, an industry lawyer practiced in side-stepping the law wasn't what they had in mind.

Before Uram was appointed, Secretary Babbitt initiated an internal review of the agency. All employees participated either by direct interview or survey. The results were given to Robert Uram upon his confirmation in order to help him identify OSM's "strength and weaknesses...(And) help us fulfill the commitments the Congress made to the American people when it passed the Surface Mining Control and Reclamation Act." The "Interim Management Team" report identified a number of widespread problems within OSM that frustrated the effectiveness of the agency: (1) poor employee morale; (2) lack of consis-

tency in oversight of state program and in inspections and enforcement; (3) poor internal communications; (4) poor organizational structure; (5) lack of clear and adequate policy guidelines; and (6) lack of credibility and poor relations with the states and other stakeholders.

Field staff were skeptical, but hopeful that Director Uram would listen to them. Despite the widespread and obvious nature of these problems, the only changes that have been instituted after the report was released in March 1994, have either been superficial or designed to weaken the agency.

Uram's tenure saw the largest cuts and most sweeping changes in OSM's nineteen year history. When Congress cut OSM's budget, Uram, in turn, cut the workforce by more than the budget reductions justified. As a result, in August 1995, OSM underwent a massive reduction in force (RIF).

Although the downsizing of OSM was originally led by Republican congressional members, it was ultimately embraced by Secretary Babbitt under the mantle of "reinventing government" as part of Vice President Gore's National Performance Review (NPR). One of the stated goals of the NPR was to reduce layers of management in federal agencies in order to make decision-making more decentralized and direct. Uram apparently read the report backwards, because under the 1995 RIF the manager to employee ratio in OSM went from one manager for every 13 employees to one manager for every 7.

Under Uram's cutbacks, the already small inspection and enforcement staff was cut by one-third; leaving the agency top heavy with managers who were either not familiar with conditions in the field or chose to ignore them. While the managers remained in place, employees with 20 years of experience in environmental management were shown the door.

The Uram cutbacks were not over. OSM underwent another reorganization in 1996. Six OSM offices were eliminated: the Western and Eastern Support Centers, two field offices and two area inspection offices.

Office of Surface Mining

Despite the high expectations for change under the Clinton Administration, Uram continued the legacy of his predecessors. The only change was rhetorical, rather than invoking Secretary Watt's "regulatory relief," Director Uram cloaked his actions under new age management jargon of "consensus enforcement" and improved "customer service."

After growing employee and citizen furor over his interference in OSM enforcement actions, Uram resigned in August 1996 declaring that he had accomplished his goals for the agency. Ellen Pfister of The Citizens' Coal Council remarked, "Mr. Uram is the worst director this agency has ever had. We hope this is an end of the agency's war on coalfield

citizens and its own mine inspectors and enforcement personnel."

Again the agency was left without a leader. After almost a year following Uram's resignation, President Clinton nominated Kathy Karpan to head the agency. Karpan, the outgoing Secretary of State for the state of Wyoming and an unsuccessful Democratic nominee for the U.S. Senate, approached the job with no public track record in the field. Employees were cautiously waiting to see what would happen under her tenure.

In her confirmation hearing on July 18, 1997 Karpan promised that there would be no drastic changes at OSM.

III. Oversight of Oversight

oversight: *n* 1. *superintendence*
2. *a mistake, error, omission, neglect*

Much of the history of OSM has involved the tension between the two meanings of the word oversight. OSM is an agency with a patchy record under the first definition, but with a rich background in the second.

What's a Little Blasting Among Friends?

Blasting is a commonplace practice at most strip mines in the United States. In the past, mine operators used explosives to break up the layers of rock covering the coal seam. Before mining could begin, the loosened rock and subsoil would have to be dug up and carted away. Today a coal deposit can be excavated in one

step using a process known as cast blasting. As the name suggests, cast blasts use powerful explosives to cast rock and soil hundreds of feet away from the coal seam. If not regulated properly, this kind of blasting can be very dangerous. In addition to the hazards posed by flyrock, blasts can also generate unsafe levels of vibrations in both the ground and air.

Under SMCRA, Congress directs OSM and the states to regulate blasting so as to "prevent (i) injury to persons" and "(ii) damage to public and private property outside the permit area" [Sec. 515(b)(15)(B)].

When OSM conducts blasting assessments in an area, they are conducted by appointment with the coal company not via random, unannounced visits. Not surprisingly blasts are kept well within limits during the duration of these studies. Under this system it would be hard to find a company which was not in compliance with SMCRA. Consequently, blasting studies are an ineffectual way to police the industry and insure public safety. There are few incentives for a company to use responsible practices during the time the regulatory agency is not present in the area.

The law requires coal operators to develop their mining and reclamation permits to reflect the demands of local conditions. To obey the mandates of SMCRA, they must tailor their plans to account for the geological makeup of the area, local water sys-



Blasting. Coal is being loosened following overburden removal on this Wyoming site.

Office of Surface Mining



Howdy, Neighbor. “Dragline” looming over North Dakota farmhouse.

tems, soil conditions, natural vegetation and wildlife and the location of private property. Ironically, blasting is the one area where OSM does not require site-specific plans. Because of the vast geological differences in terrain across the United States, site-specific blast limits are the only way damage to houses and property offsite can be adequately prevented. Notwithstanding these differences, OSM decided to use generic “one-size-fits-all” standards to measure compliance at all sites, from the West to the mountainous of Appalachia.

As currently constituted, OSM blasting limits are insufficient to protect the people and property SMCRA was enacted to protect. Current blasting limits are based on antiquated data drawn mainly from “RI 8507,” a 1980 Bureau of Mines (BOM) report. Blasting limits dictate the

acceptable level of vibrations a mine may generate. The BOM report purports to show at what levels a mine can blast before it will inflict damage on neighboring properties. OSM claims that blasts conducted within the “RI 8507” figures cannot result in damage to people and property outside of the mine premises.

The figures upon which the report are based, come from studies conducted more than seventeen years ago in ideal, strictly-controlled environments. The average coal blast monitored in the RI 8507 report used 10,000 lbs. of explosives per blast. The cast blasting methods used today employ at least ten times that amount, usually measuring between 100,000 and 400,000 lbs. of explosives per blast. The choice to use these unsuitable measurements clearly favors the coal industry. OSM and state regulatory agencies use the seventeen year old fig-

ures as if they were scientifically applicable to measure the damage potential at mine sites in all geologic areas.

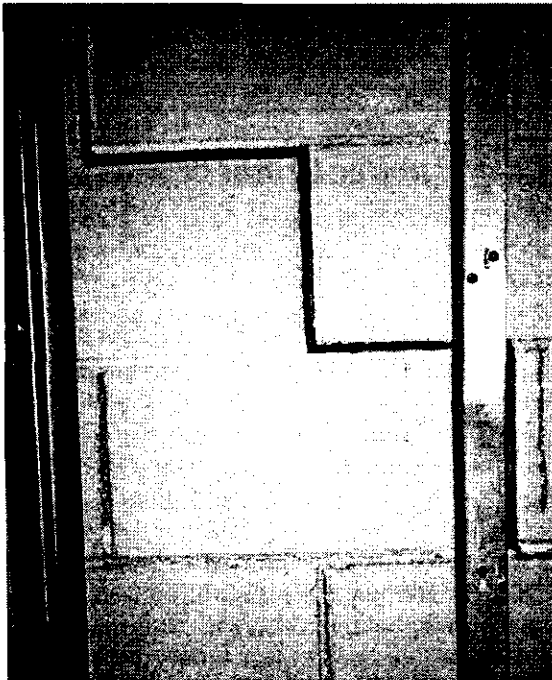
Additionally, the original data used to justify the “RI 8507” limits are unverifiable because the Bureau of Mines refused to release the blast records or identify the study sites before it was dismantled in 1996.

In blasting, most mine operators use a mixture of ammonium nitrate and fuel oil called “ANFO” explosive. ANFO is the same mixture that destroyed the Alfred P. Murrah Federal Building in Oklahoma City on April 19, 1996. As a result of that explosion, thirty-five buildings within a one mile radius of the building suffered structural damage and another 312 suffered what OSM would call “cosmetic” damage; i.e. plaster cracks

and objects dislodged from walls. The ANFO used to generate the Oklahoma City blast measured between only 4000 and 4800 pounds. Though there are differences between the average coal mine blast and the Oklahoma truck bomb, OSM continues to claim that 100,000 pounds of ANFO detonated within dated BOM limits could not cause damage in surrounding neighborhoods. In the "Progress Report of the Nationwide Blasting Work Group" dated September 3, 1996, OSM categorically stated that "blasting within numerical [BOM] limits will not cause safety hazards or structural weakness of buildings. However, it is possible that threshold (cosmetic damage) will result from blasting within numerical limits."

In order to uphold this implausible presumption of no collateral damage, OSM blasting investigators spend their time searching for other forces that might explain obvious post-blast damage in neighborhoods surrounding mines. Plaster cracks, damaged pipes, cracked masonry and chunks of falling ceiling are blamed on such destructive human behaviors as household activity (i.e. walking, doing the laundry) and normal road traffic.

After investigating citizen complaints related to the Reading Anthracite mine in Pennsylvania,



Collateral Damage. "Cosmetic" blasting damage in McCutcheonville, Indiana.

OSM Blasting Work Group Member Ken Eltschlager concluded that property damage found in the area could not have been caused by the nearby mine. Instead he posited that the houses in New Castle Township might have been damaged by an earthquake. When he was later sent to investigate complaints in Mingo County, West Virginia his "investigation" consisted primarily of looking at mine records, not of conducting tests and interviewing citizens. Since the mine operator's records indicated that they were blasting within the RI-8507 limits, Mr. Eltschlager concluded that the blasts could not have caused any impacts on surrounding areas. In fact, fly rock was leaving the mine site and crashing into homes. One boulder landed in the middle of a school yard minutes after children had been called in from recess. The mine paid out more than \$100,000 to families in the area for damage the inspector said "could not have occurred."

OSM staff are also encouraged by managers to blame the victim. Cast blasting is routinely conducted at Peabody Western Coal Company's (PWCC) Kayenta mine in Arizona. When houses and hogans (traditionally constructed homes) on the Navajo reservation started to expose cracked foundations, separating drywalls and sinking floors, Michael Rosenthal, Chief of the Physical Services Branch of OSM, found no connection to the mine. This conclusion strained credulity as some of these homes were included within the Peabody permit area without written permission of the homeowners, in violation of SMCRA. Many of the complainants homes are now located on the mine's premises. In a 1996 investigation summary Rosenthal wrote:

"It is not possible to establish a direct casual relationship between the blasting by PWCC and the alleged damage claimed by citizens. Poor construction techniques combined with inferior construction materials, poor design and environmental factors should be considered the primary cause of defects in the complainants homes."

In theory, SMCRA guarantees protection to all homeowners near a blast, regardless of whether they own a sturdy brick house or one built of adobe.

No matter how well planned, the outcome of any given blast in the field is unpredictable. The

Office of Surface Mining

geological layout of the land determines how vibrations triggered by a blast will travel through an area and thus how much potential for damage is posed by any blast design. The blast holes in strip mine blasts are designed to detonate in linear and zigzag directions in rapid-fire millisecond sequences. Problems can occur when ANFO filled holes do not contain the correct amount of explosive, do not fire in the correct sequence, or don't fire at all. When a charge does not fire, it creates an especially dangerous situation because the subsequent blast may be larger, of a different character or pattern than planned.

OSM blasting regulations are especially fallible because they do not anticipate geological "hot spots." Hot spots amplify ground vibrations and can be located both near and far from a mine site. Thus, seismographic readings taken at the house closest to the blast, which is the only location OSM stringently requires coal operators to measure, reveals information that can be meaningless in assessing danger to communities some distance away from the mine. This method, however, is extremely cost effective for coal companies because they only have to take readings at one place. If they blast within the RI-8507 limits found acceptable to preserve that one house, they will be absolved of any liability. OSM and state regulatory agencies are reluctant to abandon the BOM limits because mine operators would no longer have the "absolute" defense of compliance with the standard blast, limits.

OSM's dependency on the BOM data is unusual considering there exists a cost effective way to formulate safe and precise blasting plans. A form of technology called Response Spectra Analysis (RSA) is affordable and widely available. RSA measures, at various frequencies, how a home will respond to the amplitude of a blast's vibrations. OSM's reason for not adopting this technology was published in the Federal Register on March 8, 1983. The agency "acknowledge[d] that Response-Spectra Analysis...provides a unique solution because it sets allowable limits accurately predicting the range of potential damage. However, OSM believes that a much more general standard must be authorized for application at coal mines

where 200 to 1000 houses may be involved." For the convenience of coal operators property and lives are put unnecessarily at risk, a risk for which they are not likely to be compensated.

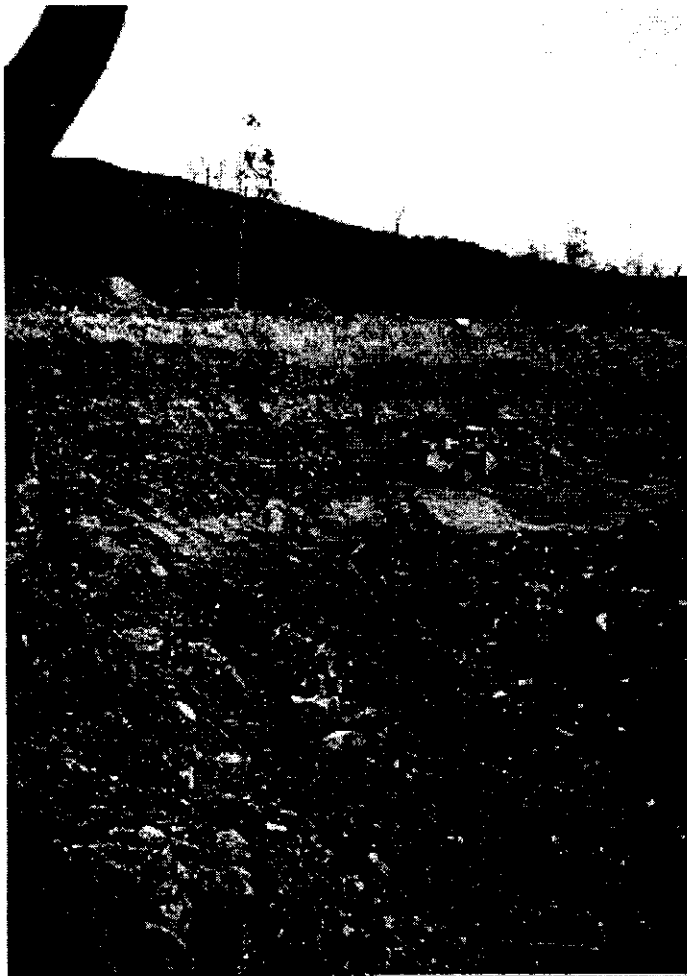
There is, of course, is no compensation great enough to cover the loss human life. In 1993, despite warnings from citizens and his own staff, Knoxville Field Office Director George Miller allowed the Sugar Ridge Coal Company to blast within 150 feet of Tennessee's I-75 freeway. Sixteen-year-old Brian Agular was killed when flyrock from the mine hit his parents car. Brian's mother stated "I hold OSM equally responsible and guilty as the mining company in my son's death."



Earthquake? Blasting damage in Western Pennsylvania ascribed by OSM to unrecorded seismic events.

What Inspections?

After experiencing twelve years of erratic enforcement and declining inspections under the Reagan and Bush administrations, staff was hopeful that OSM's unwritten policy of non-enforcement would finally be reversed with the election of a new president. OSM employees and citizens listened carefully to Bill Clinton's campaign promises to protect the environment, but many were actually won over by his choice for Secretary of the Interior. Bruce Babbitt had been active with the Endangered Species Act and was seen as genuinely committed to the environment. He publicly dedicated himself to realizing the potential of the Interior resource agencies. Under his stewardship, Interior employees believed there would finally be an end to the anti-environmental mind set institutionalized within the supervisory ranks of the Interior agen-



Landscaping. Tennessee strip mining site.

Without dedicated federal inspection, SMCRA's goal of prevention won't be fully realized. One employee wrote "although I am no longer in Enforcement, I still believe that [on site inspection] is OSM's main reason for existing." Another employee echoed these sentiments writing, "I truly believe that inspection has been, is and will be the most efficient and cost-effective means to carry out one of the most primary and important purposes of the Act: protecting society and the environment from the adverse effects of surface coal mining."

Another way to look at the value of inspections is to ask whether violations are uncovered. In the 1993 House Appropriations Committee investigation of Harry Snyder, inspectors reported that ninety-five percent of operating mines have violations which would be found if they were allowed to perform inspections.

Yet, according to its own data, OSM conducted no inspections in the states of Wyoming, Pennsylvania, Colorado, Utah, Alaska, and Iowa during the

cies. OSM employees took to heart his promises to "adopt" them and back them up if Reagan holdovers bucked at enforcement.

Far from shoring up OSM's Inspection and Enforcement staff, the decline in federal inspections has accelerated under the Clinton administration, outstripping the attempts of both the Reagan and Bush administrations to render the agency ineffective. Since 1993 there has been a marked decline in the number of inspections conducted by OSM, especially in locations where states are the primary enforcers of SMCRA: the average percentage drop by region is 61.1 percent for Appalachia, 53.8 percent for the Mid-Continent region and 62.1 percent for the West. (These figures exclude four states that either stayed at the same rate or saw an increase in inspections). Fourteen out of the 23 primacy states experienced a drop of 50 percent or more. Eight states experienced a fall in inspections of more than 70 percent.

When is an Inspection Not an Inspection?

Gross inspection numbers can be deceiving. Complete inspections are the only true indicators of a mine operator's compliance with the law. During a complete inspection, all areas of a mine are investigated, numerous samples are taken, and state, OSM and company mine records are all reviewed. The figures covering "Random Sample Inspections," "Partial Oversight Inspections," and "Other Inspections", on the other hand, do not indicate how "partial" the examination of a mine site actually was and whether the mine operator had advance notice that an inspector was coming. It is possible that during a partial inspection the inspector might only evaluate a single area of SMCRA performance standards such as blasting compliance or containment of waste piles. Additionally, OSM statistics do not reveal whether the inspector actually set foot on the mine site or merely watched a video of the mine prepared by the state program they are supposed to oversee.

Office of Surface Mining



Inspection. OSM inspector and company officials at a New Mexico mine.

Since President Clinton took office in 1993 at least a 30 percent drop in inspections was seen in all coal producing states.

The decline in federal inspections is significant because there is a general tendency among states toward under-regulation. States are less likely to bring enforcement actions against mines if they know its unlikely a federal inspector will later see the site. In this situation problems at a mine are allowed to grow until they can no longer

first five months of 1996. During that same time period, no complete oversight inspections (COI) were administered in the states of Kansas, Missouri, Montana, North Dakota or New Mexico. Indiana and Illinois, both of which have sixty-three mines sites each, were subject to no complete oversight inspections at any time between October 1995 and February 1997.

➤ In Kentucky, a state with one thousand mines, the total number of inspections declined from 1,610 in 1993, to 1,081 in 1995 to 721 in 1996; a decline of 55 percent over the four year period. Only 193 of the oversight inspections conducted in 1996 were complete inspections. In contrast, during President Bush's four years in office, the total number of inspections conducted in Kentucky averaged 1,535 a year.

➤ Since the Clinton Administration took over in 1993, Ohio has gone from a level of 300 in 1993 to a grand total of 83 in 1996; a drop of a little over 72 percent. Only two of these 1996 inspections were complete.

➤ Pennsylvania which has the second largest number of mines in the country dropped from 688 to 126.

➤ Utah, one of the states most hostile towards OSM's presence, received only two visits from federal inspectors, both of which were partial inspections.

be ignored. At that stage the problem has usually impacted resources off site and is expensive to remedy.

Accurate comparisons of enforcement patterns are not possible from year to year because the reporting format has changed several times in OSM's nineteen years. This is characteristic of most data collection conducted by OSM. It was not until the FY-98 Budget Justifications that inspection figures were even broken down into categories other than "Sampling Inspections" and "Other Inspections." It was also in that same budget request that OSM listed state inspection figures alongside federal figures for the first time in order to track enforcement patterns. These figures were undifferentiated and accompanied by no explanation. The fact that inspection data conveys minimal amounts of information is a deliberate decision by OSM not to engage in meaningful data collection and data presentation in order to obscure the gradual emasculation of "I & E" activities.

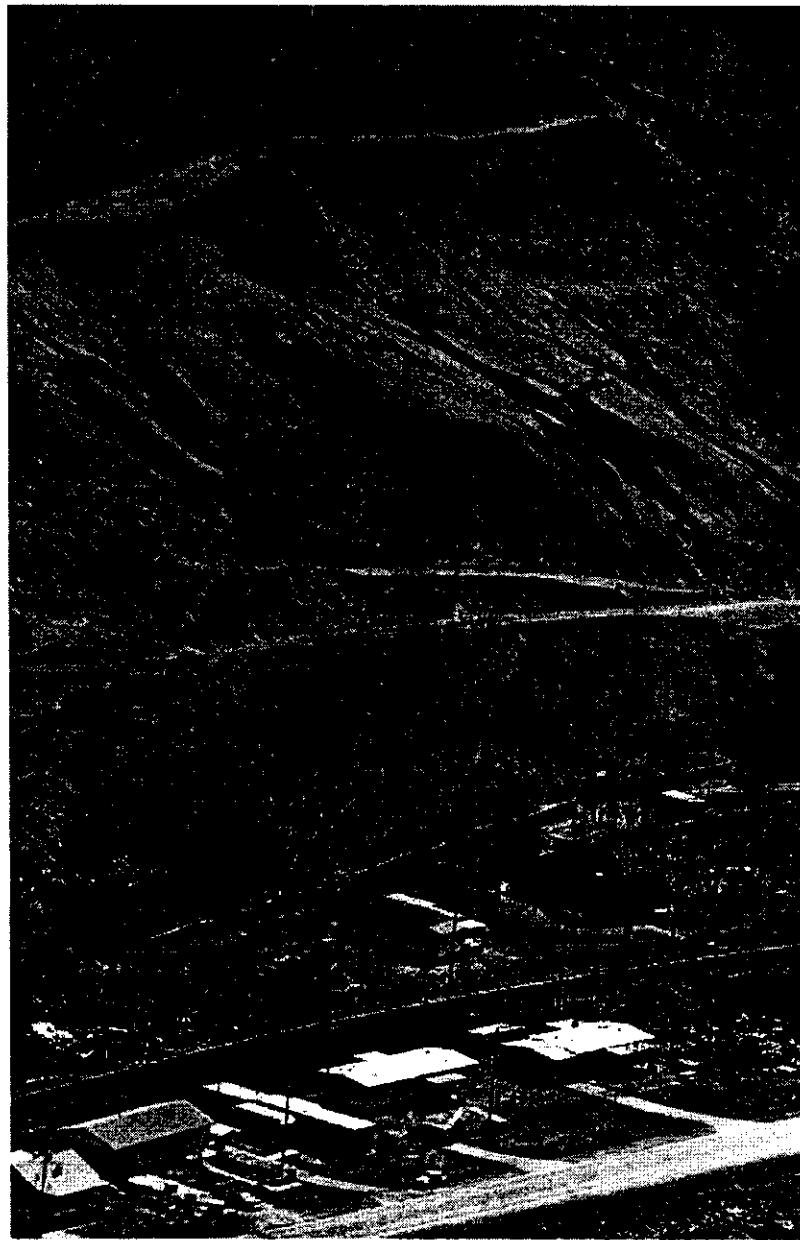
Despite rank and file belief in the importance of inspections, enforcement related positions have been the hardest hit during every OSM budget cut. Based on end of the year surplus figures, the 1995 reduction-in-force of 34 percent of the inspection and enforcement staff was unnecessary. OSM ended up with roughly a \$3 million surplus towards the end of FY1996.

Wrongs of State Rights

On February 26, 1972, 125 people were killed in Buffalo Creek, West Virginia when a coal waste dam belonging to the Pittston Coal Company gave way. As the mountain of coal sludge and water rushed down the valley it took homes, cars, and people along with it; devastating the already poor area. Four thousand were left homeless. The most shocking aspect of the disaster was that it could have been prevented. The defects leading to the dam's failure were obvious and had been the subject of numerous citizens complaints to the state regulatory authority. Characteristic of state regulation prior to SMCRA, no more than nominal inspections were ever conducted at the site.

Buffalo Creek proved to be a galvanizing event in the citizen movement to pass a strong national strip mining law. It stood as testament to the inadequacy of state regulation in the absence of national oversight. In light of states' reluctance to provide adequate regulation at any time prior to the Act, Congress made a conscious decision in 1977 not to leave strip mining to the vagaries of fifty different state legislatures, each susceptible to different political pressures. SMCRA was enacted to provide even and consistent regulation of the coal industry.

By providing national standards which states were required to follow, the Act was designed both to prevent unfair economic competition between the states and to ensure equal protection for the public against the substantial negative health and environmental impacts of strip mining. Most of all, it was enacted to provide a



Buffalo Creek. View of disaster site from 1976 photo.

EARL DOTTER

strong, independent federal watchdog, the OSM, which would ensure that states carried out their duties under the act.

Under SMCRA, states which administer approved programs are called "primacy" states. Federal regulations create a continuing and enforceable obligation for primacy states to "implement, administer, enforce and maintain [the approved program] in accordance with this Act, this Chapter and provisions of the approved State program." The Secretary of the Interior has a corresponding obligation to oversee these

Office of Surface Mining

programs and enforce the Act if states become unwilling to do so. State primacy does not deprive OSM of enforcement jurisdiction. 30 U.S.C. 1254(b) provides a separate and distinct basis for federal inspection and enforcement authority against individual mining operations in primacy states in addition to authority granted in 1271(b). OSM administers for federal program directly for Native American tribes and states that do not have primacy.

SMCRA contains provisions mandating a strong and independent oversight role for the Office of Surface Mining. In the event that a state fails to adequately implement a federally approved program or the requirements of the Act, SMCRA authorizes OSM to step in and take over all or part of the deficient program. Additionally, the Act requires mandatory annual inspections by federal OSM inspectors throughout the states and assigns them a nondiscretionary duty to issue notices to the states when they see violations of (1) a mine's permit conditions; (2) the state program; or (3) the Act. They can also issue cessation orders directly to the mine ordering it to shut down illegal operations if they find a condition presenting an "imminent danger" to the public or the environment.

Birth of "REG-8"

With the passage of legislation focused on prevention and oversight, the public should have been confident that another Buffalo Creek would never happen. Prior to the 19th anniversary of the Act in 1996, however, coal field citizens' groups found themselves warning OSM Director Robert Uram and Secretary Babbitt if OSM did not conduct more vigorous oversight of the states that another disaster like the one suffered in Buffalo Creek would recur. In fact, citizen groups boycotted a ceremony knowing that at the same time Director Uram was invoking the name of "Buffalo Creek," the finishing touches were being put on a policy that would further drain enforcement power from the agency. The policy was especially disturbing because it described the coal industry as a "customer" of OSM rather than as the regulated party. OSM titled this policy "REG-8." ("REG" is an internal designation used by OSM for interpretations of regulations and directions to staff). The first version of REG-8 was released on June 20, 1996. It was finalized on September 30th.

An objective of the group assembled to devise the oversight policy for OSM, the State/OSM Title V Oversight Team, was to "develop a



EARL DOTTER

Primacy. The State of West Virginia has primary regulatory responsibility for this site.



EARL DOTTER

End Results. By the time problems are apparent off site, it is often too late to prevent their spread.

system which overlooks success or failure of the [state] program, rather than the activities of the States or operators." This inscrutable language meant that OSM would no longer monitor a mine while it was active. The REG-8 policy is in direct contradiction to the intent of the Act which mandates a policy of prevention for OSM. Congress used the word "prevent" repeatedly throughout the Act. The Act directs the federal agency to "prevent leaching of toxic materials;" "prevent erosion and siltation, pollution of water, damage to fish or wildlife or their habitat, or private or public property;" "prevent contamination of ground or surface waters;" "prevent injury to persons, damage to public and private property...from blasting" etc. Abusive behavior can only be deterred through comprehensive permitting, permit reviews and periodic inspections.

REG-8 states that "oversight will not be process driven" and will instead focus on looking at "end-result[s]." As a result of the directive, federal oversight no longer focuses on monitoring mine operations throughout the course of the mining process, but rather in evaluating the

"end-result success" of the state program. OSM wants to avoid what it calls "duplication" of the states duties.

Only in agency-speak is there such thing as "oversight" of a result rather than an activity. Federal inspectors are no longer sent out to actual mine premises, but are sent only to inspect off site to determine whether mine activities have caused adverse affects in the surrounding areas. Yet it is only at the mine site itself that an inspector can discover latent hazards and correct problems before they spill out into the surrounding communities and nearby streams.

The policy behind REG-8 is a perversion of SMCRA because the mere existence of damage off site indicates that there has been a failure in the implementation of the law. One employee summed up the essential problem with REG-8 when she wrote:

"If we don't insure that mining is being done in the most environmentally safe manner as possible, then it is a waste of time to try and fix old problems—new ones will be created faster than we can fix them."

Office of Surface Mining

A review of recent state and OSM figures reveals the resulting drop in OSM federal inspections accompanied by a corresponding drop in state enforcement actions. Pre-FY1995 data demonstrate that state inspectors take significantly more enforcement actions when OSM maintains a strong inspection presence in the fields. One employee reported that as a result of REG-8 "in 1996, there was little or no 'over-site'[sic] of State programs being conducted in Kentucky. I believe this was true nation-wide, based on what I have heard from state and OSM personnel in Virginia and other states. OSM inspectors were spending their time conducting 'special studies' and (at least in Kentucky) reviewing video shot by the state."

In an effort to prevent actions by federal inspectors that would antagonize the states, the agency has decided on policy of vicarious inspections. In addition to inspection by videotape, OSM has its employees conduct oversight by driving past mine sites or flying over them; a practice called "drive-by's."

The REG-8 directive instructs OSM Field Offices to negotiate Performance Agreements (PA) with each state to determine how its program will be monitored. The state is essentially allowed to choose which of SMCRA's environmental standards (i.e. blasting, groundwater protection, land stability, property damage, top soil protection, contemporaneous reclamation etc.) will be used to evaluate their programs. Under the Act, however, these standards are not subject to choice. States are legally bound to implement fully all standards of the Act. They have no discretion to choose how they are to be evaluated.

The REG-8 performance agreements have already generated serious problems. For much of 1996, western states refused to cooperate in the drafting of the agreements. Ironically, OSM responded by suspending inspections and enforcement until they reached "consensus" with the states.

In Pennsylvania's Performance Agreement, the state has exempted blasting from OSM's evaluation list despite the fact that this is highly controversial issue for the state. Between October 12, 1995 and October 14, 1996, Pennsylvania's Department of Environmental

Protection (DEP) received over five hundred citizen complaints about blasting, almost all of which cited heavy shaking, loud noise, and property damage. A majority of the complaints were directed at the Reading Anthracite Coal mine located in New Castle Township. On October 12, 1995 DEP issued an NOV against Reading for having an inadequate blasting plan. It was lifted hours later when the company informed DEP it had come up with a new plan. About a month later, mine blasts sent a boulder through the roof of a neighborhood house. Sending flyrock off a mine site is considered a very serious violation. A corrective order (CO) was issued, but was lifted later the same day. Reading was allowed to continue blasting after promising to "fix" the problem.

Another violation was discovered on November 30th mandating a declaration of a "pattern of violations" and a "show cause" hearing to determine whether the mine should keep its permit. Instead of holding the hearing, DEP bowed to the mine and suspended inspections. From December 15th on, "inspections" took the form of phone calls. The inspector would ask Reading to check its records to see whether the mine had exceeded DEP's "maximum allowable limits" during the period of the citizen complaint. Not surprisingly Reading replied that its records showed only acceptable blasts. DEP stopped even the phone call "inspections" for a period of three weeks in March. When Reading's permit came up for review Pennsylvania renewed it.

Other performance agreements reveal additional problems. For instance, REG-8 documents state that

- Virginia "will conduct self-evaluation [on] surface/ground water protection and inspection frequency";
- New Mexico is only to be evaluated in the areas top soil protection, post-mining land use and blasting; and
- Kentucky has written into its PA the use of "aerial overflight reviews."

University of Wyoming law professor Mark Squillace has recently concluded that the REG-8 policy is "so deferential to the states as to

cripple the agency's ability to insist that states maintain minimum federal standards."

The Clinton Administration apparently does not share the concerns about OSM's retreat on state oversight. On July 22, 1997 OSM received Vice President Gore's "Golden Hammer" award. The award was given to OSM for the work of its "Oversight Steering Committee" and its new "Results-Based Oversight Strategy."

The Primacy of Primacy

Out of twenty-eight currently active coal producing states and tribes, twenty-three have approved programs or "primacy." Primacy states assume primary responsibility for enforcing SMCRA on state lands. For this task, states receive substantial amounts of federal funding every year to support their regulatory programs. SMCRA authorizes OSM to provide state grants totaling up to 50 percent of program costs on the assumption that states will fully and fairly implement the intent of the federal law. States can also receive up to 100 percent funding if they've been approved to enforce the Act on federal lands in their state.

Even with relaxed oversight attitudes, OSM inspectors have met severe resistance in the primacy states, particularly in the West. Home to the "wise-use" movement, the West has several governors opposed to federal regulation of any kind, especially regulation in the area of environmental protection.

Governor Michael Leavitt of Utah is a major proponent of idea that OSM should always defer to state judgment even when this means not enforcing the law as written. Almost two-thirds of Utah's coal mining activities take place on federal public lands where over three-quarters of the state's coal is produced. On June 8, 1992 the Southern Utah Wilderness Alliance (SUWA) and the Utah Chapter of the Sierra Club submitted a request that OSM seriously review Utah's regulatory program and revoke its cooperative agreement allowing the state to oversee federal lands. The groups provided comprehensive documentation of the state's failure to carry out its responsibility under the Act, much of which was drawn from OSM's own records.

Though Utah has a small number of mines relative to other states, their compliance record during the 1988-1991 report period was dismal. The percentage of mines found to be in full compliance during OSM oversight inspections was 18 percent in 1988, 37.5 percent in 1989 and 13.3 percent in 1990. Yet Utah has less than twenty-five mines.

During those three years, Utah was rated among the top three worst states in enforcement. The SUWA report detailed the propensity of Utah's Division of Oil, Gas & Mining's (DOGM) to overlook or ignore permit violations. OSM's three-and-a-half-year review of DOGM's program showed that state inspectors cited on average only 6 percent of the violations found by OSM inspectors to have existed during a state complete inspection conducted prior to a federal one. Left alone, these violations can lead to substantial environmental damage. OSM's "Annual Evaluation Report for Regulatory and Abandoned Mine Land Reclamation Programs Administered for the State of Utah for Evaluation Year 1991" (1991 Annual Report) states that "[f]ifty-two percent of violations observed by OSM...had a potential degree of impact that was moderate to considerable." Forty percent of the observed violations had impacted or had the potential to impact areas outside of the mine's permit area.

Even after OSM apprized DOGM of violations it had failed to cite, the state agency still failed to take corrective action. In 1991, DOGM followed up the 27 OSM-observed violations by citing a total of two of them. Under pressure from OSM, Utah eventually cited 15 of the remaining problems, but still resisted enforcement measures on the other ten.

Another case illustrating the need for vigilant oversight was Virginia's treatment of the Act's "two-acre exemption" provision. Operators who mine two acres or less are exempted from federal regulation. In the first years of the Act, Virginia allowed companies to hire subcontractors to purchase unlimited contiguous two-acre plots under this exemption and then passed a law exempting them from state regulation. This practice subverted the intent of the Act which was to end unpermitted "wildcat" mines. By June 1981, there were 1,083 two-acre plots in the state, 926 of which were not operating

Office of Surface Mining

under any kind of permit and therefore were completely unregulated. No reclamation had occurred at 783 of these sites.

Despite the emphasis on "end result success" under REG-8, recently there has been more serious flooding in Buffalo Creek, West Virginia. On June 26, 1997 mud, rock, coal and other debris from Arch Coal's strip mine washed down into the community of Cartwright Hollow blocking the road and leaving homes surrounded by coal waste. The West Virginia Department of Highways arrived in the days following the flood to clear the roads. The state mine inspector didn't show up for five days. OSM inspectors were nowhere to be seen. When the state inspector finally did arrive he spent less than half an hour at the mine site before coming to tell citizens that the flood was unrelated to Arch's mining operations. Residents were stunned having taken video footage and photographs of problems that would've directly contributed to such flooding including improperly stored coal waste, eroding dam impoundments and improperly maintained sedimentation ponds. West Virginia did nothing.

One day after the inspection, the hollow flooded again. The next inspection was conducted by the head of West Virginia's Department of Environmental Protection, John Caffrey. He worked as a coal lobbyist before taking the top DEP job. The inspection consisted of Mr. Caffrey flying over the mine in a helicopter.

OSM's Charleston West Virginia staff did not go out to inspect after June 26 and July 2 floods. These floods caused damage and evacuations only yards away from the site of the 1972 Buffalo Creek Tragedy. OSM waited more than three weeks to get involved and then only after a formal citizens' complaint. Until that time, OSM was content to wait on the sidelines, as the West Virginia regula-

tors tried to dismiss the problems as "Acts of Mother Nature," reminiscent of Pittston's infamous "Act of God" explanation for the 1972 disaster.

The situations outlined above are not isolated problems. They are endemic of enforcement in at least some part of all state programs. Without a strong and conscientious OSM, the conditions are likely to worsen. Many mines are located in isolated areas where citizens don't have the resources, media coverage, or technical knowledge to combat illegal behavior by mine operators and recalcitrant state agencies. Federal oversight was the reason for SMCRA's enactment and remains the key to protection of public health and the environment.



EARL DOTTER

Oversight. Inactive, unreclaimed mines mar the West Virginia landscape.

IV. Ticket Fixing: The Politics of Strip Mining

One of the main factors contributing to poor employee morale at OSM has been the continual interference by management in field decisions. At least on paper, inspectors have a great deal of authority. SMCRA directs inspectors to cite violations as they encounter them. These decisions are not reviewable unless an operator shows "good cause" that there is in fact no violation. Notwithstanding these provisions, a 1993 OSM memorandum reported "there exists a sense of futility regarding employees' ability to successfully implement their responsibilities under SMCRA...Employees, especially inspectors, allege that their actions frequently are not upheld by those in headquarters, some of whom have never set foot in a mine site (many at headquarters acknowledged this problem exists)." In addition to overturned citations, interference in OSM's statutory mission has taken the form of retaliatory transfers, debilitating reorganizations, and budget cuts centered on enforcement personnel.

OSM's failure to stand behind inspectors' enforcement decisions has led to the state and industry-held perception that OSM need not be taken seriously and thereby undermined the continuing viability of the Act. One employee suggested that the official OSM motto should really be "Lets make a deal."

According to the 1993 memorandum, this free-dealing image has contributed to "continuous and successful" attempts by states and industry to "fix tickets" at specific mines. Ticket fixing has a definite impact on inspectors decisions about whether to issue a citation in the first place and thus influences OSM's overall rate of enforcement.

Since the Reagan administration, the number of federal enforcement actions initiated by OSM has fluctuated considerably, in contrast to the Act's goal of bringing national consistency to the coal fields. Under the Act and approved state programs, inspectors must cite all violations they encounter. The citation is called a Notice of Violation (NOV). It describes what the operator must do to correct the problem and establishes a timetable by which the violation must be fixed. If the violation presents "an

imminent danger of significant environmental harm" or an immediate threat to the safety of the public, the inspector must issue a Cessation Order (CO) requiring the mine operator to immediately shut down the part of the mine causing the problem. Illustrating the need for OSM to maintain a strong enforcement presence in the coal fields is the fact that state inspectors write more violations when accompanied by a federal inspector.

Though there has been a pervasive atmosphere at OSM whereby issuing citations to certain states and mines is discouraged, conspicuous ticket fixing did not take place until Harry Snyder took over at the agency in 1989. Many employees cite Snyder, the agency's director under President Bush, as ushering a new era of political meddling with field enforcement at OSM. Snyder became the subject of a 1993 House Appropriations Committee oversight investigation for allegedly intervening in at least 25 inspection actions. OSM's legal department criticized Snyder for making extra-legal agreements with coal companies either without attorneys' knowledge or over their direct objections.

Instead of forcing the Les Juan Coal Company to pay \$180,000 in mandatory reclamation costs, for instance, Snyder negotiated an agreement with the company through which it donated the mined lands to a national park in Kentucky. The "donation" ended the company's responsibility to restore the land to a productive state. The land was estimated to be worth only about \$60,000. If the government decides to fully reclaim the area taxpayers will have to pick up the tab for the delinquent coal company.

In another instance, Snyder agreed to grant the Skyline Coal Mine in Tennessee "temporary relief" from a cessation order. The mine was causing significant environmental harm by discharging acid into topsoil and water supplies and had been ordered to shut down until it could prevent these leaks. Attorney's at OSM maintain that there was no legal basis for the agreement.

Under the Clinton Administration most ticket fixing has been concentrated around the Albu-

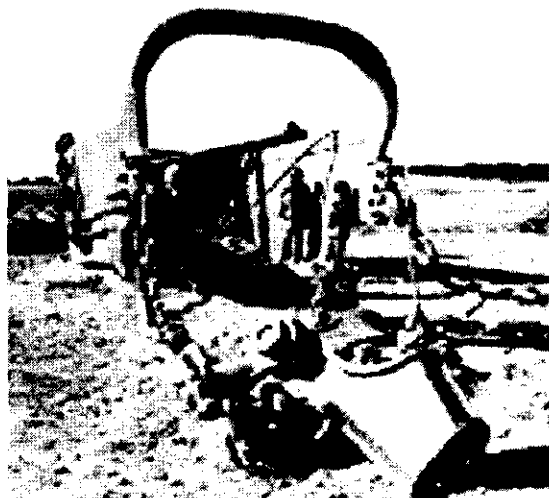
Office of Surface Mining

Albuquerque Field Office (AFO) in the Southwest, where most coal strip mining takes place on federal and Native American lands. The territory regulated by AFO, which originally included Colorado, Utah, New Mexico, and the Navajo, Hopi and Ute Reservations, is some of the most politically charged territorial disputes in the United States.

For example, Utah Governor Michael Leavitt has criticized OSM's inspection and enforcement actions within the state as an "inappropriate infringement upon Utah's prerogatives." He believes that states should be given broad deference to implement the Act as the states see fit. Governor Leavitt has been an ardent advocate for PacifiCorp's Des-Bee-Dove mine in Utah. Right up until his gubernatorial inauguration, Leavitt served as a Director of PacifiCorp. The Oregon based company is a diversified energy company that operates large coal mines in several states. PacifiCorp was the center of several enforcement controversies, including a glaring example of ticket fixing during the tenure of Snyder. The company is currently lining up the financing to buy Peabody Coal's current parent corporation, the Energy Group. This transaction, once completed, will make PacifiCorp the world's largest private coal company. The relationship between Governor Leavitt and the coal industry is a prime example of the reasons why SMCRA was originally enacted.

The Governor wrote a letter in 1994 to Secretary Babbitt on behalf of the Des-Bee-Dove mine when it was issued a notice of violation by AFO. The NOV was issued after a federal inspection showed that a violation cited in an earlier ten-day notice to Utah remained unabated. When the problems had not been corrected by the time of the next inspection, a failure to abate cessation order (FTA-CO) was issued and fines were assessed against the company directors for failing to act in regard to any of the previous citations. After receiving Governor Leavitt's letter, Babbitt arranged a meeting between the head of the Utah mining regulatory authority and OSM Acting Director Anne Shields. All fines were withdrawn.

The situation in the West proves that pressures exerted by politicians and the mines they represent have demonstrable effects on the way OSM decides to enforce, or not enforce the law. The issuance of federal NOV's and CO's has been



Big Scoop. Workers are dwarfed by the size of modern strip mining equipment.

rare if not nonexistent in the West even as production has grown steadily since the passage of SMCRA in 1977. This is especially alarming in light of the fact that Western mines are massive in size compared to mines in other regions. They are capable of producing off-site hazards on a much larger scale. Some of the largest mines are located on Native American lands where OSM has direct enforcement responsibility. These mines have been the subject of large numbers of environmental justice complaints from citizens.



"Big Muskie." At work in Ohio.

Ticket fixes are also prevalent in the West because the Albuquerque Field Office writes a relatively high number of citations relative to the number of mines in the area. It is one of the most active OSM office in the country. Inspec-

tors in Albuquerque, more than any other OSM office, took Secretary Babbitt at his word when he promised to end political corruption at OSM. AFO started by issuing citations to Consol Coal ordering it to clean up its mine on Navajo lands. It had walked away from the Burnham mine ten years before having completed absolutely no reclamation work on it. Under both state and federal law, mines must be reclaimed in a timely manner. Consol decided to ignore the federal citations. Under pressure from the Citizens Coal Council and the Dineh (Navajo) Mining Action Center, OSM assessed almost \$200,000 against each of Consol's eighteen directors. In response to forceful lobbying by Consol, former Director Uram announced in January 1995 that the \$3.5 million in individual fines assessed would be dropped in favor of a nominal \$2,000 fine against the company. Consol was given an additional sixteen months to clean up. This was just one of numerous ticket fixes that purported to absolve coal operators of reclamation responsibility.

Robert Uram continued this pattern throughout his two years at OSM making special exceptions for mines with which he made connections during his original employment with OSM and later in private practice. While President Reagan was in office, Uram spent three years as an attorney at OSM's Solicitor's Office after which he was transferred to the Field Solicitor's Office in New Mexico. There he became familiar with some of his future clients including Amcord, Inc. While an employee at OSM, Uram took part in a number of enforcement discussions regarding Amcord's Amcoal mine.

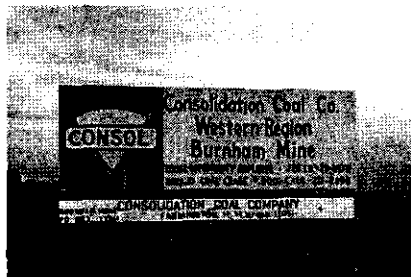
Less than four months after leaving OSM in 1984, Mr. Uram received permission from the Interior Department's ethics officer to represent the Gifford-Hill Company, owner of Amcord, Inc.

On May 11, 1984, Uram arranged a meeting between Amcord and OSM at which a "patently illegal" release agree-

ment was made, according to OSM officials. Amcoal was allowed to conduct grossly substandard reclamation of its mine and still obtain release of its performance bond. A performance bond is a financial guarantee posted by a mine operator to ensure diligent performance of SMCRA's reclamation requirements. If these requirements are not met, then the operator must forfeit the bond enabling the regulatory authority in the state to clean the site up itself.

Uram spent the next ten years representing coal, nuclear and energy interests before deciding to go back to OSM as director in 1994. His resume describes some the work done for the Amcoal Mine: "[p]lanned and executed a strategy to obtain from the State of New Mexico a release from further coal reclamation responsibility for a mine near Gallup, New Mexico. This was the first such release obtained in the state of New Mexico."

Whether in or out of the agency, Uram was able to retard enforcement of SMCRA in favor of the



Consolis Burnham Mine.



Office of Surface Mining

coal companies in which he had a financial interest. In 1993, for example, the Albuquerque Field Office was told not to send inspectors out to the Amcoal mine to measure water contamination at the site. The reason supplied by OSM's Western Support Center for this block: "You know, he [Uram] might become the next director." While in private practice, Uram threatened on more than one occasion to sue OSM if it sent out inspectors to the mine.

Favoritism toward Amcoal continued once Uram took over at the agency in 1994. In an OSM briefing paper written during Uram's tenure, the report noted that the Amcoal mine continued to have "an acid/toxic materials problem and . . . will not meet the [SMCRA] performance standards," yet no action was taken against it. As of 1995 parts of the mine were little than a waste land; incapable of supporting vegetation and showing signs of massive erosion.

In his confirmation disclosures to the Senate and Natural Resources Committee in 1993, Uram failed to disclose that Gifford-Hill/Amcord had been purchased in 1991 by Hanson Holding PLC of Great Britain. Uram listed every single company in Amcoal's chain-of-command but Hanson. Hanson owned a fifty-five percent share in Peabody Western Coal Company (PWCC), the number one coal producer in the United States. In violation of a Senate confirmation requirement, Uram did not recuse himself from participating in agency decisions affecting Peabody. He in fact participated actively in the ticket fixing that occurred at the company's mines on Navajo lands.

The corporate relationship between Peabody and Amcoal is significant for another reason. Under OSM regulations the violations and conduct of "any subsidiary, affiliate, or persons controlled by or under common control with" any applicant for a mining permit become grounds for disapproval of permit applications and renewals. Thus, the failure of Hanson Holding to control pollution at the Amcoal mine since it took over in 1991 could have lead to a "permit block" against Peabody Coal. Needless to say it has not. If Hanson Holding had been listed on Mr. Uram's recusal list, he would have been barred from dealing with 166 active and pending mining operations that Peabody admits it controls as well as on other projects where Peabody's ownership is in dispute. At every

step, Mr. Uram made sure the interests of his former clients were advanced.

During his tenure, Uram directed inspectors to violate the law by ordering them not to write violations while on site at mines on public lands. He justified his actions to the Citizens' Coal Council explaining that he did not want to "upset" the governors of Colorado and Utah. When inspectors at the Albuquerque Field Office (AFO) continued to write violations for mines in the southwest, Director Uram and his managers overrode these decisions. To prevent further action by AFO inspectors, oversight of Utah and Colorado was removed from the AFO's jurisdiction in 1996.

"Ticket-fixing" has also been rampant on Native American lands where many of the residents in the vicinity of mines are neither fluent in English nor aware of their citizen rights under the surface mining act. It takes place in spite of President Clinton's Executive Order No. 12898 on Environmental Justice. The order says that "each federal agency shall make achieving environmental justice part of its mission by identifying and addressing as appropriate, disproportionately high adverse human health or environmental effects of its programs, policies and activities on minority and low-income populations and... Federally-recognized Indian Tribes." Yet coal companies on Native American lands are subject to less rather than more scrutiny from OSM.

Federal law requires an immediate halt to any mining activities conducted outside of a mine's permit area. Accordingly, on May 23, 1996 an inspector wrote up the Peabody Western Coal Company for operating sedimentation ponds outside the boundaries of its Kayenta mine site on the Navajo Reservation. The ponds were not even within the boundaries of Peabody's approved lease with the Navajo Nation. The company was trespassing. Unapproved operations are deemed to pose an "imminent danger" to public safety. The ponds which were used to filter mine run-off was leaking "black water" into the nearby watershed and eroding the land around it.

In order to dodge the cessation order for the portion of a conveyor belt that was feeding the ponds, Peabody immediately shut down the entire mine and made some quick phone calls.

Within 24 hours, the cessation order was lifted and an unprecedented letter of apology was sent to Peabody soon afterwards. The letter read "OSM has modified the Notice of Violation to remove the cessation order. This modification allows Peabody to resume operations. OSM regrets that the Notice of Violation unnecessarily interrupted operations and caused temporary lay-off of hundreds of employees most of whom are Native Americans." According to the inspection report, however, shutting down a small part of the conveyor belt would not have affected any other part of the mine site. Peabody was testing its relationship with OSM. A Peabody employee even told the inspector that OSM management had in fact known about the unpermitted activities long before the inspection and that it was the company's opinion that OSM managers had no problem with it.

By this point, AFO was seen as an interloper in the cozy relationship between western politicians and coal companies. After the May 1996 cessation order, OSM announced that it was going to close the Albuquerque office and transfer the employees to offices all across the United States. Fortunately, the agency was forced to back down amid strong public protest and the office has continued to remain open.

OSM is not the only federal agency implicated in spurious dealings on Native American lands. As you go up the chain of command in the Department of Interior there appear questionable connections between officials' personal and financial interests and the special treatment certain western mines receive from OSM. These conflicts of interest compromise OSM's role as an independent watchdog.

One project in particular seems to have benefited from its powerful connections; the Arizona Salt River Project (SRP). The quasi-governmental organization is a conglomeration of power plants, coal companies and utility companies that have come together to supply energy and water to the southwestern United States. It has been supported by powerful Western politicians, including Bruce Babbitt. He had close ties to the project while governor of Arizona. The project included operations such as the Mohave Generating Station and the Peabody Western Coal Company. Though many of the participating mines have been the subject of substantial controversy, they have had an easy

time with OSM management and the Department of Interior.

Projects operated by Peabody on Native American reservations supply the Salt River Project with huge quantities of coal. They are among the largest mines in the country and have been subject to numerous citizen complaints by the Navajo and Hopi peoples. The multinational corporation owns two projects on Indian lands in Arizona and New Mexico—the Kayenta Mine, and the Black Mesa Mine. These operations have not been forced to meet even the most fundamental requirements of SMCRA. Though comprehensive permits are a mandatory requirement for strip mining operations, neither of the mines have even met the full permit standards of the Act.

In fact, the Kayenta Mine was stripped of its recently acquired permit by United States Administrative Law Judge Ramon Child on March 11, 1996. As support for this decision, Judge Child cited air pollution, groundwater contamination, livestock deaths and health risks to the Navajo's living near the mine. Among other violations, Judge Child found that Peabody had violated Section 522(e)(5) of SMCRA which prohibits mining within one hundred feet of a cemetery. Not only did Peabody not respect the 100 feet limit, but the company actually mined through ancient burial sites sacred to the Navajos. Peabody just picked up the bodies and buried them somewhere more convenient.

Of OSM's dealings with Peabody, Judge Child wrote:

"[N]otwithstanding OSM is a bureau within the United States Department of Interior, the Secretary of which is the legal trustee and has trust responsibilities to the Native American Tribes and their members, OSM appears to view its responsibilities to be one of arms-length dealing with the Indian[s] while protecting the interests of the mine operator.... There appears to be an accepted tolerance on the part of OSM and Peabody to the adverse effects mining has upon the lives and well being of Native Americans who live within the vicinity of the mine."

After a challenge filed by both the Department of Interior and Peabody, an appeals court over-

Office of Surface Mining

turned the lengthy opinion, giving only two cursory pages of explanation for the reversal. Close on the heels of this decision, Judge Child was forced to retire.

In 1990, the Black Mesa mine was denied a permanent permit by OSM because of concerns over the coal slurry's water consumption in the water-scarce region. (It has been operating on a temporary permit for twenty years). It was drawing over 3,800 acre-feet of water a year from the Navajo Aquifer for use in pushing coal through the length of the pipeline. (An acre-foot is the amount of water it would take to cover an acre of land to the depth of one foot and roughly the amount needed to supply a family of four for a year). A series of U.S. Geological Survey reports has revealed a direct relationship between the declining water levels in Hopi Municipal Wells and Peabody's water use. If the water dries up, the Hopi will be forced to move from their homeland where they have lived and worshiped for over 12,000 years.

The tribal government of the Hopi, the Hopi Nation, and the Hopi people have actively opposed the slurry for years. Yet OSM has allowed the pipeline to operate without the proper permit, as required by federal law. Under SMCRA, unpermitted operations are automatically defined as presenting "imminent harm" to the public and the environment. When a

company doesn't have a permit for any part of its activities, it is unlikely that those activities are being monitored by the government. Activities not under permit are subject to an immediate cessation order. OSM management has refused to allow any citations to issue to Peabody on this matter.

Protests of the Hopi have fallen on deaf ears in the upper levels of OSM and the Department of the Interior. While Secretary Babbitt has had to personally recuse himself from matters involving Peabody, his office still has a trust responsibility toward all federally recognized Native American tribes. Part of that legal obligation rests in protecting the resources and heritage of the tribes in their dealings with the United States and outside companies. This trust has not been fulfilled. DOI has taken no action regarding the coal slurry even though another governmental agency, the U.S. Environmental Protection Agency, has found that using scarce desert water for the slurry "is not an environmentally preferable alternative."

Within this same time period, Secretary Babbitt disbanded Department of Interior's Environmental Justice Office which was created pursuant to Executive Order 12898. According to Interior the function of the office had become duplicative of the Office of Environmental Policy and Compliance.



Black Mesa.
Still operating
on a "temporary
permit."

V. Aftermath

Reclamation

Reclamation is the most basic tenet of the Surface Mining Control and Reclamation Act. In approving the Act Congress found:

“Many surface mining operations result in disturbances of surface areas that burden and adversely affect commerce and the public welfare by destroying or diminishing the utility of land for commercial, industrial, residential, recreational, agricultural, and forestry purposes, by causing erosion and landslides, by contributing to floods, by polluting the water, by destroying fish and wildlife habitats, by impairing natural beauty, by damaging the property of citizens, by creating hazards dangerous to life and property by degrading the quality of life in local communities, and by counteracting governmental programs and efforts to conserve soil, water, an other natural resources.”

Under SMCRA, lands disturbed by strip mining must be reclaimed to their original shape and productivity and be “capable of supporting the uses which they were capable of supporting before mining.” All of SMCRA’s provisions are designed toward achieving that end; from comprehensive permitting requirements to periodic inspections. Reclamation provisions are vital to SMCRA. They are designed to prevent the coal industry from imposing costs on the public and

environment that should’ve been included as part of the mining process.

Under the Act, reclamation is to be done in a “timely manner;” as “contemporaneously as possible with the surface coal mining operations.” Timely reclamation ensures that precious topsoil is not left so long that it loses its ability to sustain vegetation and also averts the dangers of erosion.

It was definitely not the intent of Congress that mines to be left to sit for years without any reclamation work being done. Unfortunately, reclamation figures indicate that is often the case. Since 1978, the acres of land permitted to be mined in the nation’s coal fields has far exceeded land fully reclaimed. In nineteen years of nationally regulated surface mining only one-fifth of five million acres has been restored.

Reclamation is virtually unheard of in the arid West where the viability of topsoil is most at risk. In order to save funds, Western mine operators often remove the topsoil and overburden covering a coal seam years before they are even going to mine that area. OSM employees consider this to be a violation of the timely reclamation requirements. According to OSM’s Annual Reports to Congress, Colorado received permits to mine over 120,000 acres between 1978 and 1989. It was not until 1989 that mine operators in the state fully reclaimed any land at all. The total reclaimed was 176 acres. As of 1996, less than one percent of Colorado lands had been reclaimed.

Mine operators are even less responsible on Native American lands. As of 1996, **out of almost ninety thousand acres of mines, not one acre has been reclaimed.**

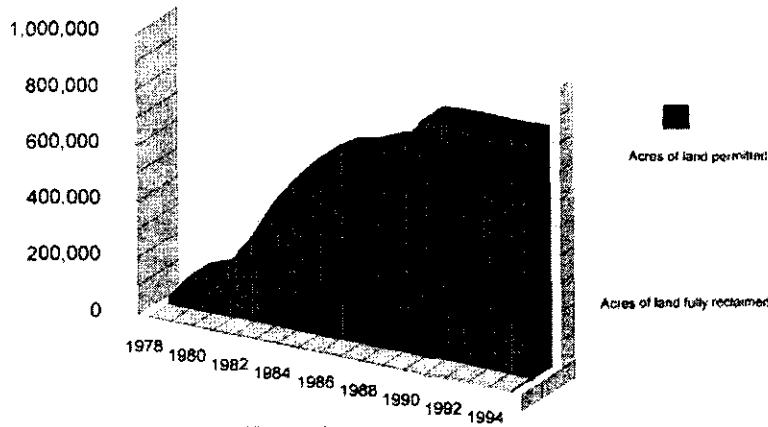
Companies in the West do not reclaim because they know they will not be forced to. State regulatory authorities either refuse to take enforcement actions against delinquent companies or modify



Reaping The Harvest. Extensive erosion from unreclaimed mine in Eastern Kentucky.

Office of Surface Mining

Failure to reclaim in the West CO, MT, NM, ND, UT, WY and Native American lands



Source: Office of Surface Mining Annual Reports to Congress

Chart 1. According to OSM records, reclamation is not occurring to any measureable extent in the West.

a mine's permit after-the-fact to ratify a substandard reclamation effort.

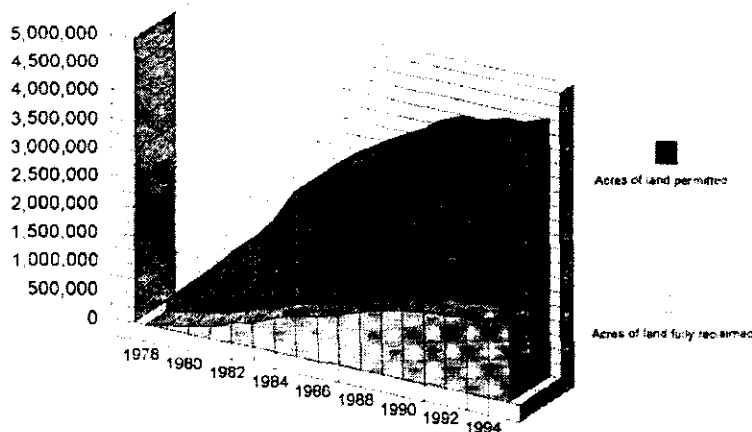
For example, Kerr Coal Company's Marr Strip operation in Colorado was allowed to leave a large depression in the earth in what had once been a relatively flat area. An August 4, 1994 Office of Surface Mining Briefing Paper stated it was Colorado's position that "[a] company need not return the site to a configuration that closely

resembles that which existed prior to mining as required by the Statutory definition of AOC [Approximate Original Contour]. They need only create a configuration that closely resembles a feature in the surrounding area. In this instance, the State and company were comparing "valley" configurations that were as far as three miles from Pit#1 [the reclaimed] location." Not only did the state allow Kerr to modify the permit to ratify the "valley", but they gave the company a state reclamation award for the site. When OSM inspectors later went to see the mine, they cited it for inadequate reclamation.

Abandoned Mines

Coal mining that took place in the U.S. prior to 1977 left millions of acres incapable of productive use and thousands of miles of rivers contaminated, undrinkable and unable to sustain life. As the vast majority of states did not require companies to reclaim the lands they had stripped

The acres of mined land far exceeds the acres of land fully reclaimed in the nation's coal fields



Source: Office of Surface Mining Annual Reports to Congress

Chart 2. National figures reflect some reclamation but the gap continues to widen.

bare, most coal operations either abandoned their mine sites or did negligible reclamation. Today these abandoned mines present numerous hazards including poorly contained toxic waste piles, subsidence, mine fires, unprotected vertical highwalls, polluted water bodies, rusting machinery, landslides, open shafts and defective explosives. One of SMCRAs most important provisions, Section 401, established the Abandoned Mine Land Fund (AML Fund) in 1977 in order to remedy these dangers and end the devastating economic and social costs these unreclaimed lands impose on residents living nearby.



Burning Mountain. This mined and abandoned slope in Saunders, West Virginia, has been on fire for seven years.

One of the major setbacks in rehabilitating abandoned sites is that OSM deliberately confuses and disguises the scope of the problem. Over OSM's nineteen year history the AML numbers have jumped up and down. Employees attribute this situation to confusion among agency policy makers regarding the image they want to convey to Congress and the public. There is internal conflict over whether to exaggerate the amount of progress OSM and the states have made, or to display the still staggering numbers of unfinished sites so that Congress will extend OSM's fee levying capability past the year 2004.

Confusion over the AML issue shows up in estimates regarding the clean-up effort. In February 1997, Kay Henry, the acting Director of OSM, reported to Congress that "another \$2.3 billion of known reclamation work still remains." Just seven weeks later a printout from OSM's own inventory of unreclaimed sites gave an amount more than two-and a-half times larger the number given to Congress. Back in 1996 the National Association of Abandoned Mine Land Programs and the Interstate Mining Compact

Commission issued placed the cost of clean-up of all identified sites at \$5 billion. And though these figures might seem manageable, they pale before Pennsylvania's claim that it will cost \$15 billion just to clean up known sites in Pennsylvania alone. These amounts do not take into account additional sites that have gone undetected. Even after nineteen years of data collection, OSM is "unable" to accurately describe what works needs to be done.

Disappearing Act

Agency employees claim that OSM consciously deleted unremediated sites from the inventory in 1992 in attempt to make the problem seem smaller. OSM has informed PEER that printouts of pre-1993 inventory totals are not available because the current system of documenting abandoned lands was not created until 1993. Thus, there is no direct paper trail, however, evidence indicating that a purge did indeed occur can be found by examining OSM's "reclamation success" statistics and congressional reports. On the fifteenth anniversary of SMCRA, OSM released a report entitled "Surface Mining Coal Reclamation: 15 years of progress, 1977-1992." The report cited a U.S. Bureau of Mines study estimating that over seven million acres in the United States are underlain by abandoned coal mines. The report found roughly two million acres had already been affected by subsidence and that another five million would be susceptible to problems in the future. Assuming a large portion of the affected two million acres would have been listed on the inventory since 1979 (the year the report was issued), a discrepancy arises in OSM's records. According to the Office Surface Mining's 1996 Annual Report to Congress a total of 4,777 subsidence acres have been reclaimed in the past nineteen years. That would still leave over a million acres left to be reclaimed according to the Bureau of Mines figures. The March 1997 printout of the AML inventory, however, shows that there are only 1,423 acres left. Hundreds of thousands of acres seem to have done a disappearing act.

Another example of disappearing sites centers on a 1977 congressional report titled "Surface Mining and Our Environment, U.S. Department of Interior." The report states that as of 1977 strip mining had resulted in 34,500 miles of highwalls. According to OSM's 1996 Annual Report only three hundred miles of highwall were reclaimed between 1977 and 1996. The March 1997 shows there is now less than a mile of highwall left to reclaim. Where did the other 34,000 miles of highwall go?

Office of Surface Mining

Current inventory figures understate the problem for another reason. Every year, states report to OSM the number of sites they have committed themselves to working on for the period of that fiscal year, rather than the total number of sites they actually have.

Reclamation of abandoned areas is funded by a fee levied on current surface coal production: 35 cents per ton on surface coal, 15 cents per ton of coal mined underground, and 10 cents per ton of lignite. OSM's authority to levy this fee is slated to end September 30, 2004, only seven years from now. Congressional appropriators have warned OSM that they will not renew the fund unless OSM starts to disburse more of the AML money that it collects every year. Expenditures from the fund are made through the yearly congressional budget and appropriations process. To date the government has collected more than four billion dollars through the fund, yet only two-thirds of that amount has been paid out over the years to recover the abandoned sites; some of which are actively draining acid into rivers and streams rendering useless more and more of our water supplies. Except for two out of the fund's nineteen year existence, more money has been collected than has been appropriated often by a margin of almost 50 percent. By the end of Fiscal Year 1997, the unexpended portion of the fund will have reached \$1.2 billion dollars. If Congress does not renew the fund, taxpayers will be left with a large cleaning bill.

The \$1.2 billion in unused funds stands in contrast of the fact that, according to the 1997 OSM inventory there are thousands of coal mine sites that "present an immediate danger to the public health, safety, or general welfare" or that OSM considers a high priority. States now have many more qualifying sites, than they are given money to clean-up. There are over 5,000 high-priority abandoned sites where no reclamation work has even begun. Under the 1997 rate of funding, it will take Kentucky 15 years to reclaim its 613 untouched sites. With 1,629 sites, West Virginia will spend twenty-five years cleaning up its lands; assuming that the AML fund continues for twenty-five years.

This is one SMCRA issue where all interested parties are in agreement. The states, coal com-

panies, citizens, labor unions and environmental groups all want the funds released immediately. Reclamation activities not only return the environmental quality of an area, but the work is also highly labor intensive leading to job creation in depressed areas. Notwithstanding these compelling reasons, when Interior Department officials submit OSM's annual budget justifications every year they not asked for the authority to spend the full amount of AML funds collected in fees. If the money is not spent it can be counted as "general revenue," and used as a paper-offset for the deficit.

In a resolution approved at the National Governors' Association in February of this year, governors' urged Congress and the Clinton administration to "promptly distribute" the funds to the states and tribes in a one-time appropriation. Despite the fact the monies are legally committed to AML clean-up and safety measures, the Governors are worried that Congress is going to think of other uses for the money. Congress did just that several years ago in the Energy Policy Act of 1992. It directed that interest earned off the fund be used to pay the cost of providing health benefits to retired mine workers.

Instead of helping to get the funds released, OSM efforts have been focused on publishing a brochure entitled "KEEP OUT: Old mines can be DANGEROUS."

To compound matters, OSM efforts are weak in the collection of AML fees. Hundreds of non-paying, deadbeat operators have not contributed since the beginning of the fund. Meanwhile, the OSM Fee Collections' staff has been steadily reduced in every budget cut.

Another problem with the administration of the trust fund concerns how disbursements for each state and tribe are calculated. Instead of distributing AML money based on the amount and severity of abandoned mine land sites found in each state, OSM allocates money through a formula that measures the present and past levels of state/tribe coal production. Under SMCRA, 50 percent of funds collected in any state or Indian reservation are allocated back to that state or tribe. These funds are called the "state share." Additional money is allocated to the states based on factors like "historic production."

Under this complex formula, a state like Wyoming, where coal production has been steadily increasing, is allocated \$22 million while Virginia receives only \$5 million dollars. Virginia has 603 untouched high-priority sites that need reclamation at an estimated cost of \$54,731,358 compared to Wyoming's single such site that is estimated by OSM to cost \$100,000. West Virginia, a state that receives roughly the same annual AML Grant Award as Wyoming has 1,629 "high-priority" sites with an estimated cleanup bill of \$553 million.

Until the disbursement formula is reconstituted to reflect need AML money will not go where it can do the most good. A recent article in the Billings Gazette reported on February 22, 1997 that Wyoming State officials were eyeing their \$22 million "wind-fall" for use in public projects such as street renovation and hospital construction.

Under the current formula, Wyoming will continue to get money for which there are no abandoned sites, while citizens in depressed areas around the country have to live near craterlike landscapes that present dangers to themselves and their children.

The way the other fifty percent of AML fees are disbursed creates some very damaging incentives for States. A large portion of this "federal share" of the money is allocated based on how many high priority sites are located in a state. Certain states, such as Louisiana, delay starting on their high priority and emergency sites in favor of working on the lower ranked sites.

State officials know that if they finish all their priority sites first, their "federal share" of AML fees will be cut in half. Some states are more worried about keeping their reclamation agencies open, than protecting the public.

As a consequence of Abandoned Mine Land problems:

- Almost all of Maryland's 410 miles of acid contaminated streams are being polluted by old mines; some of which threaten the Potomac River. Many of the people who live near the Mill Run watershed can no longer use water from their wells and

have to have water delivered by the local fire department. Without potable water many of their houses are now worthless, unsaleable. One family has to make a 30-mile round trip every other day to fill two dozen jugs with drinking water.

➤ In Pennsylvania, "when it rains...it pollutes." An estimated 2,167 miles of Pennsylvania waterways are now dead. The American Fisheries society estimates that this costs that state about \$66.7 million a year in lost tourist revenues from anglers alone. During the winter of 1995-1996, the state had heavy rain and snowfalls which elevated mine pools and produced record numbers of emergency subsidence problems.

➤ Mine subsidence is a big problem for a number of West Virginian counties. An abandoned Consolidation Coal Mine in West Virginia is collapsing and its taking the church and houses above it down with it. As of April 1997 the walls of the church had gaping cracks, the stained glass windows lay broken on the floor, and the organ was about ready to collapse.

Julius Jacquez, head of maintenance for the church remarked "[i]n my estimation, this is a really close knit community here. I think the people's consensus is they want to rebuild, but due to the high cost we may not want to do that." The congregation now worships in a car dealership.

Every day these sites are left idle increases the costs of clean-up, health problems, environmental damage, and economic devastation of the area. Abandoned mine sites continue to take a heavy toll on people, property and the environment as long as clean-up efforts are underfunded:

Twelve thousand miles of the United States' streams and rivers are contaminated with the acid, iron, manganese and sediment. There are also 594 coal waste dams, 1,693 waste piles, 1152 acres of landslides, 34 sites with explosive gases, 6,556 dangerous mine openings, 525 acres of fires, and numerous other hazards which still need to be cleaned up.



Dubious Benefits. Native American neighbors of the Peabody Mine in Arizona have complained of livestock deaths.

Abandoned People

Through tax breaks and subsidies, the American taxpayer pays more than once for the coal he uses. Coal field citizens pay many times over suffering through environmental degradation, property damage, undrinkable water, and depressed economies. By not consistently and fully enforcing the law, OSM has abandoned the people whose lives were suppose to be improved by the passage of SMCRA.

Coal producing counties suffer among the highest unemployment and poverty rates in the nation. The latest census set established that the average poverty rate in the United States is 13.1 percent. With the exception of Wyoming, coal counties in the top five coal-producing states have poverty rates significantly higher than the national average.

The number two producer of coal in the U.S., West Virginia, has a poverty rate of 23.1 percent. Kentucky is even higher. Arizona which is sixteenth in production and where almost all coal is mined on Native American



lands has a staggering unemployment rate of 34 percent; almost three times the national average.

Arizona, Kentucky, New Mexico, Louisiana, Montana, West Virginia and Virginia all have per capita incomes of at least \$4,000 less than the national average of \$14,420. Kentucky, the state that contains the largest number of mines has a poverty rate of 30.7 percent and a per capita income rate approaching only 60 percent of what the average American receives.

A combination of high poverty and low income rates are found in almost all coal field states. Only five states do better than the national average, some by mere percentage points.

With exception of Wyoming, the higher the level of production, the higher the poverty rate. 88 percent of the 24 counties that produce more than 10,000 tons of coal a year have a poverty rate higher than the national average.

Coal industry ownership is increasingly concentrated in the hands of large, multinational corporations. The #1 coal-producing company is Peabody Coal, currently owned by a British energy conglomerate. Second position is held by Consolidation Coal, jointly owned by Dupont and a German cartel. Other major producers are also foreign owned—e.g. BHP Minerals (Australia) and Costain (Britain).

Since 1950, in the lifetime of the baby boomers, coal production has more than doubled to an average of one billion tons, while the number of coal miners has dropped by 80 percent. Industry wrung many concessions out of congress during the battle over SMCRA using the classic "Jobs Versus the Environment" arguments. Yet, coal field communities continue to be poor, the jobs continue to disappear while production and profits grow and leave the country.

All but six coal producing states beat the national unemployment rate at the time the census was taken. Not only does coal production fail to create large numbers of jobs within

the industry, but it fails to generate other types of jobs indirectly related to coal production, such as jobs servicing digging equipment. The scarred landscapes and pollution that accompany irresponsible operations also retard the creation of other kinds of jobs that would open up in a community with a normal economic base.

Because of the economic problems that plague coal communities, they are usually not considered an attractive site for business investment. The legacy of U.S. coal production is thus high unemployment coupled with low wages for the employed.

Coal production also fails to bring societal benefits to the communities that support it. Coal counties rank low in their population's level of educational attainment. An average of 72.5 percent of the American population has graduated from high school. In only six out of the twenty-seven coal states was there high school graduation rate above the national average.

In the area of university education, most coal communities don't come close to producing college graduates at any rate approaching the national average of 20.3 percent which also hurts the communities' chances for economic improvement.

While conditions in America's coal fields remained troubled, coal companies continue to be recipients of state welfare. In order to keep coal companies within their borders, states dole out huge financial support to the coal industry in the forms of tax breaks and subsidies. Thus, in states where lax enforcement is the modus operandi, not only are mines likely polluting the environment and operating in substandard conditions, but they are getting paid to do so.

By receiving subsidies, coal companies are getting paid for costs incurred as part of normal business transactions, costs that other businesses have to cover themselves. Well-off corporations including Exxon, Peabody Coal and Kerr-McGee started to save an aver-

Office of Surface Mining

age of \$2.5 million per year when in 1996, Illinois passed legislation removing coal mining equipment and spare parts from a 6.25 percent sales tax.

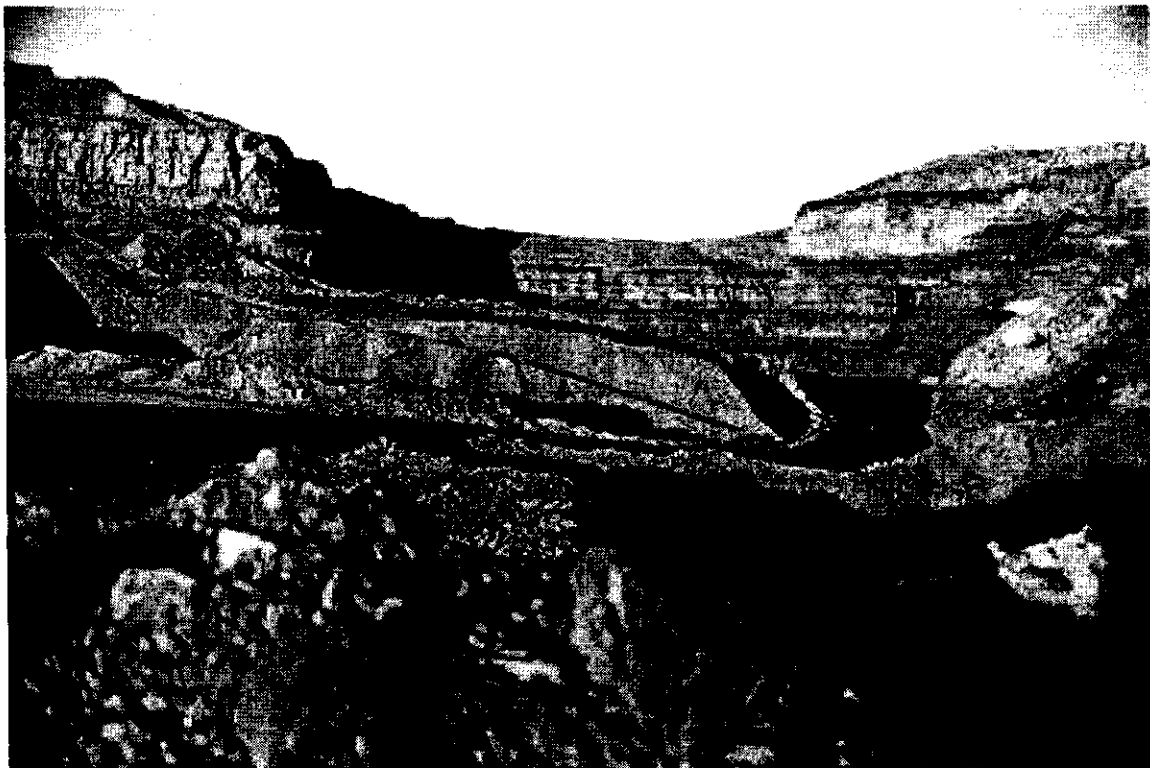
In that same year, Governor Paul Patton of Kentucky gave the coal industry a \$40 million reduction in workers' compensation contributions. In West Virginia where the per person income is less than \$9500 a year, coal companies received more than \$50 million in tax credits from July 1993 to June 1994.

By making coal cheaper than its costs, state governments are increasing the number of

years before research on renewable resources is intensified. Additionally, conservation and reclamation technologies employ more people than industries which utilize virgin resources.

OSM and states together need to subsidize the health, safety and quality of life of coal field citizens by engaging in practical and conscientious regulation. In order to meet these goals OSM must redeem the promise of SMCRA.

On the twentieth year of the Act, America must renew its commitment to keeping its promise.



Legacy. Post-strip mining devastation in Eastern Kentucky.
