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Federal Limits on State Coal Severance Taxes;Note

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FEDERAL LIMITS ON STATE COAL SEVERANCE TAXES

INTRODUCTION

The future of energy development in the United States depends upon restraining federal power in order to afford the states an opportunity to control their destinies. Western states imposed a tax on coal to regulate mining and to cover state expenses incurred due to the mining activity. A coal severance tax, levied as a fixed percentage of the market value of coal when mined, creates a fund to aid affected areas both during the mining process and after the mining companies' departure. A state must protect its right to tax and conserve its natural resources against unreasonable federal intervention.

Federal legislation, introduced in the 96th Congress, sought to place a percentage ceiling on state coal severance taxes. The nation needed such limits, proponents claimed, since the high taxes of certain western states made energy more expensive and thereby inhibited increased development of domestic energy resources. The proposed legislation targeted Montana and Wyoming, the two western states having the greatest coal reserves and the highest coal severance taxes. Although a state may tax business activity within its boundaries to pay for state services used during such activity, legislators alleged that the severance taxes of Montana and Wyoming supplemented the state general fund, thereby reducing the tax burden on their own citizens. It was hoped that federal legislation would aid in realizing the national goal of energy independence while lessening the advantages enjoyed by the resource-rich western states.

This note focuses on the current struggle between the western states and the federal government over who should control coal development. Through imposition of federal limits, this note concludes, Congress would unjustly infringe on traditional powers of the states, sacrificing states' rights in an attempt to realize energy independence. In order to preclude such action, this note proposes creation of a regional coal commission to supervise western coal development, a body which would safeguard state interests without disregarding national energy needs.

STATE INTERESTS

Increased prices of foreign oil, together with energy shortages in the 1970's, forced the United States to look for alternate, domestic sources of energy to supply its needs. Policymakers focused on coal, the only abundant fossil fuel resource in the country, to break an ever-increasing reliance on unstable foreign sources of energy.[1] The federal government continues to view greater use of coal as the key to energy independence.[2] Moreover, because of the more desirable qualities of western, as opposed to eastern coal, western coal mining has been the center of these federal energy interests in recent years.

Mining of western coal, low in sulphur and less expensive to mine than eastern coal, greatly increased during the 1970's.[3] Utilities in cities as far away as Detroit and San Antonio now use western coal.[4] Faced with the sudden rush for their coal reserves, western states imposed coal severance taxes[5] to control coal development and to provide funding for state programs dealing with both the social and environmental impacts of mining.[6] Since full-scale coal mining was relatively

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1. Coal is an abundant but underutilized energy resource in the United States. In 1976 coal consumption constituted only 19% of total energy use. Americans used 6.8 million barrels of the oil equivalent of coal, 10.0 million barrels of the oil equivalent of natural gas, and 17.4 million barrels of oil. U.S. DEP'T OF ENERGY, AN ASSESSMENT OF NATURAL CONSEQUENCES OF INCREASED COAL UTILIZATION 2-12 (1979). Yet, the United States has reserves estimated at 3.2 trillion tons—77% of the nation's total conventional energy reserves. U.S. DEP'T OF ENERGY, FOSSIL ENERGY PROGRAM: SUMMARY DOCUMENT 33 (1980).
2. Renewed emphasis on use of coal as an energy resource began with President Nixon's Project Independence and continued with President Carter's National Energy Plan. *See generally National Energy Act: Hearings on H.R. 6831 Before the House Comm. on Interstate and Foreign Commerce*, 95th Cong., 1st Sess. 1 (1977). Moreover, the budget proposed by the Reagan Administration calls for increases in leasing of energy resources on federal lands. N.Y. Times, Feb. 20, 1981, § Y, at 11, col. 5.
3. Government regulations place stringent limitations on sulphur emissions of coal-fired generating plants. *See, e.g.*, 42 U.S.C. §§ 7411-7413 (Supp. II 1978). By burning western coal, utilities need less pollution-control equipment in order to satisfy federal sulphur emission requirements. Moreover, western coal deposits lie closer to the surface and in larger seams than deposits of eastern coal. The cost of recovery to the coal producer is much less. *See* Binder, *Strip Mining: The West and the Nation*, 12 LAND & WATER L. REV. 3 (1977).

   Montana Coal Production Figures:

Year	*Gross Tons*
1971	6,983,186
1973	10,768,058
1975	22,160,236
1977	27,340,905
1979	32,545,071

Commonwealth Edison Co. v. State, — Mont. — 615 P.2d 847, 849-50 (1980), *cert. granted*, 48 U.S.L.W. 3428 (Dec. 8, 1980) (judicial notice of figures from Mont. Dep't of Revenue).

Wyoming produced seven million tons of coal in 1970. It now produces more than seventy million tons per year. *Coal Severance Tax: Hearings on S. 2695 Before the Senate Comm. on Energy and Natural Resources*, 96th Cong., 2d Ses. 154 (1980) (statement by Rep. Dick Cheney) [hereinafter cited as *Hearigns on S. 2695*].

4. *See* note 33 *infra*, for partial listing of western coal customers.
5. A severance tax is a "levy assessed at flat or graduated rates by a government on the privilege, process or act of commercially severing or extracting natural resources from the soil or water, and measured by the physical amount or the gross or net value of the natural resource produced or sold." Lockner, *The Economic Effect of the Severance Tax on Decisions of the Mining Firm*, 4 NAT. RESOURCES J. 469 (1965). Currently, 16 states have a severance tax on coal: ALA. CODE § 40-13-2 (1975); ARK. STAT. ANN. § 84-2102 (1976); COLO. REV. STAT. § 39-29-106 (1973); FLA. STAT. ANN. § 211.31 (West 1975); IDAHO CODE § 47-1201 (Supp. 1977); KY. REV. STAT. ANN. § 143.020 (Baldwin 1978); LA. REV. STAT. ANN. § 47:633 (West 1976); MONT. REV. CODES ANN. § 15-35-103 (1979); N.M. STAT. ANN. § 7-26-6 (1978); N.D. CENT. CODE § 57-61-01 (Supp. 1979); OHIO REV. CODE ANN. § 5749.02 (Page Supp. 1979); OKLA. STAT. ANN. tit. 45, § 931 (West 1979); S.D. COMP. LAWS ANN. § 10-39-1 (1978); TENN. CODE ANN. § 67-5902 (1976); W. VA. CODE § 67-5902 (1976); W. VA. CODE § 11-13-2a (1975); WYO. STAT. § 39-6-303 (Supp. 1977).
6. Wyoming enacted the coal severance tax in 1974, and Montana enacted its tax in 1975. Full-

new to the West, state legislators were forced to predict the amount of revenue required for the local aid and reclamation. Nevertheless, the legislators resolved that their states would not again suffer through the "boom and bust" cycles of the past.[7]

Through the coal severance tax, western states hope to sustain coal mining over a longer period of time and to recoup part of the wealth that mining companies ship away. Severance taxes encourage coal conservation while allowing the state to get back the money spent on solving social and environmental problems created by the mining activity. Inducing coal companies to mine at a slower rate enables a state to conserve part of its coal reserves for future generations. The severance tax increases the cost of production and tends to retard the mining process; as a result, more coal deposits remain for future use. Imposition of the tax makes it less economical for coal producers to strip mine an area quickly or to dig to the lowest level of deposits.[8] In addition to extending the mining process over a longer period of time, the tax also works to minimize the adverse environmental effects of mining.[9]

As long as demand for western coal remains high, coal producers will continue to mine. In spite of relatively high severance taxes in Wyoming and Montana, production has increased dramatically.[10] It appears, therefore, that although the severance tax decreases mining activity, coal producers continue to meet demands for western coal. More importantly, the tax creates funds for use in alleviating social problems caused by coal mining and in providing for long-term reclamation of the land.

In the West, coal deposits generally lie in sparsely populated areas. Although bankers and merchants welcome the economic surge that accompanies development of a mine site, small towns usually lack revenue to provide public services for the sudden influx of people. Costs of government services are enormous, and expenditures must be made before taxes from newly developed property are collected.[11]

When mining activity begins, local communities must undertake extensive renovation and construction of public works in order to pro-

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scale coal mining is new to these states; therefore, a period of adjustment to the development still remains. Much of the revenue has been directed at the mining areas; however, it is still too early to determine the success of the state programs. *See* WYO. STAT. §§ 39-6-302 & -303 (1977), MONT. REV. CODES ANN. § 15-35-103 (1979).

7. *See* note 19 *infra*.

8. Lochner, *The Economic Effect of the Severance Tax on Decisions of the Mining Firm*, 4 NAT. RESOURCES J. 470 (1965). The severance tax adds to the cost of recovering the coal. Variable costs, such as labor and material, rise as the rate and level of recovery increases, thereby cutting into the profit margin of the coal producer. The addition of the tax to the cost structure of the mining firm, in effect, reduces that rate and level of recovery where the firm's profits are maximized (that is, where average cost is at a minimum).

9. In addition, when the mining process proceeds more slowly, the surrounding community can better adjust to the development. *See discussion* notes 11-14 *infra*. Since the coal miners do not dig as deeply, less damage to the underground water table results.

10. *See* note 3 *supra*.

11. *Hearings on S. 2695*, *supra* note 3, at 318-39 (statement of Thomas Towe).

vide housing and basic services for mine workers. Towns must expand schools, police and fire protection, water and sewer systems, and road networks.[12] Initially, the original residents of a community must bear the cost of expansion since the expenditures are made in anticipation of subsequent tax revenue from mining development.[13] In addition, public services are often funded by local bond issues, which may require a continuous source of revenue during the period of repayment. Should the coal company and miners move out, therefore, a town may be deprived of its major source of tax revenue prior to payment of the municipal debt.[14]

The mineral-rich states of the West now recognize the value of conserving their natural resources. The "boom and bust" cycles of the past left scars on both the land and the people as mining companies exported mineral wealth out of the region. State policymakers now recognize that prosperity brought by mining does not endure.[15] Thus, the severance tax allows for coal mining yet insures that the entire cost of development and reclamation does not fall on the citizens of the state.

Western coal reserves lie under semiarid lands used primarily for grazing. Developed over thousands of years, this fragile ecosystem sustains hardy native grasses that both provide high-protein diets for cattle and prevent erosion.[16] Strip mining destroys the topsoil and makes regeneration of native grasses extremely difficult. Exotic grasses, introduced by utilities and coal companies in order to satisfy state reclamation laws, thrive only during periods of plentiful rainfall. Test plots do well with massive irrigation and fertilization but, without such intensive cultivation, cannot withstand the droughts periodically experienced in the region.[17] Revenue generated from coal severance taxes must be used, in part, for reclamation efforts and long-term research projects aimed at restoring the native rangelands.

The economies of western coal-producing states depend, in the long run, upon agriculture not strip mining.[18] Ranchers, however, cannot afford the cultivation of exotic grasses. Instead, they must rely on self-sustaining range grasses in order to stay in business. Yet, restoration of range grasses takes far longer than the duration of mining activity in

12. *See* Binder, *Strip Mining, The West and the Nation*, 12 LAND & WATER L. REV. 11-16 (1977).
13. Little, *Some Social Consequences of Boom Towns*, N.D.L. REV. 405-06 (1977).
14. *Id.* at 407.
15. "A history of boom and bust cycles has taught Montana people to view their state not only as an inheritance from their parents but also as a loan from their children—a loan which must be repaid." *Hearings on S. 2695*, *supra* note 3, at 299 (statement by Ted Schwinden).
16. K. ROSS TOOLE, THE RAPE OF THE GREAT PLAINS 122-23 (1976).
17. In 1974, a National Academy of Sciences-National Academy of Engineering study concluded that the rate and success of rehabilitating coal lands in the West depends on rainfall. In the more arid regions, revegetation of an area may, if attainable at all, take decades. NATIONAL ACADEMY OF SCIENCES, MINERAL RESOURCES AND THE ENVIRONMENT 226 (1975).
18. Toole, a noted Montana historian, points out that although Montana may prosper from the mining activity, such an influx of wealth is short-lived. The coal deposits may be gone in 30 years, but agriculture provides the state with a self-renewing industry, as long as the grazing lands are not permanently destroyed by mining. TOOLE, *supra* note 16, at 143.

the region, and reclamation laws generally require neither continued involvement by mining companies nor guaranteed restoration of natural range conditions. The coal severance tax, therefore, must provide funds for this long-term reclamation effort.

Prior to enacting coal severance taxes, states considered both direct costs and the long-term impact of mining.[19] Although the value of state services necessary to sustain mining activity in the short run may be easily calculated, the cost of complete reclamation remains unknown for many years. Once the producer leaves, however, the state alone must bear the cost of reclamation or accept the loss of productive grazing land forever.[20] By paying the severance tax, coal companies contribute to reclamation, even though their own efforts in revegetating the range lands may be ineffective. The tax creates funds for state reclamation efforts even after the mining ceases.

Although surface mining of coal is relatively new to the West, the history of Appalachian coal mining demonstrated that companies rarely complied with reclamation laws and that reclamation laws alone were inadequate to bring about restoration of the land.[21] Ohio's reclamation law, typical in the region, requires the operator to replant the surface-mined area twice.[22] If the two plantings fail, the land remains barren; yet, the producer's legal obligation is fulfilled, and the state lacks the funds to undertake reclamation on its own.

States must remain free to impose taxes both to cover adequately social and environmental costs of mining and to control the rate of development in order to save coal for the future. Although a state's power to safeguard resources for use by its citizens is limited, conservation remains a viable interest of a state.[23] In *Douglas v. Seacoast Products*, the Supreme Court struck down a licensing statute which, in effect, barred non-residents from fishing off the coastal waters of Virginia.[24] The Court ruled that the particular state regulation went too far in discriminating against out-of-state residents and in favoring its own citizens. Nevertheless, the decision reaffirmed the power of states to impose "reasonable, nondiscriminatory conservation and environ-

19. *See* Commonwealth Edison Co. v. State, — Mont. —, 615 P.2d 847 (1980), *cert. granted*, 48 U.S.L.W. 3428 (Dec. 8, 1980). "For these and other reasons, in 1975, the legislature moved to fix a tax that would provide for both the present and the future when the coal deposits were gone." *Id.* at 850.
20. The federal government contributes to the cost of reclamation, but the funds usually prove to be inadequate. Under the Surface Mining Control and Reclamation Act of 1977, the mine operator must pay for each ton of coal thirty-five cents into a trust fund for future reclamation. 30 U.S.C.A. §§ 1231-1232 (West Sup. 1979).
21. *See* Reitze, *Old King Coal and the Merry Rapists of Appalachia*, 22 CASE W. RES. L. REV. 691 (1971).
22. OHIO CODE § 1513.16(f) (Page Supp. 1970).
23. In Northern Gas Co. v. Kansas Comm'n, 372 U.S. 84 (1963), the Court stated: "There is no doubt that the states do possess power to allocate and conserve scarce natural resources upon and beneath their lands." *Id.* at 93. *But see* Pennsylvania v. West Virginia, 262 U.S. 553, 600 (1923) (West Virginia statute, requiring fulfillment of local natural gas needs before exportation); Douglas v. Seacoast Products, Inc., 431 U.S. 265 (1977).
24. 431 U.S. 265 (1977).

mental protection measures otherwise within their police power."[25]

Coal severance taxes aim at alleviating problems created by mining activity. State policymakers know how past generations suffered during the gold and silver boom and realize that the well-being of the citizenry is again endangered by coal development. If viewed as a reasonable means to attain legitimate state objectives, state taxation of mining will be upheld as a valid way to provide for the health, safety, and welfare of the state's citizens.[26] States need the revenue to care for their people and land; any federal ceiling on state coal severance taxes would hamper the states in insuring the health and welfare of their citizens.

FEDERAL INTERESTS

In the 96th Congress, legislation was introduced that threatened a state's power to control development of its resources and to raise revenue covering costs of that development. Senate Bill S. 2675, an amendment to the Powerplant and Industrial Fuel Use Act of 1978,[27] proposed a twelve and one-half percent limit for state severance taxes on coal mined on federal and Indian lands.[28] The House counterpart, H.R. Res. 6625, expanded the scope of this proposal by imposing the twelve and one-half percent ceiling on all coal mined within a state.[29] Although the bills have not yet been introduced in the 97th Congress, members of Congress continue to emphasize increased domestic production of coal.[30] This emphasis insures future conflict with any state regulation viewed as impeding increased development of coal reserves.

The federal legislation would have reduced the coal severance taxes currently levied by Wyoming and Montana. These states tax coal at seventeen and thirty percent respectively;[31] no other state taxes coal at

25. 431 U.S. at 277.
26. *See* Barwise v. Sheppard, 299 U.S. 33, 40 (1936); Oliver Iron Co. v. Lord, 262 U.S. 172 (1923). In *Lord*, the Court stated that the levy of a tax upon the mining of iron ore was not a forbidden interference with interstate commerce *per se*, even if the ore is loaded immediately upon railroad cars to be shipped out of state. *Id.* at 179. In suits alleging that a particular state tax burdens interstate commerce, the state must show that the revenue collected bears a reasonable relationship to the cost of state services provided. *See* Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 285 (1977). Also, a state may not discriminate against out-of-state consumers. Ariz. Public Service Co. v. Snead, 441 U.S. 141 (1979). For example, in *Snead*, the Supreme Court struck down a tax on electricity because it placed a greater tax burden on out-of-state consumers than on in-state consumers. *Id.* at 150.
27. 42 U.S.C. § 8301 (Supp. II 1978).
28. *Hearings on S. 2695*, *supra* note 3, at 3. Senator Dale Bumpers, a Democrat from Arkansas, sponsored the bill. *Id.*
29. H.R. 6625, 96th Cong., 2d Sess. (1980) (unpublished). Sponsored by Representative Philip Sharp, a Democrat from Indiana, the bill was passed without amendment by the House Interstate and Foreign Commerce Committee by a vote of fifteen to nine.
30. H.R. RES. 10, 97th Cong., 1st Sess. (1981) (unpublished). Sponsored by Representative Douglas Applegate, the resolution calls for renewal of a national energy plan emphasizing the use of domestic coal to displace foreign energy imports.
31. Wyoming places various excise taxes on mining activity, as well as an additional two percent severance tax on coal. The total state tax on coal, therefore, is ten and one-half percent. *See* WYO. STAT. §§ 39-6-302 & -303 (1977). County governments in Wyoming add a six and one-half percent *ad valorem* tax, bringing the total tax on coal to seventeen percent. *Hearings*

a rate greater than the twelve and one-half percent maximum set by the proposed legislation.[32]

Proponents of the bills argue that high state severance taxes add to energy costs in coal-importing states because the utilities pass the resulting coal costs on to consumers. Thus, the tax burdens consumers in states dependent on imported coal.[33] At the same time, proponents argue, the tax creates surplus revenue for coal-producing states.[34] Since a portion of the proceeds from the tax goes into the states' general funds, state governments may be able to reduce personal income taxes and property taxes paid by their residents.[35] Finally, the sponsors argue that the severance tax, by making energy produced from coal more expensive, interferes with the national goal of achieving energy independence through increased coal production and use.[36]

It is clear that Congress, pursuant to its power to regulate interstate commerce, could enact legislation limiting state severance taxes. The commerce clause permits Congress to regulate interstate commerce and to override state statutes that impair the flow of goods among the states.[37] Congress may also prevent state regulation in a particular area or allow concurrent regulation subject to federal guidelines. Any federal act striking down a state regulation, however, must be scrutinized as to whether such federal intervention impermissibly restricts the state's police power under the Tenth Amendment.[38]

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on S. 2695, *supra* note 3, at 142 (prepared statement of Senator Malcolm Wallop). Montana imposes a flat thirty percent tax on strip mined coal having a heating value over 7000 British Thermal Units per pound. *See* MONT. REV. CODES ANN. § 15-35-103 (1979).

32. *See* note 5 *supra*.

33. Virtually all of Montana's coal has been committed to long-term production contracts for use outside of Montana. Note, *The Increasing Conflict Between State Coal Severance Taxation and Federal Energy Policy*, 57 TEX. L. REV. 675, 677 (1979). Yet, the effect of the tax on the ultimate price of energy is negligible when compared with other costs. See table on next page.

34. The Congressional Budget Office has predicted surpluses from 1980 coal severance taxes of $5.1 million and $15.7 million for Montana and Wyoming respectively. By 1990, surpluses will grow to $84 million and $328 million respectively. *Hearings on S. 2695*, *supra* note 3, at 7-8 (statement by Sen. Bentsen).

35. *See* note 40 *infra*. Montana and Wyoming have yet to provide any tax relief as a result the severance tax surpluses. The increased revenue for the general fund, however, will surely allow for more government services without raising personal taxes.

36. For example, San Antonio, a city that imports coal from the Decker mine in Montana, is considering buying cheaper, foreign coal for its energy needs. 126 CONG. REC. H 10,961 (daily ed. Aug. 6, 1980) (prepared statement by Reps. James Oberstar and Philip Sharp). Thus, western coal severence taxes have a direct effect on the national price of coal. Coal fields in the Northern Great Plains and the Rocky Mountain Province contain 90 percent of the United States low-sulphur reserves that may be strip mined. Forty-two percent of this desirable coal is found in Wyoming alone. *See* Binder, *supra* note 3, at 3.

37. "The Congress shall have Power . . . [t]o regulate commerce . . . among the several states . . . ." U.S. CONST. art. I, § 8, cl. 3.

Montana's Supreme Court upheld the state's coal severance tax in Commonwealth Edison v. State, — Mont. —, 615 P.2d 847 (1980), *cert. granted*, 48 U.S.L.W. 3428 (Dec. 8, 1980). The court ruled that the tax did not interfere with interstate commerce since the severance of coal preceded the entry of the product into interstate commerce.

38. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

Monthly Taxes Paid by Average Residential Utility Customer—1979

	Sales Tax by Consuming State & City	State Taxes on Utility Company	Federal Taxes on Coal, Utility Co.	Montana Production Taxes
Illinois (Commonwealth Edison)	$1.42	$2.63	$1.06	$0.14
Iowa (Interstate Power)	0.96	1.63	1.86	0.08
Michigan (Detroit Edison)	2.45	1.20	1.07	0.12
Minnesota (Northern States Power)	1.01	1.93	1.89	0.23
Wisconsin (Wisconsin Power & Light)	1.25	1.79	2.89	0.41

Hearing on S. 2695, *supra* note 3, at 339 (prepared Statement by Thomas E. Towe).

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Comparative Costs Incurred on Delivered Price
Montana Coal

	Severance Tax (per ton)	Transportation (per ton)
Commonwealth Edison	$3.38	$17.79 (to Illinois)
Interstate Power	1.85	16.49 (to Iowa, Minnesota & Illinois)
Detroit Edison	2.84	12.81 (to Michigan)
Lower Colorado River Authority	1.41	28.72 (to Texas)
Central Illinois Light	2.42	16.32 (to Illinois)
Wisconsin Power & Light	1.32	8.68 (to Wisconsin)
Northern States Power	1.12	11.01
Minnesota Power & Light	1.65	9.84

Hearing on S. 2695, *supra* note 3, at 125-126 (prepared statement by Sen. Melcher).

The coal severance tax may be held violative of the commerce clause if the federal interest in promoting the flow of domestic energy among the states outweighs the state interest in raising revenue for the health, safety, and welfare of its citizens. In making this determination, the courts apply a three-part test to determine the validity of a state tax under the commerce clause: 1) the tax must be reasonably related to the services provided by the state; 2) it must not discriminate against interstate commerce; and 3) there must be a definite link between the taxing state and the property or activity taxed.[39] The prime objection to the coal severance taxes of Wyoming and Montana is rooted in the suspicion that the tax revenue not only compensates states for debts incurred as a result of mining, but also adds to the general revenue fund of the states.[40] As previously noted, however, states cannot accurately predict the amount of revenue needed to solve current problems and to provide for future generations.

Proponents of the federal legislation argue that "excessive" state severance taxes increase the cost of energy to consumers who depend upon western coal and thereby inhibit the flow of goods among the states.[41] Relying upon the commerce clause as a constitutional basis for this federal legislation, Congress need only have a rational basis for enacting the regulatory scheme to protect interstate commerce.[42] It is arguable, therefore, that since the severance tax increases the price of coal, it necessarily imposes a barrier to the free flow of goods among the states. Should Congress reintroduce and enact limits on state severance taxes, the legislation may be upheld under the commerce clause, assuming such federal action does not impermissibly deprive the states of traditional sovereign power.

The limitation on federal power was affirmed in *National League of Cities v. Usery*.[43] The Supreme Court held that the commerce power could not be used to regulate an integral government function of a

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39. Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 285 (1977).

40. Montana severance tax revenue is allocated as follows:

    1) 50% for a trust fund created by Article IX, section 5, of the Montana Constitution;
    2) 37.5% to the Impact Area and Education Trust Fund;
    3) 13% to coal area highway improvement;
    4) 10% to school aid;
    5) 5% for parks, cultural and aesthetic projects;
    6) 5% for alternate energy research and development;
    7) 2.5% for renewable resources;
    8) 2% for arts and state library site acquisition;
    9) 1% for land use planning; and
    10) 24% for the General Fund.

    MONT. REV. CODES ANN. 15-35-109 (1979). *See also* WYO. STAT. § 39-6-305 (1977).

41. *See* 126 CONG. REC. H 10,961 (daily ed. Aug. 6, 1980) (prepared statement by Reps. James Oberstar and Philip Sharp). *Contra* note 33 *supra*.

42. *See, e.g.*, Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964); Katzenbach v. McClung, 379 U.S. 294 (1964).

43. 426 U.S. 833 (1976). The Supreme Court struck down federal legislation which imposed minimum wage and maximum hour requirements on state and local governments. *Id.* at 852.

state. In *National League of Cities*, however, the Court failed to list those state functions that are immune from federal regulation. As a result, in each case the Court must balance the state and federal interests involved.[44] While the proposed federal legislation does not prohibit state taxation of coal, the proposed limitation may unconstitutionally interfere with a state's authority in the exercise of legitimate state regulation.

Recently, a case challenging the Montana severance tax was argued before the Supreme Court.[45] The appellants, a utility company and several coal producers, argued that the tax unduly burdened interstate commerce in violation of the commerce clause. Montana, on the other hand, argued that the tax provided revenue necessary for state services and that a state's right to tax must be upheld. In making its decision, the Court must analyze the effect of the tax on interstate commerce and strike the balance between state interest and the national need for western coal.

Limitation of coal severance taxes, either by the courts or Congress, cannot be tolerated. Both lack knowledge of strip mining in the West and cannot adequately insure the continued welfare of the people in the coal-producing states.

Severance taxes provide states with revenue for purposes directly related to mining and its social, economic, and ecological impact. Since costs of coal mining vary throughout the country, an arbitrary federal ceiling permits no flexibility for regional differences. State legislators are better able to determine both the cost of coal development and the long-term environmental impact of strip mining in their states.[46]

Although Congress has the authority to preempt a state law which interferes with the national interest, federal regulations which deprive states of the police powers reserved under the Tenth Amendment are impermissible. The legislation proposed last session reflects the important national objectives of obtaining inexpensive energy from domestic sources. The federal action, however, would cut too far into state sovereignty in an area where the states are better able to govern. The courts and Congress, therefore, must vest future control of coal development in the coal-producing states.

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44. Ripple & Kenyon, *State Sovereignty: A Polished But Slippery Crown*, 54 NOTRE DAME LAW. 745 (1979).

45. Commonwealth Edison Co. v. State, — Mont. —, 615 P.2d 847 (1980); *prob. juris. noted*, 101 S. Ct. 607 (1980) (argued on March 30, 1981). On July 2, 1981, the Supreme Court affirmed the Montana court and upheld the tax by a 6-3 vote. The Court held the tax did not violate either the Commerce Clause, under the test in Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977), or the Supremacy Clause. Commonwealth Edison Co. v. Montana, 101 S. Ct. 2948 (1981).

46. *Hearings on S. 2695*, *supra* note 3, at 128 (prepared statement by Sen. Melcher).

PROPOSED SOLUTION: REGIONAL COAL COMMISSION

Rather than impose unreasonable restrictions on state coal severance taxes, Congress should call for the formation of a regional coal commission. Composed of representatives from western coal-exporting states, the commission would work to identify and protect state interests while operating within reasonable federal guidelines.[47] Federal involvement in commission activities would be limited to a supervisory role.

The commission would begin by promulgating guidelines for taxation, production limitations, and other coal mining activities affecting the national economy. Under the proposal, states would remain free to regulate the coal industry within their borders. Should state legislation exceed the commission's guidelines, however, the state would either justify its non-compliance or revise its statute to meet commission standards.

Initially, the commission would face difficulties in forming a consensus among its members. Although the states share a concern about future coal development, interests and approaches to regulating the mining industry vary. By making state regulations in the region as uniform as possible, however, the commission could prevent any one state from gaining an unfair advantage to the detriment of the other member states.

Beyond satisfying state interests, the commission would be required to demonstrate to Congress that western states will not ignore the interests of energy consumers in the rest of the nation. Efforts to frame and enforce reasonable guidelines for the region would confirm the region's willingness to ease the nation's energy problems. Annual reports to Congress on production and tax revenue would review the commission's progress.

Upon satisfaction of the federal objectives, the commission would focus on solving the regional problems caused by coal development. By pooling the knowledge and experience of its members, the commission could develop long-range plans to alleviate the problems of western mining towns and the problem of reclamation of rangelands. Individual states may lack the expertise to solve these problems alone.

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47. In 1975, the governors of ten western states took initial steps to deal with common problems of energy development in the region. The Western Governors' Regional Energy Policy Office was formed to carry out the objectives set by participants at the conference. *See* White & Berg, *Energy Development in the West: Conflict and Coordination of Governmental Decision-Making*, 52 N.D.L. REV. 508-12 (1976).

The Water Resources Planning Act, 42 U.S.C. § 1962 (1976), allows for creation of river basin commissions, upon application to the Water Resource Council, by a state located in a particular river basin. This request must be approved both by the Council and a majority of states in the particular river basin. A commission is empowered to coordinate plans for development of water and related resources, undertake studies of water and related land resource problems in the region, and make recommendations for long-range solutions.

CONCLUSION

Although the right to control the use of resources remains important, a state cannot overtax or withhold its coal from a nation dependent on fossil fuels. Nevertheless, in sharing its mineral wealth, a state need not become a "slagheap" for the good of the country. States must guard their sovereign rights against unreasonable federal intervention. By adopting the commission proposal, western states will sacrifice some authority yet will retain their basic sovereign powers. The regional commission would accomplish national energy objectives without denying the states control over future coal development; it would also avoid the otherwise inevitable federal preemption of state energy resource regulation. The ability of states to govern within their borders is the foundation of our federal system. While the national economy depends upon future energy development, state rights cannot be undermined in order to achieve energy independence.

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