FEDERAL PREEMPTION OF STATE ENERGY POLICIES

HEARINGS

BEFORE THE

SUBCOMMITTEE ON LIMITATIONS OF CONTRACTED AND DELEGATED AUTHORITY

OF THE

COMMITTEE ON THE JUDICIARY UNITED STATES SENATE

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ON

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FEDERAL PREEMPTION OF STATE ENERGY POLICIES

TUESDAY, OCTOBER 14, 1980

U.S. SENATE,
SUBCOMMITTEE ON LIMITATIONS OF
CONTRACTED AND DELEGATED AUTHORITY,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 9:15 a.m., in room 3043, Federal Building, Billings, Mont. Senator Max Baucus (chairman) presiding.

Present: Senator Baucus.

Also present: Ken Kay, counsel.

Senator BAUCUS. The hearing will come to order.

OPENING STATEMENT OF SENATOR BAUCUS

This is the first of two hearings I will conduct on the question of Federal preemption of State energy policies.

It's not news to Montanans that our rich resources are being called this Nation's energy ace in the hole. Nearly one-quarter of the known reserves of strippable coal are found just in Montana. Nearly half this Nation's coal supply is located in the Rocky Mountain West.

Vast oil shale reserves in Colorado and Utah, rich uranium deposits located throughout the region, and oil and gas found in the West, all of these leave energy-starved easterners drooling with envy.

Most of us would agree that these resources will be a crucial element in America's drive toward energy self-sufficiency. Most of us would agree that we have a responsibility to help this Nation end its dependence on foreign oil. But whether Montanans and those who live in other Rocky Mountain States have a voice in determining how these energy resources are developed is perhaps the most fundamental question facing us today.

Ever since the Arab nations cut off our oil supply in 1973, Americans have talked of developing the natural resources located in the West.

The Energy Security Act, signed into law earlier this year, is designed to provide a major boost to alternative fuels such as gasohol and synthetic oil and gas. As this new industry develops, even more pressure to develop our coal and oil shale will appear.

Montanans, for example, took steps in anticipation of just such a situation. Our State enacted a new constitution. We enacted the

Major Facility Siting Act that establishes a responsible process for determining where energy projects should be located. We adopted a land reclamation law that served as a model for Federal strip mining legislation. We approved water use legislation creating a uniform system for determining, administering, and acquiring water rights.

And we adopted a coal severance tax to help pay for the social cost of coal development.

Other Rocky Mountain States took similar steps that demonstrated their desire to control the shape of their future.

In the past several years, Congress has been considering legislation that would severely limit a State's ability to impose a severance tax. In addition, Congress almost enacted legislation creating an Energy Mobilization Board. This Board would have been empowered to preempt State decisionmaking in the energy field. It also would have severely limited a State's or individual citizen's ability to challenge the work of that Board.

These proposals have been made and considered in the name of national energy independence. They have been reviewed by the U.S. Senate and House committees that handle energy policy.

However, these proposals do not address energy issues alone. Rather, they would profoundly undermine the way the Federal Government and the States of this country have done business for almost 200 years.

Today, the U.S. Senate Judiciary Committee begins hearings on Federal preemption of State energy policies.

The 10th amendment of the U.S. Constitution states, "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."

The spirit of the 10th amendment mandates a continued recognition of the essential role of the States in our system of federalism.

The question for us to address today is whether the 10th amendment of the Constitution, and whether the Constitution as a whole, prevents Congress from enacting the kinds of State preemptive proposals such as the severance tax limitations and the Energy Mobilization Board.

In addition, even if the Constitution permits Congress to enact these proposals, is it advisable for Congress to change the Federal-State relationship so profoundly?

These are the basic questions that we hope to address today.

In addition to these very broad questions, we hope to address some specific constitutional questions.

For example, what constitutional considerations are relevant to Federal legislation that would limit a State's authority to enact a severance tax?

Does the Constitution permit Congress to assume the role of determining what amount of severance taxation by a State is reasonable?

If a Federal limit is permissible, does the Constitution in any way limit Congress in exercising its authority to impose a Federal limit on State severance taxes?

Does the Constitution limit the power of the Federal Government to displace traditional State and local decisionmaking processes?

Does the Constitution permit Congress to assign to a Federal court legal issues concerned exclusively with State or local issues relating to energy projects?

Does the Constitution permit the Federal Government to impose deadlines on State and local decisionmaking activities concerned with energy projects?

In order to address these questions, we are fortunate to have with us today a group of very distinguished citizens. They include Ms. Nancy Wood, representing the Governor and attorney general of Wyoming; Mr. Byron Dorgan, tax commissioner of North Dakota; Mr. Joe McElwain, representing the Western Regional Council; Mr. Bob Hall, representing the Western Governors' Policy Office; Ms. Helen Waller, representing the Northern Plains Resource Council, and Mr. Bob Tully, representing the Western Coalition of Resource Councils.

I am very much looking forward to the testimony of all these individuals and look forward very much to exploring this important subject. In addition to today's hearing, we will be conducting an additional day of hearings in Missoula next Monday.

The first witness is Ms. Nancy Wood, representing the Governor and the attorney general's office of Wyoming. Ms. Wood, we're happy to have you here. I see you have a statement. If you wish to summarize it, summarize it. Proceed any way you wish.

Ms. WOOD. Thank you.

STATEMENT OF NANCY D. WOOD, REPRESENTING GOVERNOR ED HERSCHLER, AND ATTORNEY GENERAL JOHN D. TROUGHTON, STATE OF WYOMING

Good morning, Mr. Chairman. I am here on behalf of Governor Ed Herschler and Attorney General John D. Troughton to discuss two recent legislative proposals which, in my mind, represent unprecedented Federal intrusions in the name of energy independence, into State and local concerns over the health, safety, and welfare of its citizens. More specifically, the proposals which seek to establish an Energy Mobilization Board and to limit the amount of State coal severance tax which may be imposed would set a very dangerous precedent, both legally and practically, for the use of the national commerce clause power at the State's expense.

These two proposals have more in common than their noble goal of removing impediments which curtail national energy development and independence. Both proposals whitewash the energy problem. They fail to discuss the fact that it is the regulatory and fiscal policies of the Federal Government and not the States that delay energy development and cause the spiraling costs of coal. In addition, they both threaten to undermine the already precarious Federal-State balance in the area of natural resource development and environmental protection.

As we all know, the purpose of the Energy Mobilization Board is to cut through bureaucratic redtape in an effort to expedite completion of those energy projects which will reduce national dependence upon foreign sources of oil. In general, Wyoming supports an expedited decision process for critical energy facilities. However, the most recent EMB proposal raises serious questions, both in its ability to

achieve its stated goals and in its ability to trample on State and local authority in the process.

There has been little discussion of the sort of redtape that actually delays energy development. Lest we forget, it was Congress that passed the National Environmental Policy Act, the Clean Air Act, the Surface Mining Act, the Toxic Substance Control Act, the Federal Water Pollution Control Act, and a host of other public laws designed to protect and preserve the Nation's environment from increased resource development. This decade of environmental legislation and regulations, with little attention toward reducing duplication and coordinating permit procedures, has now hobbled the Nation's ability to meet its energy demands. As a general proposition, Wyoming believes that the Federal legislation is sound. However, much can and should be done toward curtailing excessive Federal regulations and coordinating Federal and State agencies in an effort to reduce regulatory overlap and duplication. In short, legislative efforts should be focused where reform is needed most: the Federal administrative sector.

The EMB is not a substitute for this much-needed regulatory reform. However, it does have legitimate objectives and purposes, and, with some careful attention, could expedite review processes without riding roughshod over State and local authority. Some specific suggestions are the following:

First, improve the front end of the EMB designation process. More attention should be given to State and local participation in the decision to designate any critical energy facility. This early input would not only avoid potential clashes but would insure that no project is put on the fast track which might later become a technological, economic, or environmental disaster.

Second, any legislation should insure that permitting decisions are based on complete and accurate information. Most delays which Wyoming has experienced occur due to incomplete information or project changes. Requiring a condensed review and decision schedule, which triggers from the date of the project application for designation, is dangerous. A more reasonable alternative would be to focus on the time that an agency receives a complete permit application. This recognizes the States' legitimate interest in having adequate data upon which to base permit decisions, monitor construction, and regulate the operation of approved projects.

Third, many Wyoming regulatory agencies are presently working toward streamlining permit processes. In light of this, an applicant for a priority energy project should specify the agencies which are the source of delay. Not everyone is a problem. Therefore, not everyone should suffer. In addition, this would provide an incentive for agencies to independently evaluate and improve their efficiency.

Finally, there are a number of means which have been overlooked that could help expedite decisions. Included in these are expanded technical assistance to the States, greater State access to Federal information, and Federal support for development of State EMB's.

As I said earlier, the State generally supports the objectives of the EMB. However, certain powers are more than a little controversial, involving novel questions of constitutional law and practical effect.

The potential of bumping up a State decision to the Federal level should a deadline be missed is the central enforcement mechanism of

the EMB's scheduling authority. This particular power raises serious legal and practical problems. On the legal side, it doesn't take a constitutional lawyer to question the propriety of having Congress authorize a Federal agency to exercise State agency authority based on State and local laws. Concededly, Congress can, on an adequate record, preempt all State and local law that interfered with the construction of a critical energy facility. Similarly, on such a record, Congress can entice State action under the threat of substituted Federal action based on Federal laws. However, this proposal involved neither Federal preemption nor substituted Federal action. Rather, it establishes Federal intervention for a single decision based on State law while otherwise leaving State authority intact.

In my mind, this proposal, in fact, illegally conscripts State and local personnel and services in violation of the 10th amendment. Following any permit approval, certain inspecting, monitoring, enforcing, and reporting services are required by State agencies under most State laws. In addition, often one permit approval triggers a whole series of other State and local agency permitting or approval actions. The compulsion of State and local action is hidden in the current EMB proposal; however, it is no less present.

On the practical side, it is questionable whether another Federal bureaucracy can implement, on a moment's notice, laws and regulations written by Congress, Federal agencies, State legislatures, State agencies, and local governing bodies. Any attempt to do so will only introduce delay and confusion as the EMB staff struggles to master the relevant laws and regulations and analyze the record already assembled by the agency. More importantly though, this attempt threatens poor decisions, which may inevitably lead to irreparable damage to State lands and resources.

The grandfather provision, which would exempt certain critical energy facilities from performance standards enacted after the designation application, also involves serious legal and practical problems. Such standards typically have nothing to do with regulatory delay and are drafted as uniform laws of general applicability to all other similar industrial concerns. In addition, the grandfather provision is totally unclear about judicial interpretations of existing law and is, unfortunately, too clear about the waiverability of regulations promulgated under existing law. This is particularly troublesome for any new technology, inasmuch as the State simply may not know what environmental protection standards are necessary until too late in the process.

Although the President correctly touches the national frustration with bureaucratic redtape, his solution is too trisky: trusting the EMB, with questionable powers, to make better decisions than experienced State and local agencies. A more thoughtful approach which encourages cooperative and innovative efforts and takes a hands-off approach when these efforts hold promise may prove to be a better model for the energy problems of the future.

The second legislative proposal which I'd like to address involves attempts to limit the amount of State severance tax which may be imposed on coal mined within a State. A review of the bills to limit State severance tax indicates that Congress finds its source of power based primarily on the commerce clause. The bills essentially regulate a legitimate State exercise of its taxing authority by placing a 12½ percent ceiling on the amount of tax which may be imposed.

Conceding that the constitutional issues are far from resolved, I believe the bill represents an unconstitutional infringement on the State's freedom to structure integral operations in areas of traditional Government functions.

Supreme Court cases recognize that interstate commerce, in utilizing the protections and services of a State, is required to pay its way. Therefore, it's not surprising that States see an unavoidable need to impose a severance tax that is fairly related to the governmental services the State provides when its natural resources are developed. Wyoming's severance tax, for example, helps pay for hospitals, streets, roads, water supplies, sewers, education, and impact assistance to cities and towns. If the State is forced to make other decisions regarding how to provide these essential governmental services outside of the severance tax option, Congress would be imposing a burden that will alter fiscal policies, curtail traditional State and local activities, and unconstitutionally regulate provision of traditional services.

This result falls squarely within the Court's prohibition in *National League of Cities* v. *Usery*, which invalidated a Federal law due to its significant impact upon the functioning of the State and local governments. In my estimation, any severance tax limitation would represent another unlawful Federal meddling in protected State policy decisions.

Apart from the above argument, the Montana Supreme Court's decision in *Commonwealth Edison* v. *Montana* raises serious questions regarding the existence of any Federal power at all supporting the bills. In the court's words,

> The severance itself is a taxable event and the Montana statutes here tax that event in advance of any entry of the coal into commerce. In other words, the coal is produced, and that production is taxed. Montana's coal severance tax is therefore ahead of and preliminary to the sweep of the power of Congress to regulate commerce. If this be not so, Montana and all other States would have to concede that any power of a State to tax the production of products which may eventually enter into interstate commerce is at the whim or forbearance of the Federal Government. Neither the U.S. Supreme Court nor any other court has so held, and well enough, for such a decision would shatter the shield of judicially approved States' rights in this field.

Enough has been said on the States' rights issue, leaving perhaps the most important points for discussion. It is obvious without argument that severance tax costs are only a small portion of total generating costs of electricity. A review of 16 Federal laws, regulations, and taxes indicate that the regulatory and fiscal policies of the Federal Government account for more than 50 percent of the price of coal. It is the Federal Government and not the States that impose a 12½ percent royalty rate, a 35-cent-per-ton abandoned mine fee, and reclamation costs ranging from $1.25 to $2.50 per ton. Beyond this, the Interstate Commerce Commission allows railroads to charge 107 percent of the cost of shipping coal. Despite these facts, Wyoming and other Western coal States are singled out as the only reason for high utility bills. The facts, however, do not bear this out.

In a very real sense, Wyoming is only asking for fair treatment and informed decisionmaking. Proponents of the bill in Texas and Louisiana should have to justify the billions of dollars their respective States enjoyed through oil and gas energy dealing. In addition, the Midwest consuming States should be asked to justify their 4-percent sales tax

on the sale of electricity, which generates more revenue on a per-ton basis than a 30-percent severance tax on coal. I might add that Wyoming only imposes a 10½ percent, not a 30-percent severance tax on coal. We come nowhere close to receiving the revenue that these Midwestern States are receiving through their 4-percent sales tax. However, these Midwest States clearly cannot support their taxes based on environmental degradation and socioeconomic impacts.

In closing, I would once again like to stress that it is both unconstitutional and unfair that the citizens of Wyoming should have to bear the entire environmental, social, and economic costs of coal and other energy development without receiving the necessary financial relief to mitigate these impacts. The costs must be internalized so that the price which the consumer pays for coal, and ultimately electricity, reflects the real cost of coal production.

Thank you for this opportunity to state my view.

Senator BAUCUS. Thank you very much, Ms. Wood.

I'm not a constitutional lawyer. One of my favorite courses when I was in law school was constitutional law, but I haven't practiced constitutional law.

It's my view that the Supreme Court, very well may find the Energy Mobilization Board proposal to be constitutional in most respects. I'm just wondering whether you agree with that, and if you don't, why not. I'm hoping you don't agree with that. But, I just worry that the Supreme Court will find that Congress can establish an EMB under the authority of the Commerce clause. I am interested in your views on that subject.

Ms. WOOD. Well, I would hate to see it reach the Supreme Court because I think everyone would agree that the Supreme Court historically has not been willing to rest decisions on the 10th amendment and limit the national Commerce clause power. Rather, they view it as almost over—you know, so overreaching that there is practically no limits on the Commerce clause.

I think that any decision, that any argument before the Court would have to focus on the fact that the Federal Government is coming in for one decision and then they're leaving, leaving the State to deal with the inspecting of the facility that they approved, the enforcing of the State laws on the facility, and, therefore, the Federal approval is only part way. They don't approve it and inspect it and enforce it to make sure that the facility is being maintained. I think that is the only argument that the Court would be sensitive to, and I think that that argument probably is not strong enough to overcome all of the legislative history which really calls us the War Mobilization Board and rests it on such national concern. I just think that the Supreme Court—they would have the basis to rest an argument on. I just don't think that they would.

I have to agree with you. I'm hoping that Congress will be sympathetic to the State.

Senator BAUCUS. I'll go to the next point. It's really up to Congress——

Ms. WOOD. That's right.

Senator BAUCUS. It's up to the legislature to prevent an EMB from being enacted. This is an area where I should have the answer rather

than you. But what suggestions do you have for the Wyoming delegation and the other Western State delegations as to what arguments we can make to our eastern colleagues that will help them realize that the EMB proposal is unwise, unsound policy? How can we convince them that to enact such a Draconian measure would be a significant intrusion into the traditional prerogatives of the States?

Ms. WOOD. I think that only certain of the powers should be reviewed by Congress. I think that it is Draconian to bump up the decision that the State and local agencies need to make to the Federal sector, and I would hope that that way, together with the grandfather clause, that those two would receive the most careful review by Congress.

Senator BAUCUS. Do you agree, too, that the more the States develop their resources in a responsible way, the less the States impose undue delays on the decisionmaking process, the more unlikely it is that Congress would enact the EMB?

Ms. WOOD. Yes.

Senator BAUCUS. I ask that because I think some people wonder if perhaps the Montana Siting Act is a little cumbersome. It does take a long time under the Montana Siting Act, for the Montana Board of Natural Resources to finally reach a decision. I'm told that California has a citing commission which can overrule other agencies in California, and I'm told that it works pretty well in California. I don't know if you are familiar with the California process, and I don't know what processes exist in Wyoming or other Western States. Those of us in the States must keep in mind that we are Americans and do live in a nation. So it's a matter of States protecting their own resources but protecting them in a way that's consistent with the energy needs of the entire country. Would you agree that the more the States have boards and commissions which are making reasonable decisions in a timely fashion the more unlikely it is that Congress will feel the need to act?

Ms. WOOD. Yes. I think that the States should, right now, begin to develop records of their past permitting actions, focusing on not only the ones that went through without severe hangups but the ones that had hangups, and try to explain why, trying to develop memorandums of understanding between State agencies which reduce duplication in permitting, such as between the State engineer who controls water and the construction of impoundments and, perhaps, water quality, which also regulates impoundments. You know, they look at the same issues. There ought not to be a lot of regulatory overlap and delay.

Senator BAUCUS. In the last year, I have been surprised at how little people in the Western States have been concerned with the EMB. People in State government were very concerned. Governor Lamm of Colorado was exercised over it, but for some reason, there wasn't a lot of groundswell of opposition to the EMB among the people in the Western States. I'm curious if you have any views about why that phenomenon occurred. I did not receive a lot of mail concerning the EMB in my office. I didn't notice a lot of editorial comments in the Montana papers. I don't know about other States' papers. We in Montana are very exercised over the proposed limit on the Montana coal severance tax, but Montanans didn't really think much about the EMB.

I wonder if it's too complicated, or if westerners are caught between their desire to control their destiny on the one hand, but their frustration with Federal rules and regulations on the other.

First, did you find a groundswell of opposition to EMB in Wyoming and other States, and if you didn't why not?

Ms. WOOD. I didn't find a lot of people concerned about it outside of the State agency officials who felt like they were going to be the most scrutinized as a source of delay.

I think that that's probably due to the fact that the EMB probably actually regulates State agencies and doesn't regulate the people. The people somehow, you know, if I could talk about them sort of broadly, see somebody making the decision, and it takes a relatively experienced person, I think, to realize which Federal agencies are the sources of delay and which State agencies and which really is the worst to work with, and they see the EMB as sort of watchdogging the State agencies and think perhaps that that's good, and I don't think that they recognize some of the more complex issues.

Senator BAUCUS. Do you agree that the EMB, particularly the version as it came out of conference and was voted on in the House, could have very significant and deleterious effects on the Western States and on people living in Western States?

Ms. WOOD. Oh, yes, I do. Very much so, yes.

Senator BAUCUS. Turning to the severance tax, it would be helpful to me to know what use Wyoming makes of its coal severance tax. What adverse consequences of development has Wyoming attempted to address with its severance tax?

Ms. WOOD. Well, I think the best discussion of that is to explain how the 10½ percent of the severance tax income is distributed: 1 percent goes to the highway fund which pays for new highways and roads to coal mines; 1½ percent is contributed to the water development fund for municipal water supplies and industrial water supplies that the mineral and energy sector actually need in order to grow.

Put directly back—to cities and counties is 2 percent in the impact area to finance sewers, streets, and municipal water services; 1½ percent is put into capital facilities to account for schools and community colleges. Perhaps most importantly, 2½ percent goes into a permanent trust fund. That's actually an insurance policy for the State to utilize once its resource base is gone, and then a fair amount——

Senator BAUCUS. I'm sorry. I missed that. The last portion went where?

Ms. WOOD. The 2½ goes into what's called a permanent trust fund. It's actually an insurance policy against the time when our mineral resource base has been depleted. And then 2 percent goes into the general fund, and that, a large portion of that, is also redistributed back to the local units of government.

In general, there was an attempt to distribute it through the places where we saw it was going to be utilized most in terms of schools and hospitals, sewers, water development projects, and, then like I said, the largest part goes into this permanent trust fund. There was just a lot of—well, we benefited a lot from seeing the Appalachian States end up throwing up their hands once they had no more industrial development in terms of resources, and in order to provide the schools

and the traditional government functions once our resource base is gone, we need this permanent trust fund to get the money from in the future. We don't have a lot of other industrial income.

Senator BAUCUS. You say 2½ percent?

Ms. WOOD. Yes, 2½ percent, and then all but another 2 percent goes into smaller areas such as the water development fund, the highway fund. It's sort of parceled out in terms of where we expect to need money the most.

Senator BAUCUS. How much did Wyoming raise in the last year through its coal severance tax?

Ms. WOOD. Let's see. I do have that figure here. No, I guess I don't. I'm sorry. I don't know how much it was.

Senator BAUCUS. My rough recollection is it was close to $100 million? Is that correct? Would that be correct?

Ms. WOOD. OK. I think that it would probably be close to $10 million.

Senator BAUCUS. That's all?

Ms. WOOD. Well, the State total of coal in 1979 was 72 million tons, and then we impose a 10½-percent severance tax, and it's just—the local, counties, and, you know, local governing bodies may impose additional tax, but it's not the 17 percent that is frequently referred to.

Senator BAUCUS. In Montana we don't have a rate of 30 percent either.

Ms. WOOD. I'm not positive of that.

Senator BAUCUS. But the point is that all the revenue goes to compensate for costs that are caused by strip mining in the State? Is that correct?

Ms. WOOD. Yes. All of it.

Senator BAUCUS. Except for the portion that goes to the——

Ms. WOOD. To the general fund, and then part goes into the general fund which is actually sort of our year-to-year treasury, and a large portion of that goes into municipal development, impact assistance. But other than that, in the permanent trust fund itself, the money is parceled out to the areas where we think we're going to need money the most, the highway fund and water development fund.

Senator BAUCUS. OK, Ms. Wood. I appreciate your testimony very much. Thank you.

Ms. WOOD. Thank you, Senator.

Senator BAUCUS. The next witness will be Joe McElwain, who is today, and I guess on other days as well, representing the Western Regional Council.

STATEMENT OF JOSEPH A. McELWAIN, CHAIRMAN, MONTANA POWER CO., REPRESENTING WESTERN REGIONAL COUNCIL

Mr. MCELWAIN. Thank you, Senator.

Senator BAUCUS. Welcome Joe. Thank you for being here. I appreciate your presence. I know you're very busy.

Mr. MCELWAIN. I'm delighted to have an opportunity to appear before you, Senator. You and I have discussed many subjects regarding the State of Montana in your tenure, and I have always found you a very attentive listener to the respective views of all the people that are involved.

Today, Senator, I'm here representing the Western Regional Council. I'm a member of the board of directors of the Western Regional Council, and also I'm chief executive officer of the Montana Power Co.

I am presenting a statement today on behalf of the Western Regional Council, a coalition of mining, energy, recreation, transportation, banking, and utility business interests in the Intermountain West.

The Western Regional Council is pleased to participate in these hearings and the symposium scheduled on Ocotber 21 in Missoula, Mont., both focusing attention on the preemption of States' rights by the Federal Government.

The WRC has been actively involved in developing positions and attempting to influence Federal policy decisions on water, energy, environment, and other issue areas. In most cases, the WRC has decidedly favored a reduced Federal role and a greater emphasis on State flexibility, enforcement, and policy determination. In that regard, our organization has worked closely with the Western Governors Policy Office, WESTPO, the Western Interstate Energy Board, WIEB, and individual Governors to develop and seek to have implemented policy positions which are compatible and which are mutually felt to be beneficial to our region as a whole. Notably on Energy Mobilization Board proposed legislation, clean air and coal leasing policy, WRC has sought to coordinate and cooperate with the western Governors.

In the past 12 months, the WRC has made individual presentations to each of the intermountain State Governors, noting concerns on energy policy and land use implementation of the Clean Air Act as a means of communicating, and where possible, cooperating on these issue areas so vital to our region.

Recently, the Western Regional Council is participating in WEST PO's project, "The West and the Eighties," in two phases, developing a proposed legislative alternative to EMB legislation and collaboration on positions on reenactment of the Clean Air Act.

All of the council's efforts have by no means been directed with western Governors. Our positions have been translated into action at the Federal level through lobbying activities in the Congress and through key White House officials.

Senator, you have called these hearings to especially consider ramifications for the State-Federal relationship and constitutional implications on that relationship which may be affected by proposed Federal legislation to place a cap on State severance taxes and to create an EMB potentially empowered to set deadlines for State agency decisionmaking and, if they should fail to act within the deadline, make decisions in lieu of action by the State or local authority on designated priority projects.

The WRC would like to speak directly to these particular issues as well as address related concerns affecting State prerogatives and the Federal Government.

As stated earlier, the Western Regional Council has attempted to work closely with WESTPO and WIEB and individual Governors, and that is not without good reason. Our member companies have, by

and large, enjoyed a good relationship with the States in which they are active. The State government is usually closer to whatever situation may arise, is more accessible, and is more fully aware of unique circumstances that may need special attention. By the same token, companies working within a given State usually intend to remain active there, and it is in their best interest to develop a working relationship with State officials and to also work toward common goals of a healthy economy and an environment that will afford a quality living experience for the company employees along with all citizens of the State. When serious problems do arise, it is usually the Federal Government, not the State government, which is responsible.

The Western Regional Council has not actively become involved in the severance tax cap issue. However, in a response to a request from WESTPO's Governors, Council Chairman J. D. Geist, and the WRC energy committee chairman, James C. Wilson, did sign a letter in opposition to the Federal legislation, a copy of which I have attached to my testimony.

[The document referred to above appears in the appendix.]

The council believes that States should not be deprived of their constitutionally reserved powers to raise revenues. While Federal policies in regard to public land management and energy development potentially have dramatic impacts on Western States, the individual States have largely been left to their own devices as to how to manage rapid growth and cope with related impacts requiring public services, schools, roads, law enforcement, and the like. These individual States can best decide how to raise the revenues necessary to deal with these impacts. The marketplace will determine what is a reasonable severance tax on coal or any other resource far more efficiently than can the U.S. Congress. Coal consuming interests will go elsewhere if a severance tax is too high, and, in turn, a State may reconsider its tax rate if it believes it is being priced out of the marketplace.

The Western Regional Council has been far more active on proposals to create an Energy Mobilization Board. After a thorough analysis of the proposals, the council adopted a resolution in August 1979 outlining its position. The resolution is attached.

The basic position of the council is that the Energy Mobilization Board legislation represents an effort to treat symptoms rather than address causes rooted in the ill-advised regulations and legislation over the years. It supports a concept of a Federal entity empowered to expedite decisionmaking regarding priority energy projects but does not feel the legislation should include the power to overrule substantive positions of existing State and local law. It believes that such legislation should include a grandfather clause exempting all projects under construction from any delays due to subsequent enacted or promulgated environmental requirements.

I would emphasize that the WRC feels that there must be some accommodation between State and Federal responsibilities to overcome the costly delays involved in the decisionmaking process. Duplication of the decisionmaking process should and must be avoided. On the other hand, narrow, parochial decisions cannot override the national interest in some areas of resource development.

Industry in general has become disenchanted with the EMB concept. As envisioned by the Senate-House conferees, a project seeking approval and all of those agencies involved in the project permitting process are confronted with another layer of bureaucracy which may in practice do little beyond complicating the existing procedures.

The WRC is currently working with WESTPO to develop an alternative legislative proposal to the EMB which would protect State prerogatives and curtail Federal intervention. At the same time, discussions are underway to streamline individual State permitting processes as evidenced by the Colorado review process and individual State siting laws. The State efforts can proceed with or without an EMB. And at this point, I'd like to call to the Senator's attention a recent editorial in the Billings Gazette which gives some substance to the Colorado review plan that I thought was very helpful in trying to put together various agencies and hurry up the decisionmaking process.

Senator BAUCUS. Those are different Colorado agencies?

Mr. MCELWAIN. Right.

Senator BAUCUS. Is that similar to California, do you know?

Mr. MCELWAIN. I'm not familiar with California, and I just ran across this the other day, and I would like to have it placed in the record at this point.

Senator BAUCUS. It will be put in the record.

[The exhibit referred to above appears in the appendix.]

Mr. MCELWAIN. We believe serious constitutional questions would be raised if an EMB were empowered to waive State and local laws or to make decisions for State authorities. Ensuing legal actions are a certainty which would only further impede project construction and operation.

Furthermore, by fast tracking a number of priority energy projects, State agencies may appoach a threshold where they do not have the manpower resources available to meet an EMB imposed project decision schedule, let alone proceed with off-track project permitting procedures or other responsibilities.

While the focus of this hearing is on the severance tax and EMB issues, there are numerous areas in which the WRC feels Federal action limits or forecloses on State prerogatives. Notably amongst those is the application of the Clean Air Act Amendments of 1977. The Western Regional Council has developed a series of maps for each of the 11 public land States which graphically demonstrates the land use implications of the 1977 amendments. In effect, the amendments create a buffer around each class 1 area which will vary in size depending upon topographic and meteorologic conditions. State siting and planning endeavors will seriously be affected by this situation as verified by the recent denial of a PSD permit by EPA for the Warner Valley powerplant in Utah. EPA denied the permit for this facility, stating that it may impact on the air quality at Zion National Park, a class 1 area about 30 miles northeast of the proposed plant location.

Proposed EPA visibility regulations may further extend Federal control over traditional State land uses. As proposed, a Federal land manager could preempt a State's siting authority over the extensive areas outside the boundaries of a national park, wilderness, or other class 1 area.

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The WRC feels that within the context of this hearing it is appropriate to briefly discuss the concept of regional variations. If, in their development and implementation of regulations, Federal agencies are required to take into consideration unique circumstances which vary from region to region, the difficulties of Federal regulation, both to the administrator and to the public or private sector, could be minimized.

WRC promoted inclusion of such a provision in the regulatory reform bills considered in the 96th Congress and was pleased that a regional or geographic variation provision was included in each of the major regulatory reform bills reported from committees in the House and Senate. We are grateful to you, Senator Baucus, on the help you gave us on these provisions.

This concept exemplifies the root of the matters before the subcommittee. Each of the States, each region, is different. There are variations in demography, topography, climate, and economy. While there are a great many common denominators, not all matters can be addressed equitably with one inflexible and rigid Federal standard. Nor can the Federal Government always govern best. There are areas where the individual States have traditionally had the lead role and where they are better equipped to deal effectively with their own unique circumstances. The Constitution recognizes the limits on Federal authority. Once again, as you are doing through this hearing, we need to reaffirm the richness of diversity in our Nation and reassert the distribution of governing authority as envisioned by the Founding Fathers.

Senator BAUCUS. Thank you very much, Joe. I'd like to better understand your council's view on the Energy Mobilization Board. You are saying that the Energy Mobilization Board should not override local and State laws.

Mr. MCELWAIN. Substantive laws.

Senator BAUCUS. Substantive laws. From that response, I infer that the council does believe it would be proper to override State procedural determination. Is that right?

Mr. MCELWAIN. I can speak only for myself but basically, I think the council recognizes that we do have an energy problem in this country and that one of the greatest things that we have got to do is in some way devise abilities to internalize our energy resources so that we are not taking $80 to $100 billion a year out of our economy through the purchase of foreign oil, and that they recognize that there is a need to some way work out the apparent maze between the Federal and State conflicts over siting, clean air, and the like. To the extent that EMB would get on with the job, I think that they support a concept which would procedurally get rid of some of the roadblocks that are involved in the siting at the present time.

Senator BAUCUS. As a general proposition, would you agree that EMB should simply address delay created by Federal agencies? Would the ideal be for the Federal Government to take care of Federal agencies and for States to take care of the States, so long as States are reasonable?

Mr. MCELWAIN. Well, I guess it goes down to a situation of attacking very major problems that are involved in the future of the United

States as a whole and States individually. And in my testimony, I think there has got to be some rationale between the jurisdiction of the two. I do think there are areas where the Federal Government does have some responsibility, and I think that the more that we can dovetail those two together so that they do become, in effect, a working together relationship on a common problem rather than fighting each other, the better, I think, we would attack the problems that are on us.

Senator BAUCUS. It just seems to me that the Constitution really does not protect the West, or other States, for that matter. This appears to come down to a matter of political power.

Mr. MCELWAIN. I'd have to say that about what little I know about constitutional law, there has been a tremendous expansion of the concept of Federal preemption in the last 50 years over what previous concepts were with respect to State and Federal legislation, and I guess that comes through the correlation of our economy as a much more sophisticated intercommerce type of thing than when there was a lot more self-sufficiency within the State boundaries than there is in today's economy.

Senator BAUCUS. Montana and other Western States can not only develop the resources in a way that's consistent with our local needs but in a way that is consistent with the needs of the entire country. We need to educate other people as to what our problems are. We need to explain that the coal severance tax pays for some of the costs of dislocations and that we want to protect some of the unique qualities that we have in our State.

Mr. MCELWAIN. I feel very strongly about the concept of State taxation in the area of severance taxes is one that should be preserved by the States. I think that they have to be responsible in imposing it, but it does portend a situation where if the Federal Government can limit, to some extent, what a State can do in this area under the interstate commerce clause or under the commerce clause of the Constitution that ends up with an ultimate result that the States probably are going to be limited to ad valorem taxes, if you wanted to carry that to a conclusion of tax effects on other areas through the commerce clause, and I very much think that that is not a precedent that we want to instill into our philosophy in the United States.

Senator BAUCUS. In your statement, you said that the council has opposed the caps on the coal severance tax. It was the chairman of the council and I have forgotten the other gentleman's name on the council who signed the letter in opposition to the severance tax cap.

Mr. MCELWAIN. In opposition? Mr. Wilson. He's head of the energy committee.

Senator BAUCUS. As I understand it, the council fears the precedential effect of a cap on severance tax. You see it as an intrusion in the States' authority to impose taxes, and on its general authority to regulate its own affairs. Does the council also agree that States are imposing severance tax to pay for costs, social costs and direct economic costs, as a result of stripmining operations?

Mr. MCELWAIN. I believe most States are using their funds for that purpose. I can't speak for the oil and gas tax——

Senator BAUCUS. Right, but on the coal severance tax, though?

Mr. McELWAIN. On the coal severance tax, I believe that's the case.

Senator BAUCUS. So there is a 100 percent correlation between the tax and the use of the proceeds of the tax?

Mr. McELWAIN. I believe Montana's tax is probably a little high. I think that it is, has some effects competitively with Wyoming on Montana's ability to sell its coal, but I don't believe it's unconstitutional or that it should be legislated out of some arbitrary percentage.

Senator BAUCUS. But whether or not Montana's higher tax places Montana in a competitive disadvantage, would you agree that Montana's proceeds are being used to compensate for the effects of coal stripmining in the State?

Mr. McELWAIN. I believe they are, and I might point out that consumers of Montana Power Co., for which I am responsible, pay the same tax on the coal that is burned for use instate and for Puget Power & Light in the Bellevue area and just as much as do the users of Montana coal in Detroit.

Senator BAUCUS. So even you as chief executive officer of the major utility in the State say that it's your view that the proceeds from Montana's coal severance tax, are being used to compensate for the effects of stripmining?

Mr. McELWAIN. I believe they are.

Senator BAUCUS. That's good to hear. That's helpful, because it's important to carry that message to other Congressmen in other parts of the country.

Mr. McELWAIN. I think the percentage location of utilization of the tax can and should be reviewed as Montana goes along.

Senator BAUCUS. I agree with that.

Mr. McELWAIN. Whether or not the 50 percent that starts, I believe this year, going into a trust fund, is the proper number, I think that ought to be reviewed as we move along.

Senator BAUCUS. I think we should continually review that.

Mr. McELWAIN. Sure.

Senator BAUCUS. But I also feel that the States have the prerogative and even the right to determine the allocation of those proceeds.

Mr. McELWAIN. I think that there has to be some responsibility in State government to recognize that there are these areas of national concern about energy that must be addressed, and I think for the most part that the States have been responsive. I believe the Montana situation is one that we do need to condense the time of decisionmaking within the State under the siting act.

Senator BAUCUS. Do you think, as a general proposition, that States should determine the rate of coal severance tax? Do you agree that Congress should not determine the rate?

Mr. McELWAIN. I believe that. I don't believe that they—there is a level of reasonableness, and I think no State has overstepped those bounds as of now. But I think primarily the severance tax and the determination of the level of it, as I've indicated in the statement, should be left to the market forces that are involved.

Senator BAUCUS. And so you don't think that Montana has overstepped its bounds as of now?

Mr. McELWAIN. Well, I've indicated that I thought it was a little high.

Senator BAUCUS. But it's proper for Montana to so set that rate?

Mr. MCELWAIN. I think it's constitutional and that the Federal Government, at that level, should not inject itself in trying to set some other level.

Senator BAUCUS. I share that view.

You briefly touched upon the Clean Air Act problems as an example of obvious Federal intrusion into State affairs, you mentioned that EPA visibility regulations will have an adverse effect on the State's ability to make their own decisions. I wonder if you could expand upon that a little bit. I'm not very familiar with the EPA visibility regulations.

Mr. MCELWAIN. Their proposed standards have not been finalized yet, I don't believe. I think they had a time schedule that requires them to finalize them sometime next month, but I would be happy to furnish that for the record for you.

Senator BAUCUS. I would appreciate that.

Mr. MCELWAIN. Maps that have been put together by WRC show that with a very conservative determination of visibility requirements from class 1 of—I believe they've limited it to 25 miles, and I think the Federal thoughts are much farther than that, that there is very little of the West that in which you can develop anything and meet the proposed visibility standards, and I'd like to have the opportunity to present those maps for the record.

Senator BAUCUS. I wish you would. I'd appreciate that. Can't Governors under the authority of the Clean Air Act, change designation for class 1 and class 2?

Mr. MCELWAIN. In certain types of situations. I believe, however, where there are Federal managers of types of Federal lands that the Federal managers can override what the State might do. Now I'm not an expert on that.

Senator BAUCUS. I'm not, either.

Mr. MCELWAIN. I've been through a very long and protracted controversy over class 1 and the Northern Cheyenne Reservation, which was finally settled, but it has been very costly to the people of the State of Montana with respect to Colstrip 3 and 4 and the price of electricity.

Senator BAUCUS. Going back to the severance tax, do you think that the Congress could prevent States from imposing an income tax on energy companies? I'm trying to compare income tax with severance tax here.

Mr. MCELWAIN. If the Federal Government could?

Senator BAUCUS. Could the Federal Government limit or prohibit States from imposing income taxes on energy companies?

Mr. MCELWAIN. Well, I think if there was a situation where you tied the energy use in to the commerce clause of the Constitution and there was a determination that commerce was involved, that probably constitutionally, they might be able to do it. But I——

Senator BAUCUS. I'm surprised to hear you say that, because I don't think that the Congress can limit State severance taxes.

Mr. MCELWAIN. I didn't say that I didn't think they had the power to do so. What I did say is I thought they should not do it. I wouldn't want to go so far as to say if Congress, under the commerce clause,

wanted to put some limitations on, I think that the way I've seen the commerce clause extended over the last 50 years that there might well be a right of Congress to do so, but I don't think it should because I think it sets a precedent, as I've indicated and as you've indicated, of them being able to put limitation on almost any tax except possibly the ad valorem tax.

Senator BAUCUS. Well, it's a curious situation here. The members of the Supreme Court are ordinary people, although sometimes they and others like to think they're not so ordinary. They're there just deciding whether or not, as a practical matter, Congress can limit the power of the States to impose taxes of various kinds upon citizens or operations between the States. That's a very basic, fundamental question apart from precedents, apart from anything else.

My personal view is that the Congress should not be able to limit or prevent the State from imposing taxes on individuals in the State or entities in the States. Such limitations or prohibitions go to the question of sovereignty of a State and potentially undermine the ability of a State to control its own destiny.

It's my hope that those nine people, whoever they are and whenever they consider it, reach the same conclusion, because I think an adverse and contrary decision would be very detrimental to the position of the States.

Mr. MCELWAIN. I think you have two situations involved, however, with the way this is developing. The one situation is a direct attack on the constitutionality of the States of Montana, Wyoming, and North Dakota, putting a severance tax of the magnitude that they have on the coal. There is a direct attack going on that regardless of what the Congress may do at the present time, and that's on it's way to the Supreme Court.

Senator BAUCUS. Right.

Mr. MCELWAIN. I think that is a different opinion and a different situation; that if Congress, using the commerce clause some way, would come in and legislate something, I think you'd have a different constitutional question than the one being raised by the appeal to the U.S. Supreme Court.

Senator BAUCUS. They're entirely separate questions. I agree.

Mr. MCELWAIN. I wouldn't want to comment on whether or not the other one, the second phase, was constitutional, but I do think that it's wrong for the Federal Government to inject themselves into this area, and I reiterate for the same reasons that you have, that they could inject themselves in almost any tax that the States might put on.

Senator BAUCUS. Well, I raise the point in the manner I raised it because essentially constitutional decisions are a matter of public policy.

Mr. MCELWAIN. Functionally, I think that 's right.

Senator BAUCUS. And when decisions reach the Supreme Court, the court, in a real sense, is legislating, and it's saying what Congress can or can't do, or what an individual or State can or can't do. As a practical matter, there's not much difference between legislating in the legislative branch and deciding judicial cases in the judicial branch. I'm saying it's just wrong in my judgment for Congress to impose these kinds of limits, and if it's wrong, it's a question of policy,

and, therefore, I think it's unconstitutional. But, of course, you use different labels for different situations.

OK. Thanks, Joe. I appreciate your presence very much.

Mr. McELWAIN. Thank you. I appreciate the opportunity.

Senator BAUCUS. Next we'll hear from Mr. Byron Dorgan, who is the tax commissioner of the State of North Dakota. I appreciate your presence here, Byron.

Before you begin, I'd like to insert into the record a statement entitled, "The Politics of a National Sacrifice Area: Western Value Issues," by Prof. Daniel Henning of the Eastern Montana College here in Billings.

[The exhibit referred to above appears in the appendix.]

Senator BAUCUS. Byron, welcome to Billings. I know you've been here many times. I last heard you speak several months ago downtown at the Northern Hotel, and I was very impressed at what you had to say there, and I'm very honored that you're here today to share with us your perceptions. I know you're very active in this area, and I appreciate the time you've taken, and I look forward to your statement.

STATEMENT OF BYRON L. DORGAN, TAX COMMISSIONER, STATE OF NORTH DAKOTA

Mr. DORGAN. Thank you, Senator. I've been involved in this issue for 6 or 8 years, tugging and pulling to get the North Dakota Legislature to enact a severance tax from its former rate of zero to 5 cents a ton to its present rate of 94 cents a ton, and it's not been a very easy struggle because the forces on the other side of that issue are very well organized and have powerful influences in the legislative process at State government levels.

I'm also interested in the concern you've expressed on this issue, and I've followed your public statements on it, and I want to commend you for those. I'm distressed, frankly, that Congress is giving serious consideration even to this sort of question. I don't think it's a question that deserves a lot of serious consideration vis-a-vis the other things that Congress ought to be involved in. Inasmuch as a fair number of Congressmen have raised this issue and pushed very hard with very powerful allies, I'm thankful that you're willing to hold hearings like this and willing to take testimony and establish a broad public record on it.

And I say I'm distressed that this is a serious issue. I was reading Business Week several weeks ago, and they pointed out that in this area of an energy shortage and the attempt to develop more energy in this country, that the decontrol of the price of oil has given certain oil companies substantially more cash than they know what to do with, and I wonder if maybe congressional hearings ought not to be held on those kinds of issues rather than the issues of how much money State governments are receiving from taxing coal.

Senator BAUCUS. We could recommend that ARCO could build a new smelter at Anaconda.

Mr. DORGAN. Right. But I suspect that political reasons dictate the statements of Senators from some of the consuming States who are more concerned with the severance tax issue, and I think maybe this hearing and other forums like it will set the record straight, and the record is pretty clear, it seems to me.

I appear before this committee today to express my strong opposition to current proposals in Congress that would restrict the right of States to impose severance taxes on coal. Such proposals stem from a parochial kind of regionalism, but their net effect would be a dangerous increase in the Federal Government's already overbearing interference in the affairs of the States.

As approved by the Subcommittee on Energy and Power of the House Committee on Interstate and Foreign Commerce, H.R. 6625 would place an upper limit of 12 percent on severance taxes on coal in the coal-producing States. Additionally, legislation in the U.S. Senate would place a cap on severance taxes on coal.

Under the guise of concern about the Nation's energy crisis, these bills seek to exploit, at cutrate prices, the coal resources of States like Montana, Wyoming, and North Dakota, for the benefit of major utility companies and their customers in Michigan, Illinois, Texas, and other States.

It's hypocrisy for a State like Texas to complain that our coal severance taxes are too high. In 1979, severance taxes on oil and gas in Texas raised revenues for that State of $1.2 billion. By contrast, Montana raised only $59 million from its coal severance tax last year, and North Dakota collected only $15 million from its coal severance tax. I call that the Texas hog rule: Take as much as you like, and then complain loudly when someone else takes even a little. I said that in a letter to the New York Times, and the Texas attorney general took great exception to that, but I still think that the facts speak for themselves.

The fact is that coal severance taxes in Montana and North Dakota constitute an insignificant portion of a midwestern consumer's electric bill, less than 2 percent. A State sales tax of 4 percent in a consuming State would add more than twice as much to the utility bills in those States than does the coal severance tax imposed by North Dakota or Montana.

Our severance tax in North Dakota, which is a flat tax rate but which ranges between 14 percent and 17 percent, has been the subject of close scrutiny and intense debate in our State legislature. It is not an attempt to jump on the energy crisis bandwagon and to capitalize on a valuable resource at the expense of our sister States. We are merely trying to make sure that those who engage in large scale coal development compensate State and local governments for the costs associated with that development, the costs of new roads, new schools, law enforcement; the costs of maintaining clean air and water; and the less tangible costs of social dislocation and drastic changes in a basically small town, agrarian economy.

But there is a second type of cost that we seek to defray through our coal severance tax. Unlike our annual crops of wheat, sunflowers, and small grains and others, coal development is a one-time harvest. Once removed, it will no longer exist as an energy and economic resource for future generations of North Dakotans. We owe it to those generations yet unborn to make sure that our coal, 80 percent of which is transformed into energy for people outside of North Dakota, is not taken out at a price and a rate that merely reflect a bargain struck between consumers in Detroit and Minneapolis and the utility companies which serve them.

We owe it to those future North Dakotans to seek a fair return for the resources lying beneath our soil so that we can establish a trust fund for alternative energy research and a diversified future economic development. Otherwise, we will have mortgaged our children's future for the present comfort of those who want cheap energy from the northern Great Plains States with little regard for the consequences to our people and our States.

Many of us in the coal-producing States of the Upper Midwest view the legislation introduced in Congress this year as a threat to our State sovereignty, but more importantly, as a threat to our Federal system and the basic structure of our Government. Congress must not substitute its judgment for the decisions of duly elected State legislative bodies in the area of natural resource taxation. We have a unique appreciation of the costs of coal development and a unique responsibility to insure that it is managed in a way that will benefit not only those who will use the coal, but also those who live here while the coal is mined and after it is gone. We will not abdicate that responsibility, nor will we relinquish it to the Federal Government without a fight that will recruit its supporters from every State capitol in the country.

Finally, I'd like to report to you that I testified before the President's Commission on Coal 2 years ago. I told the chairman, Governor Jay Rockefeller, that the coal-producing States did not need massive doses of Federal help to deal with the costs of coal development. What we needed was the wisdom and courage to put in place in our States' severance tax programs that give us the resources to deal with that issue ourselves, and I believe that's still the case.

If the Federal Government restricts the States' ability to enact their own appropriate severance tax, I know it will turn around and offer the States financial help to offset the costs of coal development. It's a case of crippling the patient and then proudly presenting a wheelchair as penance.

My message to the U.S. Congress has been and is now, leave the States alone on this issue.

I want to make just a couple of informal comments, if I might, for conclusion.

About 200 years ago, Alexander Hamilton was writing in the Federalist Papers, explaining the Constitution, and he pointed out that what the Constitution said and meant was that the Federal Government would never interfere in sovereign taxing authorities of the State governments, and it's interesting how far we've strayed and moved from that position.

I have four attorneys on my staff, and I'm not either blessed or impeded by a law degree myself, so my attorneys have told me that they think, given the expansion of the interpretation of the U.S. Constitution, that this represents a reasonable question. They told me that in response to my suggestion that we send all Members of the U.S. Congress, with a couple of exceptions to those who take the position that we're proud of on this issue, a copy of the U.S. Constitution for them to read and study again in its entirety. I don't think that the Federal Government has the constitutional authority to tell the Montana State Legislature or the North Dakota State Legislature how to tax coal.

Senator BAUCUS. I appreciate that very much, and I don't know if you're finished, but I might suggest that you send them copies of the Federalist Papers, too, particularly on questions of Federal taxation and intrusion into the domain of the States. Everybody likes to think we're getting conservative these days. We ought to take advantage of one part of that, and return to the original concept of State and Federal relationships and State sovereignty, particularly with respect to Federal interference with the power of States to tax. I suggest that you send them a copy of those relevant portions of the Federalist Papers.

Mr. DORGAN. Thank you.

One more comment. I think we've made great progress in Montana, Wyoming, and North Dakota. It's not a source of concern to me at all that we have a healthy severance tax rate on coal. The extraction of coal around this country in the Appalachian regions and others tells us that it's not been done right in those areas, and we have a chance to do it right, and we have some people who have the courage in our legislatures to put in place severance taxes that make sense.

Every utility company or coal user in this country has the right to hire the William Rogers law firm, or some law firm from the east coast, wherever they want to hire a law firm, and take these questions to court. In my opinion, they won't win, but they have the right to do that. Congress has a right to discuss these issues, but in my opinion, it's not constitutional for Congress to act to restrict our taxing authorities.

Those of us who have been involved in this fight for many years, putting in place these severance taxes, know that we've been told by those who would use the resources that the severance taxes are unfair, that the cost to the consumer is overburdening, that if the severance taxes are put in place, the coal companies will immediately leave our States. We faced those questions, and we've put in place severance taxes that our States believe to be appropriate in the public interest, and, you know, there are those in Congress and there are those who, through the courts, will call these severance taxes radical. And I wanted to leave you finally with a quote from a U.S. Senator who you know who talked about radicalism. He said, "That which is right has always been called radical by those who have a vested interest in that which is wrong."

Our coal severance taxes are not radical at all. They are right and reasonable for the future of our States.

Senator BAUCUS. Thank you very much, Mr. Dorgan.

Several people in the Southern States, Midwestern States, the consuming States, point to the trust fund, in Montana particularly, arguing:

> Well, maybe it makes sense for Montana to impose a severance tax to pay some of the immediate costs in dislocations caused by stripmining coal, but gosh. Look at what else Montana is doing. Montana is taking a big chunk of that, 50 percent of it, and just salting it away. They don't need it. They're not spending it.

What's your reaction to that?

Mr. DORGAN. Well, two reactions. No. 1, if they want to help make our decisions, they ought to move here and play a role in the legislative

process. Second, they ought to look at Texas and Louisiana. Texas taxes oil and gas, and they raise sufficient money, and they decided, rather than have a trust fund, that they won't have an income tax in their State. That's one of the ways they use the money. In Louisiana, they decided that they wanted to tax oil and gas at a certain rate, which is a resource extraction, and they decided to use part of it to offset property taxes, and they pay a substantially lower property tax than you do in Montana or I do in North Dakota.

There are different uses for money. It seems to me the wisest use at this point in time for our States is to use a trust fund for use of the proceeds from our severance tax for future use in our States. I think that it's not something that we ought to be criticized for. It's a wise use.

Senator BAUCUS. You think it's wise because it's a nonrenewable resource?

Mr. DORGAN. Exactly.

Senator BAUCUS. And the State should be entitled to sufficient benefit from the extraction of nonrenewable resources? Is that right?

Mr. DORGAN. Exactly. We all seem to think that this whole place was built just for us, and we're a very short timespan in our history, and we're taking a very valuable resource out of our Earth in the borders of our States that has existed there for a long time, and I think we ought to replace that resource with something that future generations will be able to use. The future generations in North Dakota and Montana will not have the same amount of coal resources underneath their soil because we will have used them in our generation, and I think there's a case to be made for replacing at least part of that extraction with a comparable resource they can use; in this case, a trust fund.

Senator BAUCUS. Some people will also argue that, "Sure, it makes sense because it's a nonrenewable resource, but, gosh. A lot of that is Federal coal. That's not Montana coal. That's Federal coal." They will therefore argue that Montana doesn't have a right to tax what's theirs.

What is your reaction to that argument?

Mr. DORGAN. Well, again, I guess I'd ask them to read the U.S. Constitution again and maybe the Federalist Papers, and I would reiterate what the former witness said; that market considerations play a role here as well. The State of Montana would be foolish indeed to impose a 400-percent severance tax on coal. There's a level beyond which you're not going to move because that will affect the marketability of coal.

It's clear to me that the imposition of a severance tax on Montana at present rates has not affected the marketability of Montana coal. I think that's clear to the decisionmakers in Montana as well.

Senator BAUCUS. I think that's true, but I suppose that another argument in response to the Texans' and Arkansans' argument is that even though a good portion of the coal in Montana is Federal coal, still, the costs of stripping that coal are borne not only today, but the costs are felt in subsequent years, and that the trust fund is necessary to help defray a future cost that is caused by present strip mining.

Does that make sense to you as a general proposition?

Mr. DORGAN. Yes, I think so, but again, I think those in Texas and Louisiana who are concerned about this kind of worry about a mouse

in the corner when there's a lion at the door. I think Senator Towe in Montana has made a case about the role the severance tax plays in the cost of energy vis-a-vis, for example, not just the entire freight rate but just the increase in freight rates in the last couple of years.

I would really like to see those folks who are very concerned about this and really interested in finding out what kind of impact this has in analyzing the entire cost of coal development, not just the severance tax. The severance tax does not play a substantial role in the cost to the consumer of the energy that that coal produces. It just doesn't, and the facts don't support the statements of the mayor of Minneapolis or Detroit or the Senator from Texas. It just doesn't support the contention that the State of North Dakota or Montana or Wyoming are being unreasonable.

Senator BAUCUS. What advice do you have, or suggestions do you have, to help us in the Congress dissuade Senator Bumpers from prevailing and actually persuading other Senators who aren't from Arkansas or Texas but from, say, Massachusetts or California?

Mr. DORGAN. Well, I'll tell you a secret. I hope to be in Congress with you in January.

Senator BAUCUS. I hope you are, too.

Mr. DORGAN. Aside from that, I think the facts are so compelling. The people who reasonably analyze what the rights of States are and ought to be under the Constitution of this country, I think, have an awful time trying to make a case that they ought to be able to restrict Montana and North Dakota and Wyoming in their tax rates. There's just no precedent for doing that, and I think we need to continue to give as many facts as we can to all those folks about what is the impact of the severance tax imposed by Montana on coal to the consumer who purchases the energy product of that coal someplace in a consuming State, and the impact is very miniscule. Less than 2 percent of that consumer's energy bill. I thing, you know, let's not let politicians in those States use that as the whipping board for high energy costs. It's just not true.

Senator BAUCUS. We are, frankly, making those same arguments, but in addition, we're pointing out to them the disastrous precedent that these severance tax cap bills would have and how it might affect their States. About 36 States impose some kind of a tax on their resources. Minnesota, as you know imposes tax on iron ore. There are many examples all across the country. So, the argument we're making is, "Look. If you impose a cap on coal severance taxes, what's to prevent Congress in future years from imposing some kind of a limit on taxes that will affect you"

Mr. DORGAN. And I think you might suggest, especially to the folks in Texas, that maybe if, in fact, they do impose caps on the taxation of extraction of resources, perhaps they should impose logically an extension of a dollar cap. Suggest to Texas that a State should be limited to $500 million on taxes of the extraction of minerals, which therefore would cost Texas $700 million, and then see how excited the Texans are about imposing caps on the extraction of resources.

Senator BAUCUS. Do you know what Alaska's revenue is on their tax?

Mr. DORGAN. No, I don't. I just know that Alaska is doing very well.

Senator BAUCUS. I do, too. I was curious about how much they're getting.

Mr. DORGAN. You're talking about oil and gas?

Senator BAUCUS. Oil and gas, yes.

Mr. DORGAN. Somewhere between 11 and 13 percent on oil and gas, as I recall.

Senator BAUCUS. What options do States have if their ability to impose severance taxes on coal or to pay for costs are significantly reduced? What are States going to do if they don't have any severance taxes?

Mr. DORGAN. What the States will do will be to ask the Federal Government for massive doses of Federal money to deal with the costs of coal development, and there's no question that even with the State severance tax, there are those folks who think that that's the solution; that the solution is to pour Federal money into these areas to deal with those problems. I don't think that that's a wise solution. I really compliment Montana for its severance tax. I wish we had one as strong as Montana does. I fought for it. That avoids, I think, you know, the substantial problems that we have at the Federal level with revenue problems, and it also helps create that division between State and Federal Governments that we have and should have. We should manage our own affairs to the extent we can.

Senator BAUCUS. Another argument I often run up against is that Montana has already been compensated for the stripmining costs because of the amount of Federal dollars that go to States under the Federal reclamation laws. In your judgment, is that revenue sufficient? And shouldn't States be able to raise their own revenue, to pay for their own costs?

Mr. DORGAN. No, those revenues are not sufficient. In sparsely populated regions of the country such as Montana and North Dakota, when you have substantial developments, we have substantial developments especially because our coal normally is used fairly close to the mine, and so the electric generating facilities are built close to the mine mouth, and you have substantial infusions of new people into a sparsley populated area. And the amount of cost that imposes rises geometrically as opposed to the increases in the number of people that are coming in, and so it's not enough, no.

We had a study in North Dakota. Our legislature paid $4 million to create an agency called REAP, regional environmental assessment program, to find out what precisely does coal development cost in our State. What are the revenues that come in associated with coal development, income tax and property tax, and all the revenues, and then what are all of the costs? It showed that even with our present severance tax in a 4-year period, there is going to be about a $50 million shortfall in our revenue in our State. That logically would tell a legislator, then, to vote for a higher severance tax, except that even at this state of our discussion and debate, the influence of the coal industry is substantial, and they play a significant role in impeding a high severance tax.

Senator BAUCUS. You're the State tax commissioner, and in a certain sense, you are biased and in another sense, you're very objective and an expert in the area.

Mr. DORGAN. Very objective.

Senator BAUCUS. In your judgment as a State tax commissioner, can Congress constitutionally impose any kind of a limit on a State's

power to tax? In what areas would such limits be constitutionally permissible?

Mr. DORGAN. Well, there, indeed, are some constitutional limits. I think our State cannot select certain kinds of interstate commerce and attach to that interstate commerce massive doses of North Dakota taxation. There obviously are some limits, but hopefully the limits are reasonable ones, and I don't think anyone who is reasonable can suggest that the severance tax rates imposed by the States represent an unreasonable burden on the consumer, and that's the final test. What is the impact of the severance taxes on the consumer? It's the only test that matters, I think, and the answer to that is very simple. Less than 2 percent.

Senator BAUCUS. Aren't there cases which really analyze whether States are taxing to support a legitimate State function rather than looking at the effect on a consumer? If the proceed of a State's tax really are paying for legitimate operations of the State, isn't that, by and large, sufficient inquiry and the Constitution need not, or public policy need not, go to the next question of whether it has an adverse effect on consumers outside the State?

Mr. DORGAN. I think so. But, again, the fact that someone raises the question allows that question to be debated in public.

Senator BAUCUS. Sure.

Mr. DORGAN. Again, I don't think, as I said, I'm distressed that we're discussing the question at great length in our U.S. Congress because there are many more important issues that are much more serious than that, and I don't think there's a serious question here. The Federal Government does not, in my opinion, have the constitutional authority to whipsaw Montana and Wyoming and North Dakota under severance tax rates. We have every right to impose whatever severance tax we please, within some modicum of reason, on the extraction of coal, and the market forces will determine largely what we do.

Senator BAUCUS. Well, I sure hope that you're with us in the Congress next year, because let me tell you what we're up against. I talked to Senators and House Members who I used to think were reasonable, and I have explained to them our position on the coal severance tax, and it is very, very hard to convince them of our point of view. I'm astounded at the difficulty I'm running up against in talking to Congressmen from California who have no real direct stake in this issue. Others from other parts of the country with no direct stake, not producing States or consuming States, simply want more energy. They want cheap energy, and they really don't care if that makes it impossible for a State like Montana to function effectively. They just don't care. They're thinking in the short term. Maybe they're distracted because they're up for reelection next month, and maybe they'll cool a little bit in January. But I'm telling you, it is astounding to me how difficult it is to get our point of view across in private conversations with friends, people who sit and represent other parts of the country. It's very, very difficult.

Mr. DORGAN. If we put all the information together, I think, that we've learned in Montana and North Dakota and other States, I think we can make a good case.

One last point. In the last legislature, we did lose a little ground. We had a little better severance tax than we have now, but there was a substantial debate, and they reduced the severance tax somewhat to its present level. The utility companies that previously had been very, very militant on this issue and said that the severance tax would drive them out of business and so on and so forth, they were asked, when the severance tax was reduced, by the news media, "Does this mean that the customer is going to experience some kind of reduction in their bill?"

And the utility company's response was, "No. The severance tax is not a significant part of the utility bill."

A very interesting comment, I thought.

Senator BAUCUS. Thank you very much.

Mr. DORGAN. Thank you, Senator.

Senator BAUCUS. Before you leave, one final point. Is there a point where Federal limitations on State taxing power will make it impossible for a State to function?

My personal view is that any limitation crosses that line. I'm just curious as to where you think that point lies.

Mr. DORGAN. Well, it's a very dangerous line to draw, and I tend to agree with you. We need to allow States to function by themselves with as much autonomy as is possible, and when we start drawing those lines, that first line is a dangerous one to intersect, in those constitutional authorities, and that's why I'm very distressed that this is given serious consideration.

I agree with you, having visited with a lot of Congressmen and Senators, and having had some soundings in Congress. There is a need to discuss it, because there's a serious threat with a lot of folks who don't understand the issue and who very much like Federal intrusion.

Senator BAUCUS. Thank you very much, Mr. Dorgan. We appreciate your presence.

Mr. DORGAN. Thank you.

Senator BAUCUS. The next witness will be Mr. Bob Hall, who is representing the Western Governors Policy Office.

STATEMENT OF ROBERT HALL, REPRESENTING WESTERN GOVERNORS POLICY OFFICE

Mr. HALL. Mr. Chairman, my name is Robert Hall. I appear before you this morning representing Mr. Phil Burgess, executive director of the Western Governor's Policy Office, WESTPO. However, I presently serve as assistant director of intergovernmental relations in the Office of the Governor of Colorado. Mr. Burgess extends his regrets that he is unable to personally present these remarks this morning.

The Western Governors' Policy Office is an independent organization of Governors of 11 intermountain and High Plains States: Alaska, Arizona, Colorado, Montana, Nebraska, Nevada, New Mexico, South Dakota, North Dakota, Utah, and Wyoming. WESTPO, a nonprofit instrumentality of the States, was established to strengthen the

policymaking capacity of the member States and their role in the Federal system.

The subject of your inquiry this morning, the balance of power between State and Federal Governments, is a primary reason why western Governors gathered in 1976 to give their individual sovereignties a stronger collective voice in the regional and national policy decisions affecting the West. WESTPO serves as a regional forum and provides a mechanism for member Governors to address and influence important national, regional, interstate, and Federal-State issues. WESTPO is a vehicle for collective political expression and influence, an important asset for the sparsly populated Western States.

The preemption of States rights, particularly in the areas of energy policy and resource management, has consistently and with increasing frequency come before the Governors as a policy and management issue. In the mid-1970's, a predecessor of WESTPO, the Western Governors' Regional Energy Policy Office, known as WGREPO, was confronted by a proposed Federal coal leasing program and an unrealistic national energy policy initiative called Project Independence. Neither gave the States a participatory role in the decision and policymaking process. Yet both would have had tremendous impacts on the future of the States and the authority of the States to provide for the health, safety, and welfare of their citizenry.

I am reminded of a meeting of WGREPO Governors in Albuquerque, N. Mex., in 1975 where representatives of the Secretary of the Interior casually informed the Governors present of Federal plans to energize the West, to have it serve the Nation's appetite for energy. One need not ponder long about the Governors' reactions. There had been no prior consultation, and there was no evidence that the constitutional responsibilities of the States had been considered. That encounter was a real eye-opener for the States and their chief executives. From that point on, the possibility of Federal actions overrunning the desires and rights of States has been a daily reality.

Several examples serve to expand the historical perspective of the Federal preemption issue. Congress and several administrations have considered coal slurry pipeline legislation. Notwithstanding the debate between proponents and the Nation's railroads over the granting of eminent domain authority, the effect of such proposals on State water rights and their administration has, and continues to be, a primary concern of the States.

The authority of the States to administer surface mining regulations is another example of the continuing conflict in the relationship between State and Federal Governments. At issue is the extent of State authority to administer regulations and the extent to which executive branch regulations have gone beyond the intent of Congress. These problems are near resolution, but the fact remains that at issue were basic States rights. We find that a constant vigil is necessary to insure against Federal preemption.

Two additional examples serve as indicators of a changing relationship in the Federal system. In 1976, Congress enacted the Federal Lands Policy and Management Act, FLPMA. FLPMA and the regulations promulgated by the act contain two important mandates: that public domain lands be retained in Federal ownership, and that those

lands be managed under the principles of multiple use and sustained yield. FLPMA and regulations promulgated to administer the act called for a high degree of public participation and consultation in developing the plans for use of the lands.

The regulations, section 1601.4–3, also specify that land use plans for public lands be consistent with the resource related plans and policies of State and local governments. There are implications that the Federal-State relationship mandated by FLPMA is working, particularly if one considers the consultative process embodied by the Department of the Interior's Federal coal management program and the institutionalization of the regional coal team concept.

Yet such optimism may be short lived, given two recent court cases which have focused on the question of compliance by lessees on public lands with State and local laws and regulations. In the case of *Ventura County, Calif.* v. *Gulf Oil Corp.*, the Supreme Court was asked to determine whether zoning ordinances promulgated by local government apply to a leaseholder on public lands. Gulf Oil, holding a lease to drill on Federal lands within the county, refused to comply with the county's zoning ordinance. The county sued, and the Federal district court ruled against the county.

In August of last year, the Ninth Circuit Court of Appeals affirmed the lower court on the basis that the 1920 Mineral Leasing Act preempts the State and local regulation of private lessees' operations and action. In March of this year, the Supreme Court upheld the appellate court decision.

In their amicus brief in support of Ventura County, WESTPO governors voiced their support for a strong State and local role in public lands management. The amicus emphasized the distinction between the administrative powers of the Federal Government as property owner and the legislative powers of the States as sovereigns. The Governors asserted that Congress never intended to preempt State and local legislative power vis-a-vis users of Federal lands within a State or local jurisdiction.

The significance of the *Ventura* decisions is not yet known. Some State and local government environmental permitting officers fear a broad interpretation so as to exempt lease holders engaged in energy and resource development from compliance with State and local land use and environmental protection statutes and regulations. A recent Stanford Law Review article interprets the decision as striking down the county's authority to prohibit federally authorized activity but retaining its authority to set standards and regulate activity on Federal lands.

In related litigation also before the Ninth Circuit Court of Appeals, a case involves the State of Washington and the Bonneville Power Administration, or BPA. The State, joined by Franklin County, brought suit against BPA, asking that BPA comply with the Washington Siting Act and with the county's comprehensive plan in siting its transmission corridors.

I would add, Mr. Chairman, that the State of Montana gave amicus support to the State of Washington and Franklin County. At jeopardy with a holding in favor of BPA is the preemption of Washington's

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Energy Facility Siting Act and the county's comprehensive plan. The long-range implications of a decision supporting preemption will cloud the role of State and local governments in land management and will clearly strike at the heart of State authority envisioned by constitutional framers and expressed in legislative actions like the Washington and Montana Facility Siting Acts.

Mr. Chairman, the litany of examples of the ongoing struggle over the power and authority between the States and the Federal Government is hardly inclusive. The system is out of balance. Power is tilted to the Federal side, and current trends and future prospects appear to be reinforcing the tilt favoring Federal authority over State and local authority.

Two proposals which Congress is considering this session, the establishment of the Energy Mobilization Board and the limitation of State severance taxes, dramatize the threat to States rights and portend unprecedented and fundamental changes in the relationship between State and Federal governments. From the States perspectives, Mr. Chairman, the Priority Energy Project Act of 1980 must be considered as more than a mechanism to provide a coordinated, prompt, and simplified process for the location, construction, and operation of energy projects determined to be in the national interest.

Powers proposed for the EMB could override State and local laws and would effectively scuttle 200 years of constitutional history. While I do not intend to represent myself as a student of fine legal arguments related to the constitutionality of the EMB proposal, even a cursory examination shows it to be a clear and present danger to this system of shared and exclusive powers we call federalism.

There are many instances in the EMB's fast-track process where questions of constitutional balance can be raised: The bump-up, the grandfather provision, procedural streamlining, judicial review, and the very broad discretionary authority of a presidentially appointed board. If a review of the effect of imposing the EMB process on the Montana Major Facility Siting Act is not sufficient to indicate the extent to which EMB would result in sweeping changes in the Federal-State relationship, one need only consider the effect of three or four priority designations of oil shale projects in Colorado, where the permit and siting process is voluntary and does not rely on binding deadlines. The EMB will have complete authority to determine how many priority projects will be located in any one State. Designation criteria need not consider State procedures, views, or resources. The project decision schedule need not respect State or local procedures or the availability of fiscal and manpower resources necessary to make decisions.

The board's streamlining recommendations made to State and local agencies for voluntary implementations could modify procedures required by State law without legislative action. The board acting under State law in its exercise of the so-called bump-up authority need not follow State procedures. State or local agencies would be required to implement board decisions they did not make and may not agree with. It can be argued that supplanting this decisionmaking strikes at the very heart of State and local sovereignty. The total discretionary authority of the board to rescind, modify, or amend State or local law

under the grandfather provision clearly must be considered as constitutionally suspect. No less suspect are the judicial review provisions which remand to a Federal Court legal issues exclusively dealing with State or local laws.

Arguments and assertions have been set forth which indicate that these preemptive actions are within the authority of Congress under the commerce clause. Yet the Supreme Court has recognized there are limits to such encroachments when congressional legislation interferes with the exercise of traditional State functions. The EMB proposal is subject to challenges on several grounds.

First, it sets decision schedules binding on State and local agencies. Second, it waives State and local procedural decisionmaking requirements, and third, it supplants State and local decisionmakers.

Senator, the WESTPO governors have consistently recognized the responsibilities of their resource-rich States in the national energy picture. They have pledged affirmative action to develop their resources but have asked that their place at the decisionmaking table be maintained. Decisions regarding where the resources are developed, at what rate development occurs, and the mitigation and management of the social and economic impacts of such activities all have a definite relationship to the health, safety, and welfare of their citizens. The discretionary opportunity available to an EMB to preempt and set aside our basic legal foundations must be questioned.

To deny that there are problems of regulatory delay at all levels of government would be shortsighted. I would note, however, that the States, and even divisions of the Federal Government, are simplifying, refining, and streamlining existing processes and developing new mechanisms to expedite the permitting. The Colorado joint review project, known as JRP, is one example of these State initiatives. I have submitted a summary of the JRP with my written testimony [exhibit 4]. Your staff has been provided a more detailed step-by-step analysis of the JRP, a process which does not preempt State or Federal requirements but coordinates, expedites, and facilitates communication among decisionmaking and levels of government. I would also note, as Mr. McElwain has previously, that WESTPO governors have worked very successfully with the private sector in expediting critical energy projects.

This cooperation will continue as the Governors move to implement a commitment to work on improving existing permitting procedures. In the near future, we will convene a workshop and seminar on state permitting.

The WESTPO Governors, with a desire to play a constructive role in future possible EMB deliberations, have also agreed to establish a working group composed of the western congressional delegations, the Western Regional Council, and other appropriate individuals to develop legislative recommendations that would streamline federal permitting processes.

Finally, Mr. Chairman, I would like to focus on congressional proposals to limit State authority to levy severance taxes. The stated intent of these proposals is to remove excessive burdens on the production of coal used in powerplants and major fuel burning installa-

tions. Introduced by Congressmen from consuming States, these measures single out the coal severance taxes of the States of Montana and Wyoming which exceed the proposed 12.5-percent limitation. Proponents who allege that western severance taxes are the reason for high electric utility bills have singled out only a low-cost component, the severance tax, and have ignored other factors that contribute much more significantly to the cost of electricity from coal-fired powerplants in the consuming States, factors such as Federal laws and regulations, transportation costs, monetary policies and the taxation policies of consuming States.

Unfortunately, the veil of consumer interests has clouded the issue and diverted attention from the precedent-setting nature of these proposals. Congressional action which limits States' taxation, in the absence of judicial findings of an unreasonable burden on interstate commerce, is a dangerous precedent in two arenas of constitutional balance. First, such action preempts the judicial process by substituting congressional determinations for judicial findings. Second, these proposals invade the fundamental right of states to levy and collect taxes.

Proponents of the legislation argue that tax rates that exceed that arbitrary limit place an unreasonable burden on interstate commerce. The severance of coal is not an interstate activity. It is a local activity performed by private companies for profit and is clearly subject to State regulation and taxation. Moreover, there is increasing evidence, developed by Los Alamos Scientific Laboratories and others, that severance taxes do not begin to burden the stream of commerce until they approach the level of 35 to 40 percent. Congressional limitations in this instance are without constitutional authority and are in direct contravention of States' rights under the 10th amendment to regulate their internal affair.

I have no doubt that enactment of the 12.5-percent limitation would cause directly affected states to challenge on constitutional grounds. But other States, perhaps even those represented by the sponsors of this legislation, will also join in that challenge because the precedent bleeds into other areas of state taxation; property, sales, and corporate taxes, and even other minerals and energy resources.

Further, Mr. Chairman, these proposals will preempt the States' right and guaranteed authority to provide for the health, safety, and welfare of their citizens. There are public costs of coal and other resource development which are not fully internalized in the costs of production, nor are they provided for through public accounting, notwithstanding the Federal payment in lieu of taxes, Federal mineral leasing revenues returned to States, Farmers Home Administration 601 impact assistance, and others. Providing sewers, streets, and other infrastructure, including schools, hospitals, police, and fire protection and other essential services requires adequate revenues, revenues derived from taxes, including severance taxes. These proposals will limit the States' ability to meet a fundamental constitutional responsibility by preempting taxation authority.

While a majority of the debate on these proposals considered the use of severance taxes to mitigate the present impact of energy development, I am disturbed that an equally important, if not more compelling, reason for severance taxes seems to have been slighted.

I am referring to the criticized use of a portion of the revenues to provide for future generations by establishing trust funds. Permanent trust funds, whether based on revenues derived from coal or oil shale extration, represent a portion of a lost capital asset or economic base not available to future generations. Limitations on the States' ability to provide a legacy for future generations, as well as the present, are clearly inappropriate because they unreasonably limit the responsibility of the State to protect and promote the health, safety, and welfare of its citizens.

Limiting severance taxes does not limit the needs of present or future generations. Imposing a ceiling on such revenues is likely to cause targeted States to look to other mechanisms such as increases in corporate or property taxes. To paraphrase a current slogan, "You can pay me here, or you can pay me there, but the costs of production must be paid." Why in the world would Congress want to get involved in each State in deciding how to identify, provide, and pay for the costs of energy production?

In conclusion, Mr. Chairman, enactment of these proposals, proposals which set aside the authentic and legitimate activities of the States, would set dangerous precedents and have counterproductive effects. While questions of constitutional integrity are at stake, so are issues related to the ability of the States and the Federal Government to work together with the private sector to solve the Nation's energy problems. Moving our Nation toward energy selfsufficiency will require the mobilization of talent and resources at all three levels of government.

In fact, in many areas, local officials, and especially county commissioners, will play key roles in decisions related to energy development. This is not an enterprise that can be run from Washington or by Washington. Similarly, the development of new energy sources is largely a responsibility of the private sector. The pace and direction of development will be shaped, and priorities affected, by public policy—again, by all three levels of government—but the process will be driven by private investment decisions interacting with public policies.

Accordingly, this is a time to seek new ways to cooperate. This is not a time for the Federal Government to preempt other levels of government or to further intrude into the private sector.

The job is too big; the uncertainties, too excessive; the costs of failure, too overwhelming. This is a time for national policy to guide a national effort to achieve energy security. Federal policy is just one component of national policy, and, in the end, it may not even be the most important. Let's work to maintain a proper balance, and in so doing, Mr. Chairman, we urge you to continue and expand this inquiry into the questions of constitutional balance represented by these proposals and possibly others, under the jurisdiction of the Senate Judiciary Committee.

Senator Baucus, on behalf of WESTPO and Mr. Burgess, I appreciate the opportunity to present these views.

Thank you.

Senator BAUCUS. Thank you very much, Bob.

I'd like to ask you one of the same questions I asked Mr. Dorgan, and that is even if it's true, that States should be able to set aside some of the severance tax revenue in a trust fund, what response do you have to those who argue, "Well, that's still Federal coal that you're taxing. That's not State coal." And I raise the question because it's a question that I run into quite often, and it's one that I think we should meet head on sooner rather than later. I'm curious as to what arguments you have in rebuttal to that point.

Mr. HALL. Senator, if the States were taxing Federal coal, we would tax, I think, the coal in the ground as a capital asset. The severance tax is levied by Western and other States in taxation on coal once it has been leased to a private enterprise for profit, and I think those are two severable instances. The challenge that it's a Federal resource that is being taxed, I think, is unfounded and clearly overlooks the severability or the clearly identifiable issues of Federal leasing revenues paid by private enterprises to develop those as the cost of doing business and other costs of doing business as the mitigation of impacts, and part of that is, in fact, provided by the severance taxes, and I think they are severable instances.

Senator BAUCUS. Could you expand a little bit on the Los Alamos study which indicates that severance taxes do not begin to burden the interstate commerce until they approach the level of 35 to 40 percent?

Mr. HALL. Mr. Chairman, Los Alamos Scientific Laboratories engaged in a number of energy policies, research activities. They are independent. They serve many branches of government, and I think in this instance they are researching the question of the burdens of severance taxes for the Department of Energy. In any case, they aren't attached to any State which has a certain case to present for or against a severance tax.

In the economic modeling which they have done, and I understand that, although I have not been a part of that process, nor have I seen it, they have modeling that indicates that the production of coal, the burden on interstate commerce does not come into play until severance taxes reach the level of 35 to 40 percent. I would be happy to contact Los Alamos and have that submitted for the record.

Senator BAUCUS. I'd appreciate it if you would, and also if you would submit any other studies that you're aware of on that same point.

It's my view that one way to head off congressional action is to show that we in the West are responsible and reasonable. In your testimony, you spoke a little bit about the Colorado Review Process?

Mr. HALL. The Colorado Joint Review Process.

Senator BAUCUS. The Colorado Joint Review Process. Would you explain a little more how that works, and second, whether you think that's a good way to help thwart Federal action?

Mr. HALL. By means of a historical prospective, the EMB proposal is a little over 1 year old, but the Colorado Joint Review Process is about 2½ years old. It was developed as a response to the fact that in Colorado, legislative inaction was unable to provide a facility siting act such as we find here in Montana or Wyoming or Washington, or a lot of other States in the country. The Colorado Joint Review Process has coordinated intergovernmental review procedure for energy review projects, oil, uranium, oil shale.

Currently, we're also working through our public utilities commission on a siting process which will work to coordinate the necessary decisions involved in moving a permit along for coal fired powerplants.

The joint review process, basically, has three stages. The first stage involves an applicant voluntarily coming to the State and indicating its willingness to participate in the process. A decision is made at the State level as to whether the proposed project will be accepted, and to the best of my knowledge, none have been rejected. There's one currently underway which is the Mount Emmons molybdenum project, which is a fairly large endeavor on the part of AMAX. The Rio Blanco oil shale project has also indicated that they will participate in the joint review process.

The second stage is organized with active participation with appropriate State and local agencies and a proponent. A joint review project team is established representing those parties. There is a definition of responsibilities of the relevant agencies and the company. A project decision schedule is prepared very similar to the type of schedule the EMB uses. That provides detailed guidelines for the coordination of the regulatory process and also includes the conduct of several public participation activities.

Under the third stage, the project specific decision schedule is implemented, including the development of the environmental impact statement if one is determined to be necessary. During that stage, the required regulatory reviews are completed. The proponent completes the necessary design and feasibility studies. There's a great deal of public participation. In addition to that, there's a continuing joint review activity to insure coordination. Under the Mount Emmons/AMAX activity at present, I think the team meets at least once a month. There are some 150 to 200 people who see the progress reports.

Senator BAUCUS. Is it working?

Mr. HALL. I think it is, sir.

Senator BAUCUS. Do most people in Colorado, on the environmental side and development side, generally agree that it's working?

Mr. HALL. The project hasn't been built yet, and the proponents of the—not to say that it won't be built, but the project proponents have not withdrawn from the process. There's a great deal of progress that's being made. We're finding regulatory reform. There's a lot of overlap. We are streamlining some of our hearing requirements. They're overlaid on each other.

Senator BAUCUS. I wonder if you're at a point yet in Colorado where there is general agreement as to whether this process is an efficient way to determine where to site a project in Colorado without the need of an energy mobilization board?

Mr. HALL. We think it has given an alternative.

Senator BAUCUS. That's you; you're representing WESTPO?

Mr. HALL. I'm speaking right now as a representative of the Governor of Colorado.

Senator BAUCUS. OK. Now do you think it's fair to say that most Coloradans would agree with that statement? I'm not trying to put you on the spot. I'm just trying to get a feeling for whether there's some concensus on whether that's a good way to go.

Mr. HALL. The only time you're able to tell that or sense that is when, you have a roadblock.

Senator BAUCUS. When will it be operational?

Mr. HALL. I think the final permitting can expect to be completed within the next 12 to 14 months, and then, subsequently, the project is constructed.

Senator BAUCUS. It's taken as long to get the process in place as it has for the decision to be reached.

Mr. HALL. Well, to some extent, it's, for a lot of people on both sides of the table, it's a new way to do business, and I guess there were some real surprises of the State people about some of the Federal requirements, lack of understanding how that operated, and to have the parties sit at the table and lay those out and agree on how to streamline and move the duplications, it does take some time.

Senator BAUCUS. How can we mobilize public opinion in the West a little bit better to alert westerners of the dangers of the Energy Mobilization Board? I was struck with how little public concern there was at that time.

Maybe it sounds too complex and so it's not easily understood. Maybe there's a cross-current here that prevents sufficient public concern. But I frankly was astounded at how little public knowledge, interest, and concern there was even among editorial writers and among Western State newspapers. Do you find there's not much concern in Colorado or the Western States? Why are some people so unfamiliar with the dangers of it?

Mr. HALL. Senator, I'll meet you half-way in the agreement. I think that in the area, within the circle of people that have followed the issue, there was a tremendous amount of concern.

Senator BAUCUS. You were very concerned, I know. I've worked with you, and I know you are very concerned, and I know the Governor of Colorado was alarmed at the prospect. But I'm curious why more people weren't putting more pressure on the State delegations.

Mr. HALL. I don't think most people viewed it as an override of the State processes. Even some of our Governors didn't focus on it.

Senator BAUCUS. But do you agree that it was an override?

Mr. HALL. Most definitely.

Senator BAUCUS. And the Governor of Colorado agreed, too?

Mr. HALL. Yes, sir; and the WESTPO Governors have taken the position formally, informally, and sought from the President in a meeting that they had with him in Albuquerque last year in November a waiver of State and Federal substantive laws.

Senator BAUCUS. That's right. And here's a Federal agency which would come in and waive State substantive law. I just don't understand why that doesn't alarm more people.

Mr. HALL. And, you know, maybe it really should have, because I think if you look at what happened with some of the Eastern States, it was a real sleeper from its first existence until some time, really, that it went to conference committee. And when it became fairly apparent and the debate really got focused on the waiver of State laws and debate over the Santino amendment, the Eastern States, because of some of their siting legislation and their efforts to get siting legislation, really started to focus on it. The debate brought—there was a lot of input into the conference process. Daily communications back and forth between Governors and conference members, influential mem-

bers outside the conference, between WESTPO and the western regional council.

I guess for the Western States, it should have and did become more apparent to people, and I guess really the debate became more focused as a western issue when it became linked to synfuels. I think that, in some instances, we fell short in taking the point to the people.

Senator BAUCUS. I'm not looking for blame here at all. I'm just looking for suggestions that you might have as to how we in the Congress or other interested people in the States can help people realize the dangers of the EMB proposal. I suppose basically it comes down to more education and discussion, and explaining the dangers. But it was a phenomenon that struck me at the time, and I was curious as to its cause.

Mr. HALL. If I may, one of the other procedural quirks in that whole process was the fact that from almost the day that the EMB was introduced, it was in a real dynamic process that was continually changing, and the range of players narrowed as it got down to finally making the determination on what should or shouldn't get into the conference report. Some of those people were very submerged and not accessible, and the fact that, I guess, the administration failed to move on some of the issues that it saw created some of that ambivalence and nonrecognition.

Senator BAUCUS. OK, Bob. I thank you for coming here today. I appreciate it very much.

Mr. HALL. Thank you.

Senator BAUCUS. We're going to be involved in this dialog for a long time. This is a good start. But, this is a question that we will need to continue to examine.

We'll recess the hearing now until 2 o'clock this afternoon.

[A recess was taken.]

Senator BAUCUS. The hearing will come to order.

Continuing in our discussion of Federal-State relationships, our next witness will be Ms. Helen Waller, who is representing the Northern Plains Resource Council. Helen, do you want to come up here and give us your views?

STATEMENT OF HELEN WALLER, CHAIRMAN, NORTHERN PLAINS RESOURCE COUNCIL

Ms. WALLER. You bet.

Senator BAUCUS. If you want to read your statement, that's fine. If you want to summarize it, that's fine, too.

Ms. WALLER. I'd rather read it so I don't miss anything.

Senator BAUCUS. You go ahead and proceed any way that you want.

Ms. WALLER. Good afternoon. I am Helen Waller, and today I am representing the Northern Plains Resource Council, of which I am chairman.

NPRC is made up of farm, ranch, and townspeople in Montana who have joined together to represent their interests in the face of large-scale mining and industrialization. We applaud the Senator's attention to the vital issues raised in this hearing and fully endorse Judiciary Committee review of these important constitutional issues.

Not since the Union split apart in 1860, precipitating a terrible and tragic Civil War, has a region been faced with such a crisis in the Federal system as is now confronting the Western United States. Like that 19th century crisis, this 20th century challenge centers around the delicate balance of power between the Federal Government and the State government. Ironically, where the civil rights of a large number of Americans was a major issue in the 1860's, it is conversely the civil rights, the right to due process, the right to self-government, that are at stake in the 1980's for many westerners.

Whereas in the 1960's, the fight was, among other things, to grant a large number of Americans full citizenship, we see in the 1980's an attempt to deny many Americans their rights as citizens. As it happens, the thrust of this policy focuses primarily on citizens of Western States.

The effects of proposals now being considered to curb the authority of the State government threaten the very foundations of constitutional democracy. Let me elaborate first on what can only be termed the infamous proposal to create an Energy Mobilization Board.

The EMB, as developed in the 96th Congress of the United States, would grant to an appointed Federal board the unprecedented and constitutionally dubious power to administer State and local laws. It would grant the board arbitrary powers to waive laws passed by Congress. It would so narrowly constrict the access of citizens to judicial recourse as to effectively deny judicial review entirely.

The EMB was to be granted powers which belong, under our constitutional system, rightfully only to the legislative body, the Congress. Moreover, this same appointed body was to be shielded, in many respects, from judicial review.

The proposed Energy Mobilization Board is a monstrous Frankenstein antithetical to the American political system which depends so heavily on a carefully crafted system of checks and balances. Under the EMB, there is no check on the decision to declare a priority energy project because there is no judicial review. There is no balance when a Presidentially appointed board can administer the siting laws or zoning laws of a State or county, knowing practically nothing about the people who established those laws or the community that will live with the EMB decision. There is no check when this appointed body makes decisions governing people who have absolutely no say in electing or defeating that same appointed board. There is no check when these same citizens are denied access to the courts by virtue of severe limitations on judicial review. There is no balance when laws passed in the interests of the health and welfare of all U.S. citizens can be arbitrarily waived so that most U.S. citizens are protected from, let us say for example, toxic solid waste storage in their groundwater systems, but the citizens of McCone County would not be protected.

Notwithstanding the widely felt sentiment that an EMB would be an administrative nightmare, and not withstanding the feeling that EMB, in fact, stands for even more bureaucracy, in a much larger sense, the proposed Energy Mobilization Board represents tyranny intolerable to American constitutional democracy.

It is important to address, in the context of this hearing, the question of whether the energy crisis is adequate justification for establish-

ing a Federal agency with broad power to displace traditional State and local decisionmaking processes.

The answer, for at least three reasons, is clearly no.

First, analyses of regulatory inefficiency point to the Federal regulatory processes as the source for most of the problems. There is a great potential to tighten up the process at this level and to coordinate with State and local agencies without going to the Draconian measures contemplated in the Energy Mobilization Board. It is ludicrous that the Federal Government, which, by and large, has much more trouble than State and local governments in the area of redtape, should presume to step into State and local decisionmaking processes.

Second, as a measure of commonsense and practical experience, governments will naturally be more responsive and more accountable as they are closer to the people represented, as in State and local governments. This, in the case of siting and permitting energy projects, translates into reaching the kinds of compromises and conditions that people can live with. This accommodation would be precluded in any EMB situation where an insulated and distant Federal board can easily, and without consequence to itself, ram these things down people's throats.

The third and most obvious reason why the energy crisis does not justify an EMB is that we have a diverse and readily available array of alternatives to meet our energy needs that simply do not require the dismantling of the Constitution and heavy-handed Federal coercion over the States. These alternatives include alcohol fuels from biomass, passive and active solar construction, methane from solid waste, wind electric and hydraulic power, and microhydro electricity, to name some. We also have tremendous potential to vastly increase our energy efficiency through such means as building weatherization and industrial cogeneration. We have barely scratched the surface of these options which are capable of giving us energy independence both faster and cheaper than, let us say for example, synthetic fuels from coal.

For many Montanans, the Energy Mobilization Board proposal represents only one threat to their ability to govern themselves. It is one that they are not intimately familiar with yet. A proposal with which Montanans are much more familiar is the bill to limit coal severance taxes to 12.5 percent. It is similar to the EMB in its arbitrariness, its discrimination, and its direct harmful impact on this State. It is a proposal which inflames the vast majority of Montanans who know all too well the legacy of natural resource extraction and of boom-and-bust economies after 100 years of the Anaconda Co. in this State.

We can repeat the facts by rote. Several States that buy Montana coal are charging far more in sales tax for the electricity than the electric consumer pays for Montana's coal severance tax. Compared on a Btu basis, Oklahoma, Louisiana, and New Mexico are taxing oil energy higher than Montana taxes coal energy. The Montana coal tax is a small fraction of the transportation costs for shipping that coal. Railroad rate increases since 1973 on coal hauled to one Texas utility amounted to more than six times Montana's severance tax. That's just the rate increases. How can Congress deregulate the rail-

roads, which it has just done, and simultaneously attempt to regulate this State's right to tax coal as we see fit?

In considering whether Congress oversteps its bounds in trying to limit the severance tax on coal, one must look to the function of the tax. Does it serve in the interests of the people of Montana? Although there are costs which accompany resource extraction which cannot be compensated monetarily, there is as well a heavy financial burden to be borne by the State and the localities affected. The coal tax is used to alleviate this burden.

It helps to pay for the tremendously expensive cost to the communities of new and improved roads, schools, water treatment plants, bridges, police and fire protection, and social services, to name a few. It is being used to help foster renewable energy systems that represent a long-term economic boon for Montanans in contrast to the inevitable economic bust of removing a finite, nonrenewable resource like coal. It sets up a trust fund to pass on to succeeding generations of this state, some return for the coal which belongs to them also.

American Jurisprudence states:

> Among the matters which are implied in the Federal Constitution, although not expressed therein, is that the National Government may not, in the exercise of its powers, prevent a state from discharging its ordinary functions of government.

For Congress to legislatively intervene in Montana's coal severance tax, which is both a reasonable and fair tax, would be to prevent the State from meeting its obligations to the people of Montana.

In conclusion, I wish to emphasize the tremendous importance of this issue, the Federal preemption of States rights, to Montana and its neighboring States. We are being asked to offer up our natural resources for the Nation, and we have proceeded to do so in good faith, but we must do so on our terms which recognize the long-term best interests of our people and our responsibilities to succeeding generations. Without equal protection under the law, without due process, without significant local control and local autonomy, we can be sure there is nothing to mitigate or prevent us from becoming a national sacrifice area.

Thank you.

Senator BAUCUS. Thank you very much, Helen.

It's my view that this question comes down to the perception that other people in the country have of Montana's development of its resources. If people who live in Minnesota, think that Montana is acting reasonably, the less inclined they will be to want to enact caps on coal severance tax or to enact proposals such as the Energy Mobilization Board. I don't know if you agree with that or not. If you don't, I'd like to hear, but if you do agree, I guess the question really comes down to what's reasonable, and how far should Montana go in satisfying other States? Theoretically, we could try to prevent coal from going out of the State. We could sure try it. But if we want to help prevent the EMB's and the caps on coal severance tax, we need to be very reasonable. How can we handle our resources in a manner that will discourage Federal intervention?

Ms. WALLER. Well, I think when our State legislature set the coal severance tax, that was, in fact, saying, "This is the price that we have

to have to compensate the areas that will be impacted and to set aside some for future generations," and I tend to believe that people outside the State should look upon that as the price of Montana coal. When I go into a store, I price what I want, and if I don't want to pay that price, I don't get the item. And I think in all fairness, they have to realize that even though we have set a price on it, it still doesn't cover all of the impacts that Montanans are expected to bear. There are many social impacts that no amount of dollars, if we doubled coal severance tax, would pay for.

Senator BAUCUS. What are those impacts? It would be helpful if you could state what they are, because that's the kind of information that other Congressmen need to know. The more they recognize and understand what those social impacts are or what those costs are, I think the less they'll be inclined to vote for some of these bills. What are some of the social impacts?

Ms. WALLER. Well, probably the one that I think would hit me the hardest if coal is developed in McCone County is the whole school situation. What happens to your local schools? Now I realize that the impact money helps to pay for the construction of a building, although the local people still pick up part of the tab, but even so, the physical building is a small part of the kids' education.

One for-instance that I know of, and I'm sure you've heard this one before, is the fact in Colstrip, in 1 year, one particular child I know had eight teachers. Now that's a cost that that child is paying that no amount of dollars will ever make up for. I think that has had a damaging effect on that particular child.

Senator BAUCUS. Why did one child have eight teachers?

Ms. WALLER. Because the teachers simply couldn't hack it. They'd move on. They'd come and go and come and go. That kind of upheaval in a school system is hard for the children to bear, but it's intolerable, evidently, for some teachers.

Senator BAUCUS. Is that continuing? Is there still a great turnover of teachers?

Ms. WALLER. I think that's probably the case, although I expect the eight per year is an extreme.

Senator BAUCUS. Do any other problems come to mind? Are there any other costs, direct or indirect, that come to mind as a result of coal development?

Ms. WALLER. Sure. In fact, I can tell you about some that come to mind even though there's not been a shovelful of coal taken out of McCone County.

Senator BAUCUS. What are they?

Ms. WALLER. There is disagreement among people in communities, even in our own. You know, people who tend to think development is all right because they will gain financially, whether they're business people, whether they have surface they want to sell. Those kinds of things in contrast to those of us who want to keep our community the way it is. And even though there has been no coal extracted, we have already been impacted and no money is going to ever, you know, quite bring our community back to what it was, whether there's development or whether there isn't.

Senator BAUCUS. I understand. Is that a social cost caused by potential development? Any community can have a disagreement over something unrelated to potential coal development.

Ms. WALLER. Yes. I realize those things can happen, but the possibility of coal development and the proposals there have caused problems between the people who we deal with on Main Street and local agricultural people. When they have enforced coal development, they are telling us that "I would rather have coal dollars than I would yours." You see what I mean?

Senator BAUCUS. Yes.

Ms. WALLER. Consequently, the people who I have patronized all these years, and we've farmed for 27 years now, I don't feel as comfortable with. I don't feel like patronizing those same people who I have kept in business all these years. If they're waiting for the day that they can serve new customers rather than their agricultural customers who have kept them in business.

Senator BAUCUS. You weren't here this morning, but this morning, I asked witnesses what suggestions they had as to how we can mobilize public interest in this basic question of Federal intrusion. I've been stymied by the failure of the people to get exorcised over it. Why are people not disturbed over potential EMB's? I take it that you think they should be?

Ms. WALLER. Definitely.

Senator BAUCUS. Why isn't there more interest?

Ms. WALLER. There is a lot of interest at grassroots, but when you are hit with such an overwhelming proposal, which is what this EMB is, the people back home feel powerless. What do they do? They can see the sketch of what the EMB might be, and they can get a feel for what might come out of it, but I think many people aren't really to the boiling point until the EMB is created and the EMB has designated a priority energy project to go in the backyard, and then wait to see what happens.

Senator BAUCUS. I guess that's right. It's probably academic at this point.

Ms. WALLER. It's so far removed that they can't imagine anything could be that bad.

Senator BAUCUS. A good example would be the withdrawal of the smelter in Anaconda. For a while, people knew that was a possibility. People didn't know how much of a possibility it was, but at least they knew it was a possibility. But once ARCO made the decision to withdraw, everyone is scurrying around trying to get jobs into that area. So it's human nature not to act until it's absolutely necessary.

Ms. WALLER. Plus the fact that it was such a monstrous thing to consider. It's really hard to realize how EMB is going to relate on the grassroots level until a definite proposal is designated.

Senator BAUCUS. So how do we get around that?

Mrs. WALLER. Well, we're trying.

Senator BAUCUS. It's human nature not to get upset until we get hit between the eyes. How do we get a few steps ahead so we aren't hit between the eyes? Any suggestions? Do you have any thoughts on that?

Ms. WALLER. Well, I guess it probably all boils down to the same type of apathy that we see toward many other, you know, laws that

are enacted. I think it's a feeling among grassroots people of not knowing how you can, you know, how you can do anything that will stop it. I think people feel powerless.

Senator BAUCUS. A sense of futility?

Ms. WALLER. Yes. You know, "It's going to be steamrolled through; why waste your time?" I have people tell me this. "You're not going to fight big government. You're not going to fight big industry anyway, so you're wasting your time." I don't happen to think I am, because I think we can beat them.

Senator BAUCUS. I think you can, too, but it's going to take a lot of effort.

Ms. WALLER. Yes. Well, we're dedicated to that.

Senator BAUCUS. Thank you very much, Helen. We appreciate your testimony.

The next witness will be Mrs. Ruth Towe, representing her husband Tom. Ruth, I'm glad to have you here. I understand Tom can't make it, but we look forward to the statement of his which I understand you're going to read. Your husband has been one of the leaders on this subject for years and he has been very helpful to all of us in fighting this battle. In fact, I don't know anybody in the State who is more knowledgeable on this subject than your husband Tom. I look forward to your statement.

Mrs. TOWE. Thank you. I'm sorry that he couldn't be here.

STATEMENT OF RUTH TOWE, REPRESENTING SENATOR THOMAS E. TOWE, STATE OF MONTANA

This is a statement prepared by my husband, Senator Thomas E. Towe.

During 191 years under the Constitution of the United States, this country has developed a very special relationship between the Federal Government and the sovereign governments of the individual States which make up this country. No other country in the world operates exactly like the United States in this regard.

As our name suggests, we are a country made up of separate, sovereign, and united States. Each State is completely sovereign to do anything and everything it chooses except as limited by the Constitution of the United States. For example, the Constitution expressly prohibits States from conducting foreign policy, entering into treaties with foreign countries; from coining or printing money; from engaging in war; and from collecting duties on imports or exports. Additionally, Congress is granted specific powers, such as the power to regulate commerce between States, and the proper exercise of these powers is expressly considered superior to all State acts. Thus, the proper exercise of the express powers granted to Congress can constitute another limitation on the States.

Outside these limitations, however, the States power is supreme. They are sovereign. For example, the States have full power to regulate criminal behavior, except for violations of Federal law; to regulate family matters such as marriage and divorce; to regulate descent of property from one generation to the next; to provide for the education of children; to regulate hunting and fishing; and many other things. Obviously, one key power reserved to the States is the

power to levy taxes and collect sufficient revenue to cover the necessary expenses of providing government services.

While Chief Justice Marshall once said that the power to tax is the power to destroy, the reverse is also true. The power to limit the right to tax is also the power to destroy. It takes no imagination to visualize what would happen to the States if Congress had the power to limit the general taxing authority of States. If a State passed a law Congress did not like, such as a criminal penalty or a divorce law, Congress could simply say, "Repeal that law or we will prohibit you from collecting any income taxes." Or Congress could say, "No State can levy and collect any revenue from a State income tax, a property tax, or a sales tax if it passes a law prohibiting no-fault divorces." Since a State cannot survive without these taxes, Congress' mandate would be complete and absolute. This same procedure could be used to prohibit the recognition of a will for inheritance purposes or to prohibit fishing on weekends.

Certainly, this was not intended by the framers of the Constitution of the United States. The Founding Fathers intended the States to remain strong sovereign entities unified only by a common foreign policy, a common monetary policy, and a few other common interests. If they had intended to allow Congress to regulate every aspect of the lives of its citizens, it would have said so.

Congress cannot and should not be able to achieve this same result by the back door; namely, by limiting a State's right to raise and levy taxes. Yet, that is exactly what would happen if Congress had and used the power to limit the general taxing authority of States.

With the exercise of such power, States would cease to be sovereign. They would act only at the will of the Federal Government. Since the Federal Government would be able to exercise total control over their purse string, the States would exist only at the will of the Federal Government. We would no longer have a Federal system but a monolithic central government. The delicate balance between the States and the Federal Government would be destroyed. The Founding Fathers would roll over in their graves to think they had set up such an all-powerful central government.

Fortunately, this has not happened. Congress has never yet attempted to limit the general taxing authority of States. Although it has come dangerously close in the prohibitions contained in the Railroad Revitalization Act, the tax limitation laws currently on the books do not affect the general taxing authority of a State. Congress has prohibited a State from using its tax powers to discriminate against a Federal instrumentality such as a national bank or a Federal savings and loan association. There are also limitations relating to taxation of airports and other special Federal operations. Until now, Congress has never attempted to place a general limit on a State's income tax, sales tax, or property tax.

A severance tax is no different. Congress has never before attempted to place a general limit on a State's severance tax. In this regard, H.R. 6625 and H.R. 6654, and, to a lesser extent, H.R. 5294, S. 1778, and S. 2695, all presently before Congress, are unprecedented. They would all attempt to limit the general power of a State to levy a severance tax

on coal to 12.5 percent of the value of the coal. The limitation is the same in principle as a bill limiting the general income tax a State can collect to 12.5 percent or to 5 percent of net income.

The precedent is overwhelming. If Congress can reduce the coal tax in Montana to produce cheaper electricity for the rest of the Nation, it can reduce the oil severance tax in Texas and Louisiana to produce cheaper gasoline, the wood products tax in Oregon to produce cheaper lumber, the iron ore tax in Minnesota to produce cheaper steel products, and the single business tax in Michigan to produce cheaper automobiles. It isn't very far from these to a law that would limit the sales tax in Illinois or the income tax in Iowa to allow farmers to grow slightly cheaper corn. Or a law that would limit the property tax in New York to allow larger dividends from corporations with large corporate headquarters in New York City.

Once established, such a power in the hands of Congress would eliminate States as we know them today. The federal system with its inherent checks and balances would give way to a monolithic, all-powerful central government. The United States of America would be a misnomer. Our country should then be renamed "The Omnipotent Central Government of America."

If the coal tax was levied only on coal destined for shipment in interstate commerce, it would be a different story. Then the limitation bills would be a proper exercise of Congress power to regulate interstate commerce. The tax, however, is levied before the coal reaches interstate commerce: namely f.o.b. mine, just before it is loaded into a railroad car. Also, it is levied at the same rate on both coal used in Montana and coal shipped out of State for consumption.

Also, if proponents of the coal tax limitation bills had done any research and had any basis whatsoever to suggest that the existing tax in Montana and Wyoming is higher than necessary to assure reasonable protection from the coal-related problems, and so high that it would prevent shipment of our coal out of State, they might be able to justify Congress authority under the interstate commerce clause. Presumably, at some point the tax could be so high that it affects the shipment out of state to the detriment of the other States, and if the revenue is more than necessary to address the normal government cost associated with coal development, Congress may attempt to claim authority to step in to prevent abuse.

Identification of coal related costs, however, must be left to the States. For outsiders to tell Montana what those costs are and how much is reasonable to set aside to meet them is like the King of England telling the American colonists they must pay an arbitrary tax on tea, or like the once-powerful Anaconda Co. dictating to the Government of Chile how much severance tax Chile could collect on copper. Unless we in Montana can set our priorities to meet our own needs, we are nothing but a colony subject to manipulation by outside forces. I call this energy crisis colonialism.

But more importantly, no effort has been made to evaluate the costs related to coal development. All the bills attempting to limit coal severance tax use the same figure: 12.5 percent. Yet all the authors admit the figure is completely arbitrary and not based on any research or

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study of financial needs. For example, Senator Dale Bumpers, chief sponsor of S. 2695, was recently asked, "Why 12.5 percent on the MacNeil–Lehrer Report?"

He answered, "Well, No. 1, that is an arbitrary figure, and I recognize that."

In fact, the Congressional Research Service of the Library of Congress concludes, "Montana's severance tax rate imposes about the same or less of a burden on other States than the examined severance tax rates on oil or gas from the perspective of the end product that the consumer actually uses." And that quote is taken from "Energy: Limiting State Coal Severance Taxes," issue brief No. IB800602, page 8.

The Congressional Budget Office, in an attempt to evaluate energy impacts, concluded that a capital investment of $7,122 per person and operating costs of $1,714 per person for each new person brought into an area by coal development could reasonably be anticipated by local governments. Assuming a conservative coal industry employment of 4,000 employees at the present time and 12,000 total increase in population in the coal mining areas, that amounts to over $20 million operating costs and over $85 million capital investment costs, nearly double our annual coal tax collection. And the Congressional Budget Office admits they omitted the single biggest impact cost: roads. And further, this leaves nothing for the future impact problems.

Under these circumstances, proponents of a coal severance tax limitation can hardly show an abuse. Further, with a coal production increase of 117 percent in Montana since the tax was enacted, they can hardly show a substantial interference with interstate commerce.

Proponents of these bills cannot justify these bills on any existing precedent. If passed, the bills will plow new ground. The furrows are likely to be deep and irreparable. By upsetting the delicate balance between the States and the Federal Government, our country may never be the same again. We will have gone far astray from the kind of government envisioned by the Founding Fathers that met in Philadelphia in 1787 to draft the Constitution of the United States.

Senator BAUCUS. Thank you very much, Ruth. That's an excellent statement in two respects, in particular. One is that it identifies the costs associated with strip mining very well. I was very interested in the budget office estimate of the number of dollars that it would cost to pay for 4,000 people who are brought into a community. They show that Montana's coal severance tax doesn't pay for all the costs that are attributable to that kind of development. The statement makes that point very, very well. And second, it states with considerable articulation the power of the Congress to limit a State tax is the power to destroy the State. It's a point that we all know, but it helps to see the point made well, and that statement makes that point extremely well.

So I want to thank you, and please thank Tom, too, for his statement.

Mrs. TOWE. I will. Thank you very much.

Senator BAUCUS. The next witness will be Bob Tully, who is representing the Western Coalition of Resource Councils. Bob?

Mr. TULLY. Senator?

Senator BAUCUS. Good to see you. We appreciate your presence here, Bob.

STATEMENT OF ROBERT TULLY, CHAIRMAN, WESTERN ORGANIZATION OF RESOURCE COUNCILS

Mr. TULLY. Thank you, Senator. I appreciate the opportunity to testify here, and I would like to congratulate you on organizing these hearings.

For the record, I am Robert Tully. I'm a rancher from the Bull Hills near Roundup, and I am testifying today as chairman of the Western Organization of Resource Councils, known as WORC.

WORC is a coalition of the Northern Plains Resource Council of Montana, the Dakota Resource Council of North Dakota, and the Powder River Basin Resource Council of Wyoming. We are an association of ranchers, farmers, and townspeople who want to assure that energy development in the northern Great Plains does not destroy the agricultural base that is our livelihood, and I think it's quite evident that we are truly a grassroots organization, and I'd like to go on record today as claiming that this testimony comes straight from the horse's mouth and not the other end of the horse.

We believe that the Congress is on the wrong track, promoting proposals like the Energy Mobilization Board, which I will talk about today, synthetic fuel development, and the Northwest Power Act. We believe that such legislation would decrease the power of State and local government, waste time and money, and do nothing to solve our real problems.

The Congress was in a great rush to establish an EMB last year, and many vital issues were never debated by the Members of Congress. I am not a constitutional lawyer, but I find that my role in this struggle is accurately described in "American Jurisprudence," first edition, and I quote. "The citizens of a free government are justly jealous of their constitutional rights and privileges, and this should be attributed to them as a virtue rather than as a fault. It keeps them on the alert and inspires them with courage and determination in their efforts to resist the aggressions of arbitrary power. It is just as obligatory upon the citizen to resist encroachments upon his rights and liberties guaranteed by the Constitution as it is for him to uphold and maintain its integrity," end quote.

I believe that the Energy Mobilization Board is a bad idea, an unworkable idea, and, most probably, an unconstitutional idea. Maybe I should say that it is a bad idea that luckily, especially for those of us who live in the West, it is also unworkable and unconstitutional. Let me outline briefly why I make this statement.

One, the EMB would enter a constitutional no-man's land and would stand a good chance of being stricken down by the courts. I would like to include with my testimony at a later date a legal memorandum prepared by Northern Plains Resource Council Attorney Andrew Patten, giving a detailed explanation of our views on the legal questions raised by the proposed EMB. Although the Federal Government has the authority to regulate, it may be claimed, to the exclusion of the States, the Federal Government cannot take certain authority without the assumption of regulatory authority. The basic structure of the EMB, therefore, is flawed.

Two, the EMB is politically unpalatable. Congress did not consider establishing an EMB that assumed all the responsibilities necessary

to clarify the constitutional question just mentioned because it would have been politically impossible to take from State and local governments all the responsibilities they now exercise over the siting and permitting of energy projects. Yet, the muddled version proposed by Congress, still assumes too many of the responsibilities traditionally exercised by State and local governments to be politically acceptable. In the last few years, we have seen an increasing number of Americans, including the President during his 1976 campaign, voicing support for lessening the role of the Federal Government in our daily life and decreasing the size of the Federal Government. Yet, this legislation would create a new bureaucracy to carry out many of the responsibilities that another new bureaucracy, the Department of Energy, was created to perform just 3 short years ago. The Congress would be well-advised to consider abolishing the DOE. Two wrongs do not make a right.

Three, the provisions of the EMB legislation are totally unworkable. For example, the idea of allowing the EMB to make a decision in lieu of a State or local government is ludicrous. The idea of the EMB chairing a meeting in Circle, Mont., in lieu of the McCone County Commissioners is outrageous, although such an experience might well be educational for the EMB personnel involved.

Four, in areas where both the Federal and State governments have responsibilities, cooperation, not coercion, is most effective. We are not colonies to be ruled. Cooperation is the only way of avoiding all the constitutional questions that would otherwise tie up this legislation in court for many years. In addition, if the goal of the EMB legislation is to speed up consideration of important energy projects, intergovernment cooperation is by far the quickest path. There is no history of State government attempting to delay energy projects. On the contrary, many States have passed siting laws to facilitate consideration of major energy projects.

The assumption underlying the EMB legislation is that State and local governments, Federal agencies, and citizens are trying to delay and hinder needed energy projects. This is unfair and untrue. As you know, many of us fought for years for passage of legislation on coal leasing, stripmining, modification of the BLM Organic Act, the Clean Air Act, and many other Federal statutes. Congress may forget about legislation it has passed, but we don't. We have diligently participated in the adoption of agency regulations, the passage of State laws consistent with Federal law, and participate in the activities of agencies enforcing Federal law in this region. Our work pays dividends, and not only for our own members. Montana, for example, was the first State to promulgate a State program consistent with the Surface Mining Control and Reclamation Act and to complete a cooperative agreement with the Office of Surface Mining. Although we have lost some battles along the way, we continue to struggle within the legal system. We are simply trying to assure that the laws are enforced as written and that agencies meet the requirements of their own regulations. The EMB legislation is an insult, accusing State governments and citizens alike, of aggravating our energy problems. This is simply not true. We work within the legal system and ask only that others do likewise.

Five, for obvious logistical reasons, State and local government proceedings are easier for citizens to participate in than most Federal activities. The EMB would take many responsibilities away from local governments and establish timetables that would diminish the opportunity for public comment and response. Whenever a cut is considered, public participation is always the first item sliced off any schedule. This is to be deplored. We believe that those whose lives and livelihoods would be the most affected by major new energy projects should have the right to participate in Government decisions absolutely guaranteed.

Six, if the laws that we have worked so hard to pass can be waived by whatever Byzantine process that Congress devises, if decisionmaking responsibilities are taken from our local governments, if jurisdiction is taken from local courts, then what access do the people have to the Government? How can anyone be expected to remain a lawabiding citizen if the Federal Government won't abide by the law itself? The EMB would be a club to change the rules in the middle of the game.

Your letter inviting me to testify asked if our energy problems require such major changes to be made in our laws as proposed in EMB legislation. I say "no." One of the major foundations of the President's first energy message was that all sections of the country should share equally in the cost of modifying our use of energy. We are not prepared to become a national sacrifice area, losing our land, our livelihood, and our rights so that bigwigs can continue to be driven around in air-conditioned limousines, and multinational energy companies can export coal. The members of WORC are committed to energy conservation, increasing energy efficiency, and promoting alternative sources of energy. The Congress should get down to the hard business of helping eliminate the many ways in which we waste energy instead of blaming State governments and vital Federal statutes for our energy problems. We are not prepared to jeopardize the long-term production of our agricultural land, the value of our timber, or our precious water resources to meet short-term energy production goals calculated to meet insatiable foreign and domestic energy appetites. The major changes that are required are in our patterns of producing and using energy, not in the laws or the Constitution of this land.

Your letter also asked if there were a fast-track approach to energy project decisions that would not compromise the rights of State and local governments. I believe that it is possible to work out a flexible, informal system within our existing laws and regulations so that State and Federal officials and citizens can work together. Whenever there is a problem, the solution is not necessarily to pass a new law. For a change, we should look forward toward making our present laws work better.

It should also be pointed out that many a project is delayed because its proponents have inadequately prepared permit requests, making it impossible for citizens and officials to decide whether the project is viable and can be built safely. Many projects take a long time to complete the decisonmaking procedures because they do not accept rejections of their permit requests and keep modifying their proposals and going to court in hopes of obtaining approval. There is nothing wrong

with being persistent, but such delays should not be blamed on environmental laws or pesky citizens, but on the projects' difficulties in meeting legally established standards.

In closing, I would like to emphasize that Congress would serve us better if it concentrated on working cooperatively with citizens and State and local governments and quit looking for simple answers to the complex problems that face us. Before passing any new laws, Congress would be wise to consider these words from American Jurisprudence, and I again quote:

> Thus, any act of Congress plainly and directly tending to enhance the love and respect of the citizen for the country's institutions and quicken and strengthen his motives to defend them and which is germane to, intimately connected with, and appropriate to, the exercise of one or more of the powers granted to Congress is valid.

The EMB flunks on all counts.

Thank you.

Senator BAUCUS. Thank you, Bob. You made a couple of points that were extremely helpful. One is the EMB procedures are unworkable. Whenever a board or a group of people make a specific decision that affects a specific area adversely but where that decisionmaker is thousands of miles away, in all likelihood, people in the area where they're affected are not going to tolerate that decision.

One energy company I talked to admitted to me that if local people in an area don't want a project, it won't get built; that is, if they go to very great extremes to prevent the project from going through, including the court process, probably the project won't go through. It's one thing for Congress to pass a law of general applicability that affects the country generally, but it's something else for unelected people to make a decision which very specifically affects only a specific locality. Not only do they not have any course because they can't boot the people out who made the decision, but they're angry because they dislike the decision. So I appreciate your making that point. It's very unworkable to have a distant organization making a very specific decision.

I also appreciate the point you're making, that EMB would be a lawless institution; that is, it would be a very significant intrusion into our customary Federal and State relationship. It would be in my judgment, operating outside of how I think the Constitution should be interpreted. And so I appreciate that point.

I'd like to ask you a question, though, on the distinction that's often made between procedural and substantive law. There is some argument that, "Well, perhaps the EMB should not override substantive State law, but it's OK if it only affects State procedures; that is, the time within which a board of natural resources, for example, decides whether to locate a powerplant in the State."

I'd like your view on the degree to which Federal instrusion into State procedure is proper, and the degree to which Federal instrusion into State procedure is improper.

Mr. TULLY. If I may, Senator, I'd like to put it within the framework of, if you will, the credibility of Congress in the eyes of the people affected.

Consider, if you will, a number of years ago. The Federal Government in Washington was in the position of scolding, encouraging,

cajoling, squeezing States into adopting Environmental Protection Act laws, stripmining regulatory laws, and so on. And it seems inconsistent and incredible today to have moves in Congress that would cut the ground from beneath, for example, the reclamation law that we did pass in Washington—I mean, pardon me, in Helena. And as I mentioned in my presentation earlier, in compliance with or in cooperation with a Federal agency administering the Federal Stripmining Reclamation Act. And as you know right today in Congress, there's a move afoot to adjust the Federal stripmining reclamation law.

Speaking with specifics to the EMB, but to enlarge the scope a little bit to include the Northwest power bill, Senator Jackson's baby, the attack on the Stripmine Act that was passed very recently in Congress, the synfuels bill, and the EMB as a package, you asked Helen, you know, "How do we get people's interest?" You've already got people's attention. They're quite furious about it because they can appreciate what all of those taken together mean. Now the EMB stumbled along its way toward passage, and God forbid it ultimately will be passed, and I hope the others can be defeated because they are brainwaves of an undesirable nature. But if an agency of Government, the EMB, with its prerogatives, fitting hand in glove with the Northwest power bill and what it portends for not so much the Pacific Northwest and the light metals industry, but rather for Montana and Wyoming who are going to provide the wherewithal in this cosmic plan, is pretty frightening, and this is why people are excited, and people are, very definitely, really angry and excited about the EMB's and what it would, quote, be jamming down their throat. They are quite alarmed about the possibility, very real possibility, that the horrendous forecasts of the 1971 northcentral power study may come to pass, and guess who it's going to dump on? Montana and Wyoming and North Dakota, chiefly.

Senator BAUCUS. Well, I think you're absolutely correct. It's my view that often distinguishing between substance and procedure is missing the point. Limitations on State procedure have the same effect as limitations on State substance.

Mr. TULLY. Exactly.

Senator BAUCUS. And that's the point I was asking about. I am also concerned about EBM's that intrude upon State procedures, whether or not they intrude upon substance.

Mr. TULLY. I don't see that there's any distinction.

Senator BAUCUS. That's right. As it came out of conference, the final version included both substance and procedural overrides, but the earlier versions of the bill provided only that the EMB could override State procedure and not substance. It seems to me that in many cases overriding State procedure is just as harmful as overriding State substance. For example, if EMB would say, "OK, Montana. You have to decide within 6 months whether or not to locate a synthetic fuels plant on the Yellowstone," that as a practical matter, amounts to substantive override. If Montana has not acted within 6 months the State has to turn the decision over to the EMB. The States can't consider substance if they don't have enough time. Under those circumstances the plant probably will be built.

Mr. TULLY. And basically, what you're saying is under the EMB concept, you aren't really regulating anything. You are calling for

carte blanche, blank check, to whoever or whatever forces want to build or dig or generate, what-have-you.

Senator BAUCUS. In your statement, you said we shouldn't have EMB's, but we should cooperate more. How do we cooperate more? How do we show the rest of the country we're meeting them halfway?

Mr. TULLY. Well, there's been an awful lot of PR involved inferring that there has not been cooperation, and I think this is erroneous, and a case in point that I would cite would be, for example, the Colstrip 3 and 4 hearings and the drawn-out procedure that was gone through. And so often, it's cited as an example of bureaucratic redtape and intolerable delay and so on, and if you know the actual facts of the matter, you appreciate that the intolerable delay and the long, drawn-out process was not occasioned by intransigence on the part of the administering agency of Government or on citizen's groups. For instance, the hearings, the days of testimony in the hearings, something like over 100 days were put on by the company seeking the permit, and something like 4 or 5 days in total time before the committee or board was put on by opponents. So it's not accurate to characterize the experience of the permit application for Colstrip 3 and 4, for example, as something to be deplored and changed by arbitrary acts such as the EMB.

The number of judicial appeals, I believe you'll find, were greater instituted by the companies involved, consortium, than those who would oppose that permit. So it isn't all a horse of one color.

Senator BAUCUS. So you think that the Montana Utilities Plant Siting Act should not be changed?

Mr. TULLY. Absolutely not.

Senator BAUCUS. You do not think the decisionmaking period should be shortened?

Mr. TULLY. Well, it must be recognized—and a few people do—that the State of Montana has already addressed this fast-track need that's been rooted about, and it has offered some remedy to that end. So that's what I'm talking about by public relations and publicity.

Senator BAUCUS. So you think we're cooperating enough in Montana with respect to other States' perceptions of Montana's efforts or non-efforts to develop responsibly? Do you think we're cooperating?

Mr. TULLY. Yes, sir.

Senator BAUCUS. Could we do anything else to show that we're cooperating?

Mr. TULLY. There you get into public relations.

Senator BAUCUS. Do you take out an ad in the Arkansas Gazette and say, "We're cooperating?"

Mr. TULLY. Harking to some of Helen's testimony and Mrs. Towe's testimony with respect to the coal tax, I can't understand how a Congressman from Texas, for example, can start howling in Congress in Washington about the severance tax on coal in Montana and Wyoming in view of the billions of dollars that his State and neighboring Louisiana has extracted from energy, and they're basic fossil fuels, energy sources, natural gas and petroleum products. It looks like they would be terribly vulnerable to having it snapped back right in their face.

Senator BAUCUS. Sounds like a Texan to me.

That perplexes me, too, and they'll do it straightfaced and you point out all the benefits of the oil severance tax, and it's like water off the back of a duck.

Mr. TULLY. Doesn't this ring a bell with those who don't pay any attention to those severance taxes, and yet those who would reduce Montana's and Wyoming's?

Senator BAUCUS. Excuse me?

Mr. TULLY. Doesn't this ring a bell? How can they escape ringing a bell?

Senator BAUCUS. Some are beginning to wake up a little bit. For example, I think the chairman of the Finance Committee who is from Louisiana, which produces a lot of oil and gas, is beginning to recognize the dangers of this kind of a bill. We're picking up a few along the way. I'm heartened by the number of people that we are picking up here and there. About every week, somebody else will see the light.

You're right. Some of these States don't produce much coal, and so it sounds like a good idea to them, but when they start thinking about the precedent and what this might mean to their States, then they take a second look at it, particularly when they learn that passage of Bumpers' bill, for example, is not going to lower the consumer utility bill one penny. That is when they realize that in all probability, it's the utilities which are very conveniently setting up a straw man that is responsible for high utility bills rather than pointing out the true costs which are transportation and other costs. It's not the Montana severance tax or the Wyoming severance tax. It's a matter of education. We're slowly progressing.

Thank you, Bob, very much.

Mr. TULLY. Thank you, Senator, for the opportunity.

Senator BAUCUS. Our next witness is Mr. Gary Helgeson, deputy attorney general for the State of North Dakota. I understand you're representing the attorney general; is that right?

STATEMENT OF GARY HELGESON, DEPUTY ATTORNEY GENERAL, REPRESENTING ATTORNEY GENERAL ALLEN I. OLSON, STATE OF NORTH DAKOTA

Mr. HELGESON. That is correct.

Senator BAUCUS. We appreciate your trip today. You can either read or summarize.

Mr. HELGESON. Senator, I will be reading the statement of Attorney General Allen Olson.

I appreciate the opportunity to present testimony on S. 1778 and S. 2695, which propose limitations on and Federal preemption of State-imposed natural resources severance taxes.

There has been a growing political struggle throughout the United States as a result of the extensive increase in the cost of energy the past several years. The President and Congress under the banner of public interest have been referring to the need for a national energy policy which would stabilize the disruptive effects of high energy costs on the consumers of energy throughout the United States. Now with the introduction of the proposed legislation being considered by this

committee, some Senators and Congressmen are seeking to place a Federal restriction on the amount of severance tax a particular State may impose upon an operator extracting minerals within that State. Specifically, these bills would limit a State's severance tax to 12.5 percent of the value of the coal extracted. If either of these bills are enacted, many Western States will be adversely affected since they have historically levied taxes on the extraction of natural resources.

Due to the increased activity in the past 7 years in the search for and the development of alternatives to foreign oil, there has been a great increase in coal exploration, surface mining, energy conversion, and energy transmission in North Dakota. This activity has created a host of problems within the State and created numerous burdens upon State and local governments where these activities have taken place. With the influx of mining and energy personnel, roads, schools, law enforcement, social services, and other essential local government services have had to be created, improved, or enlarged at great expense to the taxpayers in North Dakota. Also, recent laws governing surface mining, land reclamation, powerplant, and transmission line siting have been enacted in response to this increased energy activity. These laws have created new obligations for State government.

These necessary Government programs must be paid for. North Dakota and other States have looked to coal severance taxes for a share of these costs and for compensation for a nonrenewable resource. Many of the other States in the West have done likewise, each having learned a lesson from the history of Appalachian coal development.

It has been said by some that all these severance taxes are but ill-disguised attempts by the States to carve out a bigger piece of the pie, to the detriment of sister States which do not have the natural resources of the Western States. The fact remains that the extraction of coal from North Dakota and other similarly situated States, depletes the physical wealth of the State, imposes undesirable consequences on portions of society, and forecloses alternatives available to the State. Examples of this are the desolation by an open pit strip mine and the deterioration in air quality caused by coal conversion. State taxation of natural resources, in the form of a severance tax, is an appropriate means for the citizens of North Dakota and other Western States to receive just compensation for adverse impacts caused by the extraction and removal of coal from within the boundaries of North Dakota.

Our constitutional framework provides a substantial check on the independent behavior of States in the economic sphere. On the other hand, there are legitimate public purposes for resource taxation, some of which have previously been delineated, which cannot be ignored and which have traditionally been afforded constitutional protection. It is clear that States have the power and the right to tax resource extraction activities, as well as other industrial and manufacturing processes which take place within their borders. It may be argued that if a given State were to impose a severance tax upon coal, the amount of which would prohibit the economic extraction of the coal and placing it into interstate commerce, then it may be an unreasonable interference with interstate commerce. See, U.S. Constitution, Article II, Section 8. Now, however, the States are confronted with bills that would replace local decisionmaking with a national restriction on severance taxes.

The key question is where does the levying of a severance tax on coal and other minerals impose such an impermissible burden so that the tax would be unconstitutional as violative of the commerce clause? It appears that the initial belief of the sponsors of the present legislation is that anything over 12.5 percent would be too burdensome on interstate commerce. The enactment by the Congress of such legislation would result in an arbitrary and discriminatory limitation on the taxing powers of the States. The resolution of this issue is of great concern to all North Dakotans, as well as other Western States, and great care should be taken to insure that an adequate record be made concerning this issue.

It is implicit that a tax on the severance of coal and other minerals has a public purpose underlying its imposition upon taxpayers within a State. The services provided by North Dakota, and the protections afforded mineral extractors in North Dakota, provide the foundation upon which a severance tax is based. Most recently in the case of *Massachusetts* v. *United States*, 89 S.Ct. 1153, 1165 (1979), the U.S. Supereme Court delineated its position on this issue. The Supreme Court stated,

> A governmental body has an obvious interest in making those who specifically benefit from its services pay the cost and, provided that the charge is structured to compensate the government for the benefit conferred, there can be no danger of the kind of interference with constitutionally valued activity that the clauses were designed to prohibit.

This test was earlier phrased in 1940 in the case of *Wisconsin* v. *J. C. Penney Co.*, 311 U.S. 435, 444 (1940),

> A state is free to pursue its own fiscal policies, unembarrassed by the Constitution, if by the practical operation of a tax the State has exerted its power in relation to opportunities which it has given, to protection which it has afforded, to benefits which it has conferred by the fact of being an orderly, civilized society.

The extraction of minerals, especially coal, in North Dakota has necessitated increased State government services. A severance tax is not imposed just to fill the coffers of the State, but on the other hand, the revenues are used to pay for additional government costs, environmental impacts, and the depletion of a nonrenewable, important, economic, and natural resource. It is not the intent of the State of North Dakota currently, nor has it ever been, to levy a tax which would create an interstate trade barrier. In such an event, North Dakota coal would not be competitive with the coal of other States. In short, coal mining in North Dakota would then be uneconomical.

It is clear that the framers of the Constitution sought to free national commerce from the strictures of State protectionism by granting the Congress the power to regulate commerce among the several States. It is also true that the U.S. Supreme Court has, since the 1937 decision in the case of *NLRB* v. *Jones and Laughlin Steel Co.*, recognized the fact that the U.S. economy is extremely complex and Congress has the power to act in plenary fashion under the commerce clause, to protect interstate commerce. However, it is also clear that the 10th amendment provides an external check by the States upon Congress.

A review of the modern cases in the areas of State regulation, State taxation, and State severance taxes may be helpful in determining

the limitations put on Congress and the States through the commerce clause.

The U.S. Supreme Court has articulated a balancing test in the case of *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137 (1970). In that case, the Court invalidated an Arizona State statute which required Arizona cantaloupes to be packed in the State. A four-prong test was used to balance the interests. They are, one, evenhandedness as to the effects had upon intrastate and interstate commerce; two, legitimacy of the local public interest; three, the burden imposed upon commerce in relation to the local benefit; and four is the regulation the least restrictive alternative. Thus it can be seen that some forms of regulation by the States can impose a burden on interstate commerce and not be unconstitutional as long as it meets this test. This is the leading case in the field of State regulation of interstate commerce.

In the past 5 or 6 years, the U.S. Supreme Court has significantly changed the older, outmoded policies of previous Supreme Court decisions as they relate to State taxation of interstate commerce. The earlier decisions as evidenced by *Spector Motor Service, Inc.*, v. *O'Connor*, 340 U.S. 602 (1951), and *Colonial Pipeline, Inc.*, v. *Triangle*, 421 U.S. 100 (1975), held that a tax on the privilege of doing interstate business was violative of the commerce clause. However, in the case of *Complete Auto Transit, Inc.*, v. *Brady*, 430 U.S. 274 (1977), the Court rejected a mechanical, formalistic approach to State taxation and adopted a balancing test to decide whether the tax was unconstitutional. The Supreme Court adopted the following functional test to validate a State tax. "One, the activity had to have a substantial nexus with the taxing State; two, be fairly apportioned; three, did not discriminate against interstate commerce: four, was fairly related to the services provided by the State." 430 U.S. 274, 279 (1977).

This test was reaffirmed a year later in *Department of Revenue* v. *Association of Washington Stevedoreing Companies*, 98 S.Ct. 1388 (1978). The key issue in both these cases was whether the activity unfairly burdens commerce by exacting more than a just share from the interstate activity. Id. at 1398. One of the areas that concerned the Supreme Court was the possibility such a cumulative tax burden might be placed on interstate commerce from State to State so as to make interstate commerce unprofitable. It is clear that such a concern is not present when a State is taxing the severance of minerals since only the State where the minerals are extracted or severed could levy such a tax. Applying the *Brady* test mentioned earlier to the taxing activity shows that such a tax can be upheld as constitutional because all four prongs of the test can be met by a State-imposed severance tax.

The early cases which dealt with a State severance tax on minerals and set the tone of the Supreme Court's treatment of these type cases was the *Heisler* trilogy decided in the 1920's. It is still good law today. In each of these cases, the imposition of a severance tax upon the producer of minerals was upheld against a commerce clause attach. The cases were as follows: *Hope Natural Gas Co.* v. *Hall*, 274 U.S. 284 (1927); *Oliver Iron Mining Co.* v. *Lord*, 262 U.S. 172 (1923); and *Heisler* v. *Thomas Colliery Co.*, 260 U.S. 245 (1922). The Court decided that in each case the act of severing minerals preceded the entrance of these minerals into the flow of commerce. It is interesting

to note that the facts of the *Heisler* case parallel the modern problems facing the western States, especially North Dakota. Anthracite coal was being taxed by Pennsylvania. Since anthracite coal was found only in a few counties of Pennsylvania and virtually nowhere else, the State had a virtual monopoly on anthracite. Eighty percent of the total production was shipped out of the State, and the coal was a necessity in other States due to the other States' local laws prohibiting the use of other coals for heating. These facts are markedly similar to the present reality of modern western coal and have given rise to the present commerce clause argument and stated that the taxing of the severance of minerals preceded the protection afforded interstate commerce. The distinction between when an activity was in commerce or preceded commerce has held to the present day, and so far has protected a State's ability to tax the severance of minerals.

A few recent cases have also shown the continual support by the Supreme Court for these decisions in the *Heisler* trilogy. In *Michigan-Wisconsin Pipeline Co.* v. *Calvert*, 347 U.S. 157 (1954), and *State of Alaska* v. *Arctic Maid*, 366 U.S. 199 (1961), the Supreme Court reaffirmed the validity of the *Heisler* holding. Also most State courts which have had to deal with similar questions have adopted the *Heisler* rationale, including, most recently, the Montana Supreme Court.

While some commenators feel that the mechanical test as found in the *Heisler* cases should be changed due to trends in other areas of Supreme Court decisionmaking, the *Heisler* trilogy is currently the law of the land. Even if a new test was adopted by the U.S. Supreme Court, it would probably be very similar to the *Brady* test. It appears that a State law imposing a severance tax across the board on severance of minerals would pass the muster of the *Brady* test.

A key issue in the whole matter of State severance taxation is whether Congress has the plenary power to step in and put a limit on the amount of the tax imposed by the States by way of the commerce clause. Admittedly, since 1937 the Supreme Court has given Congress a great deal of deference in preempting a State regulation that in Congress view has a serious effect on interstate commerce. This is essentially the holding of *NLRB* v. *Jones and Laughlin Steel Co.*, 301 U.S. 1 (1937). This is the crux of the issue here today. It is quite apparent that some Members of the Senate believe the time is ripe for the U.S. Government to get involved with the States' severance taxes and put a cap on the rate of taxation which can be applied by a State.

Senate bill 1778 was introduced by Senator Bentsen of Texas. This bill places a limit on coal severance taxes charged extractors of Federal coal from Federal public domains. It is interesting to note that there are no Federal public domain lands within the State of Texas, so there would be no effect upon Texas if the legislation is passed. Yet there is a great deal of lignite coal in Texas beneath State and privately owned land.

Senate bill 2695 has been introduced by Senator Bumpers, Durenburger, Jackson, Riegle, Levin, Nelson, Proxmire, and Metzenbaum. Each of these Senators represents parts of the country where little if any coal is mined and where there is little, if any, Federal public domain lands. It is the ultimate in legislation that is discriminatory

against Western States. Its enactment would be a flagrant injustice to the Western States. Its effect would be to make of the Western States a regional colony to serve the economic needs of the rest of the Nation. Such legislation only adds fuel to the arguments which favor the sagebrush rebellion.

State taxes or regulations of commerce which have been determined by the courts to have created trade barriers which impede interstate commerce have not involved State severance taxes on minerals. See, *West* v. *Kansas Natural Gas Co.*, 221 U.S. 229 (1911), *Pennsylvania* v. *West Virginia*, 262 U.S. 553 (1923), *Philadelphia* v. *New Jersey*, 437 U.S. 617 (1978), and *Hughes* v. *Oklahoma*, 99 Supreme Court 1727 (1979).

The 10th amendment, the concept of federalism which permeates the Constitution, and finally the public in its power to elect different leaders, all limit the actions of Congress through external pressures. Any attempt by Congress to impede or lessen a State's ability to provide basic services to a State's residents strikes at the very heart of American federalism. A recent Supreme Court case specifically held that there are Federal limits to Congress power to interfere with States. In the *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), the Court invalidated a congressional mandate as to the minimum wage laws as applied to the States This case stands for the proposition that the Federal Government is unable to interfere with the internal operations of a State.

Another way which Congress attempts to limit the States is through the supremacy clause and the concept of congressional preemption. In areas where the Federal Government has not previously staked out a position, the courts will closely scrutinize the sudden necessity and reason for the preemption of State power and authority. I believe that a careful look at the motives of the sponsors of the present legislation will reveal that they contain little substance as to national interest or purpose. It is unlikely the courts would be persuaded by supremacy clause arguments aimed at invalidating State severance tax laws. A clear intent would have to be made by Congress to preempt, as opposed to limit, the field, and absent such intent, the action by Congress would fail. Congress has always recognized the States' power to levy a severance tax. As recently as the Natural Gas Policy Act of 1978, section 110, the Congress has been careful to protect the State's power to levy severance taxes on oil and gas. It would be unwise and discriminatory for Congress to have a different policy regarding coal.

North Dakota does not believe that in the foreseeable future the Congress needs to change its longstanding policy to allow States to tax the severance of minerals unencumbered by national standards. The Western States have generously responded to our country's energy needs. They have also acted responsibly as stewards of the land and as trustees for future generations. The proposed legislation is unwarranted and unnecessary.

In summation, any attempt by the Congress which would impair a State's sovereignty would be an impermissible violation of the principles of federalism and the 10th amendment. *National League*, supra, and *Fray* v. *United States*, 421 U.S. 542 (1975), both stand for this principle. The *Fray* court stated, "The 10th amendment expressly

declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a Federal system." We submit that congressional interference with a State's power to tax the severance of minerals would so violate the 10th amendment.

Thank you for considering my comments.

Senator BAUCUS. Thank you very much, Mr. Helgeson.

The portion of your statement which more clearly flushes out the cost to the States, the direct costs and also the services that the States have to provide, are particularly helpful. The more we can show that and document that, the more we're going to be able to withstand congressional and constitutional challenges. I encourage all of us to flush out these costs as much as possible.

We don't have to exercise any artificial effort in that regard. All we have to do is dot our i's and cross our t's and show how all the expenses add up. People will begin to realize that these severance taxes are directly related to the costs.

You've been here for much of today's prior testimony. What observations do you have as to how we can best head off Federal intrusion. You were undoubtedly sitting back there and thinking to yourself about what we can do.

Mr. HELGESON. Senator, this morning it was a pleasure to fly out of Bismarck and go west to address a congressional hearing, and sitting here today and this morning and this afternoon, I had the thought that if Billings were the Nation's Capital, I doubt very much that any of us would be here today making these statements, and this legislation probably would not even have been introduced.

I think there has been a commonality of testimony that's just been presented, and I made some notes and some observations this morning personally on some of the questions that you raised, and in particular, your interest with the facts and specifics on impacts. I think it would be important if they have not already done so that the impact officers, the State officers in the impact offices created by the legislatures in North Dakota, Montana, and Wyoming, present testimony and address this committee with specifics. We have a coal impact office in North Dakota that is independent, and the coal impact officer is charged with distributing to local communities, local governments, cities, counties, townships, school districts, park districts, funds that have been appropriated through severance taxes. They are, perhaps, in the best position to articulate the most direct impacts that come to their office from roads to schools to recreational facilities, the increased pressures on law enforcement, the increased pressures on medical facilities.

The mining business is a dangerous business. In our State, our hospitals are experiencing great pressure for the need for emergency services, and when you are dealing with towns of less than 2,000 who have an influx of several thousand construction workers in the area, local hospitals are hard put to cope with that. That's one of the areas where our impact office deals directly and can make grants directly to cities and local governments to aid in those areas.

Senator BAUCUS. That's avery good point, and your suggestion is a very good one, too.

I'm a little concerned about the point you made in your statement, near the end, suggesting that the *Usery* case stands for the proposition that the Federal Government is unable to interfere with the internal operations of a State. Certainly that would be a fairly broad interpretation. Do you think that the congressional efforts to impose a cap on the State severance tax would also be struck down because of the *Usery* precedent? Aren't the facts in that case substantially different than the issues presented by the severance tax? In the *Usery* case the Congress was legislating with regard to the minimum wage.

Mr. HELGESON. Minimum wage, right.

Senator BAUCUS. What wages State and local governments pay their employees is certainly an internal matter. Congressional efforts to dictate those rates is an unwarranted intrusion.

But isn't the congressional effort to limit a State's severance tax legislating in an area that does have impacts on interstate activities?

Mr. HELGESON. Senator, it's probably easier to make the legal argument in court in defense of the validity of State severance taxes, and to me the tests that the courts have set up over the years do show that there is a relationship between the needs of the State and the tax that's being imposed. It's easier to make that argument, perhaps, than it is to make a legal argument that Congress is without the power to legislate in a given area. I've served both personally as a Federal attorney and also as a State attorney, and it's interesting how your perspective changes when you shift from one position to the other. However, one thing that is important, I think, to keep in mind is that when we get into these constitutional questions of power, the Federal Constitution grants powers to Congress, and as section 8 of article II of the Constitution delineates the powers of Congress, it says that Congress shall have the power to do certain things, and it describes them. In contrast, State constitutions reserve powers, and legislators, in passing legislation, are restricted only with regard to those prohibitions that may be contained in State constitutions.

Senator BAUCUS. Right.

Mr. HELGESON. Congress, however, in the past 50 to 100 years, has, as we all know, greatly expanded the area of legislation, and generally Federal courts and the Supreme Court have upheld Congress in passing much of its legislation. I do believe that the States, however, would marshall a U.S. effort, if this kind of legislation were passed, to test the check that the 10th amendment may hold in this case as to whether Congress has gone beyond, and I believe that that legal argument would be addressed in the courts, and it's difficult to make that argument.

Senator BAUCUS. My concern is we won't have sufficient constitutional protection because energy is probably more of an interstate matter than wages of a municipal employee. The Supreme Court might not view this matter in the same way that we do, and if that's the case, then we have to figure out how in the heck we're going to protect ourselves.

Mr. HELGESON. I think the facts will be more supportive of what the Western States are doing than perhaps the law, in that the States can show that they have been acting responsibly.

Senator BAUCUS. I think that's right. I think that's very true.

Mr. HELGESON. And if we can convince the Congress of that, then this legislation will not be necessary.

Senator BAUCUS. That's right. That means, one, the States have to act responsibly, and I think in many cases the States have acted responsibly, and, second, the States have to communicate effectively that they've acted responsibly. It's a matter of education.

Mr. HELGESON. And I think wherever the States have assumed administrative and enforcement of Federal law, which has been the tradition in the last 10 years in the environmental area, the States do a much better job.

Senator BAUCUS. One way I plan to get the attention of other Senators, is to write a letter to, say, the Senators from Michigan and say, "I want you to join me in an effort to tax the iron ore of the States around the country." I think this is a great way to get their attention. I would just say, "Please join me in this effort to limit States' ability to tax iron ore." At least it will get their attention and then they'll go around explaining why that doesn't make sense.

Thank you very much for coming.

Mr. HELGESON. Thank you very much for the opportunity to present this and the courtesies of your staff in helping us prepare for this. Thank you.

Senator BAUCUS. Thank you. I'm sure we'll be discussing these matters with each other in the future. This is a problem that is not going to go away for the next couple of years.

That concludes this day of hearings. We'll reconvene these hearings next on Monday in the Federal Building in Missoula. This hearing stands in recess until next Monday.

[Whereupon, the hearing adjourned at 3:40 p.m.]

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FEDERAL PREEMPTION OF STATE ENERGY POLICIES

MONDAY, OCTOBER 20, 1980

U.S. SENATE,
SUBCOMMITTEE ON LIMITATIONS OF
CONTRACTED AND DELEGATED AUTHORITY,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice at 10 a.m., East Conference Room, Federal Building, Missoula, Mont., Senator Max Baucus (chairman) presiding.

Present: Senator Baucus.

Also present: Ken Kay, counsel, and Patrick Harkins, legislative assistant.

OPENING STATEMENT OF SENATOR BAUCUS

Senator BAUCUS. The hearing will come to order. This is the second in a series of hearings of the Senate Judiciary Committee on the basic question of Federal preemption of the States' rights.

It's not news to Montanans that our rich resources are being called this Nation's energy "ace in the hole." Nearly one-quarter of the known reserves of strippable coal are found just in Montana. Nearly half this Nation's coal supply is located in the Rocky Mountain West.

Vast oil shale reserves in Colorado and Utah, rich uranium deposits located throughout the region, and oil and gas found in the West—all these leave energy-starved easterners drooling with envy.

Most of us would agree that these resources will be a crucial element in America's drive toward energy self-sufficiency. Most of us would agree that we have a responsibility to help this Nation end its dependence on foreign oil. But whether Montanans—and those who live in other Rocky Mountain States—have a voice in determining how these energy resources are developed is perhaps the most fundamental question facing us today.

Every since the Arab nations cut off our oil supply in 1973, Americans have talked of developing the natural resources located in the West.

The Energy Security Act, signed into law earlier this year, is designed to provide a major boost to alternative fuels such as gasohol and synthetic oil and gas. As this new industry develops, even more pressure to develop our coal and oil shale will appear.

Montanans, for example, took steps in anticipation of just such a situation. Our State enacted a new constitution. We enacted the Major Facilities Siting Act that establishes a responsible process for deter-

mining where energy projects should be located. We adopted a land reclamation law that served as a model for Federal strip mining legislation. We approved water use legislation creating a uniform system for determining, administering, and acquiring water rights.

And, we adopted a coal severance tax to help pay for the social cost of coal development.

Other Rocky Mountain States took similar steps that demonstrated their desire to control the shape of their future.

In the past several years, Congress has been considering legislation that would severely limit a State's ability to impose a severance tax. In addition, Congress almost enacted legislation creating an energy mobilization board. This board would have been empowered to preempt State decisionmaking in the energy field. It also would have severely limited a State's or individual citizen's ability to challenge the work of that board.

These proposals have been made and considered in the name of national energy independence. They have been reviewed by the U.S. Senate and House committees that handle energy policy.

However, these proposals do not address energy issues alone. Rather, they would profoundly undermine the way the Federal Government and the States of this country have done business for almost 200 years.

Today, the U.S. Senate Judiciary Committee conducts the second in a series of hearings on Federal preemption of State energy policies.

The 10th amendment of the U.S. Constitution states:

> 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.

The spirit of the 10th amendment mandates a continued recognition of the essential role of the States in our system of federalism.

The question for us to address today is whether the 10th amendment of the Constitution—and whether the Constitution as a whole—prevents Congress from enacting the kind of State preemptive proposals such as the severance tax limitations and the Energy Mobilization Board.

In addition, even if the Constitution permits Congress to enact these proposals, is it advisable for Congress to change the Federal-State relationship so profoundly?

These are the basic questions that we hope to address today.

In addition to these very broad questions, we hope to address some specific constitutional questions:

What constitutional considerations are relevant to Federal legislation that would limit a State's authority to enact a severance tax?

Does the Constitution permit Congress to assume the role of determining what amount of severance taxation by a State is reasonable?

If a Federal limit is permissible, does the Constitution in any way limit Congress in exercising its authority to impose a Federal limit on State severance taxes?

Does the Constitution limit the power of the Federal Government to displace traditional State and local decisionmaking processes?

Does the Constitution permit Congress to assign to a Federal court legal issues concerned exclusively with State or local issues relating to energy projects?

Does the Constitution permit the Federal Government to impose deadlines on State and local decisionmaking activities concerned with energy projects?

In order to address these questions, we are fortunate to have with us today a group of very distinguished citizens. They include:

Mike Greeley, Montana attorney general.

Ted Doney, Montana director of the Department of Natural Resources.

Roger Tippy, Helena attorney.

Prof. Jackson Battle, University of Wyoming Law School.

Prof. Jan Laitos, University of Denver College of Law; and

Luke Danielson, National Wildlife Federation.

I am very much looking forward to the testimony of all these individuals and look forward very much to exploring this important subject.

It was Thomas Jefferson who wrote, "The only way the States can avoid the abuse of national power is to strengthen the State Government * * * and this must be done by the States themselves * * *"

I agree with Jefferson's assessment, and I do believe that many of the States, including Montana, have labored tirelessly to strengthen their State government.

But in this day and age, it also takes a recognition by representatives of those State governments in Washington that national power can be abused and that national power must be designed in such a way that it does not run roughshod over the legitimate rights of States.

I believe these are serious and significant questions that will continue throughout the 1980's and 1990's. I am delighted to be here today to explore these important questions with our distinguished panel and I look very much forward to their testimony. Thank you.

Our first witness is Ted Doney, the Montana director of Department of Natural Resources and Conservation. Ted?

Mr. DONEY. Do you have copies of my testimony?

Senator BAUCUS. Yes; I do. We appreciate your being here, Ted, particularly because in the areas we will be discussing today you are one of the most knowledgeable persons in our State. I want to thank you for taking the time to come here.

STATEMENT OF TED DONEY, DIRECTOR, DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION, STATE OF MONTANA

Mr. DONEY. I appreciate the opportunity to be here and the invitation.

Mr. Chairman, for the record, my name is Ted Doney, director of the State department of natural resources and conservation. I'm also a practicing attorney, but in my role as director of the department, I have foregone the practice of law for a few years, and so my testimony today is going to be directed mainly at the policy issues that are concerning us with States rights and not so much the legal issues. Although, I could comment on those if you would like.

I thank you for the invitation and the opportunity to present testimony before this hearing on Federal preemption of States rights. Not only is this an extremely important issue, but it is one which de-

mands an increasing amount of attention from State officials, attention which could be much better focused on the substance of the serious social, environmental and economic problems we face. In my area of responsibility as the director of the DNRC, I see this problem facing us every day when we are administering programs related to natural resources, particularly water and energy.

I will confine my remarks today, however, to the proposed Energy Mobilization Board, an attempt by the President and the Congress to cut through the redtape on large energy projects.

The often-cited justification for the EMB is the so-called energy crisis period. It is clear that this country is in the midst of an ever-worsening energy crisis. Less clear is that the solution to that crisis is to build several large, capital-intensive, technologically uncertain industrial facilities by preempting and overriding State and local prerogatives and procedures.

Over the long term—20–40 years—our society must make a transition to an economy based not on depletable fossil fuels, but on the sustainable sources of energy which flow from the Sun. The bridge to that future must be carefully constructed from a combination of conservation—using energy more efficiently—and fossil fuels. But it does not follow that, because fossil fuels should play an important role during the next few decades, large fossil fuel projects should be fast-tracked at the expense of State and local rights.

That the EMB would threaten the ability of State and local officials to execute their duties and legal responsibilities is an understatement. In Montana, the principal victim would be the Major Facility Siting Act.

Initially passed in 1973, the Siting Act has been debated and modified in four subsequent legislative sessions. Simultaneously, the board of natural resources and conservation, the decisionmaking body under the act, and the department of natural resources and conservation, the act's administering agency, have processed over 20 facility applications. Most of these projects, all of which were approved by the board, were electrical transmission lines. In virtually every case, the projects were improved in response to legitimate local concerns because of the process established by the Siting Act.

The most noteworthy case involving the Siting Act has been Colstrip 3 and 4. Here again, the board approved the project after considering a voluminous record, but added conditions which significantly improved the project.

The Siting Act has been inaccurately characterized as providing too many opportunities for litigation and delay. Indeed, there have been several court cases which have litigated disputes under the act. But most of these cases have involved procedural uncertainties; now that the cases have been concluded, the procedures are now much clearer and more certain.

At the same time the legislature was improving the act and the courts were clarifying it, the board and the department were adopting administrative rules, based on experience with the act, which further reduced the uncertainty. The cumulative result is a Siting Act which, in my opinion, now affords timely and efficient decisions.

This act is directly threatened by the proposed EMB. The priority Energy Project Act of 1980 would have imposed on the State a proj-

ect decision schedule of 12 months, grossly inconsistent with the 33 months afforded by the Siting Act. The careful procedures and the close scrutiny of issues required by the Siting Act simply cannot be accomplished in significantly less time than 33 months. Any shortening of this schedule would diminish the ability of the board to reach a sound decision, given the complexity of the issues which will accompany the proposals for such facilities as synthetic fuel plants.

The Priority Energy Act of 1980, if passed, would have been vague as to the content of an acceptable application for priority status. It would be quite likely that the Federal project decision schedule would be ticking away while the State would be waiting for a satisfactory application.

In addition, the PEP Act of 1980 would have authorized the EMB to require a single Federal EIS to satisfy any State or local requirements for a comparable document. Federal EIS's may be adequate for Federal decisions, but they are simply not adequate for State and local concerns.

Because of the incompatibility of the Montana Major Facility Siting Act with the proposed Priority Energy Act of 1980, the board of natural resources and conservation will ironically be unable to approve a project despite its merits. Because of an inadequate hearing record, inadequate data and analysis, and perhaps an inadequate application, the board must say no. That is hardly the intent of the "fast-track" concept.

There is a "fast-track" approach to energy project decisions which would not compromise the rights of State and local governments. That approach is to focus attention on the level of government most responsible for delays to date, the Federal level.

Experience in Montana has shown that three general entities have been responsible for project delays: State government, the applicants, and Federal Government.

As I have described, State government has addressed the problem, and through a combination of legislation, litigation, and administrative rulemaking, has largely solved it.

Likewise, the corporations, recognizing the depth of the public commitment to careful consideration of environmental and social values, have begun to play by the rules. Their cooperation has vastly improved the process.

Remaining is the Federal Government. Federal agencies continue to fail to recognize, not only State and local processes, but each other. For example, the Federal Government, in the case of Colstrip 3 and 4, ignored our State Siting Act process and did not complete its EIS process and transmission line route selection until December 1979, some 3½ years after the State certificate had been issued. With clear leadership from the White House, and a commitment to expeditious and efficient decisionmaking, the Federal Government, even without congressional action, could become a part of the solution instead of part of the problem.

The 96th Congress ultimately rejected the concept of the Energy Mobilization Board in what columnist William Greider termed "a fragile case of Hill sanity." With the 1980 Presidential election behind, the 97th Congress can examine the "fast-tracking" issue without regard to Presidential electoral politics. The ensuing debate will hope-

fully recognize the important and legitimate role of State and local governments in the energy facility decisionmaking process.

Thank you, again, Mr. Chairman, for inviting me to testify.

Senator BAUCUS. Thank you very much, Ted. As you know, one of the biggest reasons why the proposed EMB gained momentum was its alleged ability to cut redtape. I wonder if you could expand a little bit more on delays caused by the Federal Government, State governments and applicants.

It's my understanding that often the applicants have caused some of the delay.

Mr. DONEY. Yes.

Senator BAUCUS. I have heard of cases where the applicants supply excessive evidence and other cases where they don't supply enough information. I wonder if you could give us the benefit of your advice as to what are the significant causes of delay that we should be addressing.

Mr. DONEY. I think that the process for permitting these types of energy facilities has evolved over the last several years into a process now that is really resulting in more expeditious processing of these permits.

When the Siting Act first started in Montana, we were green. The State government was green, the applicants were green, and we did get applications that were deficient and, I think, cause delays.

In the case of Colstrip 3 and 4, that was certainly the case. The application we got there was totally inadequate. So, the board and the department were forced in the position of trying to generate the type of information that was essential under our law for our board to make a decision that the applicants had not provided. I think it's likewise the case with the Federal agencies, and I refer to them in my testimony, have still not improved the process to the point where they are keeping up with State government.

I guess what I'm saying, Senator, is I think the State governments, and I have seen the Siting Acts in other States, I have talked to their officials, are really trying to improve their process. For example, in Colorado they have now——

Senator BAUCUS. They have a joint review process, don't they?

Mr. DONEY. Joint review permitting process. Montana is looking at that. In fact, our department proposed that before the last legislature but it was tabled for an interim study, which is now being completed, and there are things like that that I think are being done and the States are doing it.

I would also like to mention that Montana has just entered into a joint cooperative planning agreement with the Federal agencies on corridor planning, the BLM and the Forest Service. We are the only State to do that to date, and our hope there is that we will end up jointly studying corridors and jointly approving corridor route selections for projects in the future. If this works, then, I think we can do the same thing with synthetic fuel plants when they come down the road for application in our department. I'm not saying we are in advance going to be picking routes before we even get applications. But what we are trying to do here is set up a joint process which has not happened up until recently.

Senator BAUCUS. Let's take the applicant first. To what degree do you think delay, at least on Montana's experience, has been due to an applicant's failure to provide sufficient information or an applicant engaging in dilatory actions. To what degree is the applicant responsible for delay in Montana's experience?

Mr. DONEY. The applicant has certainly been part of the cause. I think in the past it has been the majority of the cause, but I think that that has improved now.

As I said in my testimony, most of the applicants now figure it out.

Senator BAUCUS. What was the nature of the applicant's delay? Was it their inability to understand the law and the regulations? Was it because of the novelty of the process? Are you saying that now that they are familiar with the process that delay will be minimized?

Mr. DONEY. I think there are two reasons: One was the reluctance to admit that the State government did have a role here finally in siting of these facilities under our act. It's something brand new. They weren't used to it and, second, they just didn't know what was required and that was the fault of the State agencies as well. We didn't get our act together until a few years ago in making it clear what was required in an application.

Senator BAUCUS. So, you feel now the applicant' generally understand Montana law and that they are more likely to be expeditious and efficient in their submissions——

Mr. DONEY. Yes; we are seeing that already occur.

Senator BAUCUS. Now, let's take the State. To what degree in our experience has the State been responsible for unnecessary delay or unreasonable delay?

Mr. DONEY. Well, there is no doubt in my mind, Senator, the State has had a role in that. I think it, again, comes about that it was something new that we got into in 1973. We didn't really understand all the intracacies of a siting act process, and so we started out not really knowing what to expect.

The Siting Act in Montana was supposed to be a one-stop permitting process. It never has been and still is not a one-stop permitting process. Our department or board makes one decision and the board of health makes another decision, and there ought to be ways to integrate that, which we have tried to accomplish. So, there is still room for improvement.

But I mentioned in my testimony we have improved our law considerably. Last legislature we amended it substantially and took out many of the delays that we thought were causing some problems.

Senator BAUCUS. Would the bill that was tabled address some of these problems?

Mr. DONEY. Yes, it would, absolutely.

Senator BAUCUS. Could you explain how it would solve some of those problems?

Mr. DONEY. Well, we were proposing a one-stop permitting procedure for all natural resource development projects, not just energy: Water, land, air, the whole works. It would have set up a, in effect, a clearinghouse where the applicant could have made one application to one agency on one form, and then that application in turn would

have been sent out to the different permitting agencies for them to process under their own statutes. But they all would have been given time periods to meet and they would have had to coordinate the EIS work and their studies, and the whole thing would have culminated in a single hearing and a single decision under this process. Now, that is being tested now in Colorado, as you mentioned, and we would like to see it tested here in Montana. But there doesn't seem to be much support for it at this time at this point.

Senator BAUCUS. Why is there not much support? It would seem to me that it would be helpful if something like that were to pass. Especially, it would help us in the Congress to prevent EMB's from being enacted.

Mr. DONEY. I think the reason there is not much support is it is a new way of doing things and the applicants now are starting to get used to the process we have got. They would rather go on and knock off each agency one at a time than they would go through one single agency and try to get one permit. Some industries are receptive to the idea. The majority of them are not and even the State agencies themselves frankly are a little skeptical about how the thing would work.

Senator BAUCUS. You mean to say that the applicant industries testified in favor of more agencies rather than fewer agencies controlling their destiny?

Mr. DONEY. I guess I wouldn't put it that way, Senator. I would say that they are used to the system we have and they would rather not see a change in that system with another process.

Senator BAUCUS. Even if it means less redtape?

Mr. DONEY. Yes.

Senator BAUCUS. And fewer regulations and fewer agencies to deal with?

Mr. DONEY. Yes.

Senator BAUCUS. Third we should discuss the Federal Government's contribution to delay. You mentioned that during the consideration of Colstrip 3 and 4, it took 2½ years for the Federal EIS to be finally proposed. Can you expand a little more on the Federal Government's contribution to delay?

Mr. DONEY. Well, in the Colstrip 3 and 4 case, we attempted to get the Forest Service and the BLM to jointly study the project and adopt a common EIS on that project. We could not get them to agree to our schedule and, frankly, our schedule was too tight for them to meet their deadlines and, like I said in my testimony, it took them 3½ years after we completed our decision for them to finalize their process. That has occurred in some other instances, too, and some other transmission lines that we have processed under the act. But over the years we are cooperating more and more with the Federal agencies. In fact, today like, as I mentioned earlier, we have a cooperative agreement now. We are starting to implement for joint corridor planning and I'm hopeful that process will work a lot better.

Senator BAUCUS. Does the BLM or the Forest Service have legitimate explanations as to why it has taken them so long? In your view, could that period be tightened up?

Mr. DONEY. I think it could be tightened up. Some of their explanations are legitimate, I guess.

Senator BAUCUS. What are some legitimate explanations for delay?

Mr. DONEY. Well, first they need to know exactly what is being proposed by an applicant, and in some cases the applicant is not very clear on what is being proposed. Second, I think that the Federal agencies have a much more cumbersome bureaucracy than we do in processing things through their system. They have a system that goes clear up to the secretary level in some cases. That takes a long time to accomplish. The State agencies, because we are lean, I think, can process things a lot quicker.

Senator BAUCUS. You have in your statement explained why you think that the proposed Energy Mobilization Board would be so harmful to our State. I agree with you. Why, in your view, has there been to date relatively little public concern about the EMB? Some people, certainly you and others in State government, have spoken up against the EMB. Few editorials in our State's newspaper have really spoken against it. We don't have the same reaction in Montana against proposed EMB's as we do against the attempts to cap our coal severance tax. Why is there less public concern?

Mr. DONEY. I do agree with you that there is less public concern, and I have thought about that and I guess I don't really understand it myself. Except perhaps the public does not yet see what danger that can have to the State's prerogatives. I think the general public does feel that the bureaucracy at both the State and Federal level is slow, and it is in some cases. I think that they, the public, feels that well, the EMB has an idea that would maybe help out that situation. I don't think the public understands what it will mean in terms of State control over its own destiny. Somehow we have got to explain that to the public. We have tried, but it is a very difficult thing to do.

Senator BAUCUS. I know the Great Falls Tribune has editorialized against it. Do you or others talk to other editors around the State?

Mr. DONEY. Oh, yes, we do. We try and explain it. The EMB, as you know, is a very complex——

Senator BAUCUS. It is very complicated.

Mr. DONEY. Hard to explain it and what impacts it would have. In fact, I don't know what impacts it will have for sure if it's passed, so it's hard to explain it.

Senator BAUCUS. I have often thought, too, one of the big problems with the EMB is the potential for three unelected people sitting 2,000-plus miles away who probably would never come to Montana to look at any locations here, could decide not only whether we, in Montana, should have a synthetic fuels plant but where it should be located. It seems to me one of the problems that creates is the public frustration, in fact outrage, with the decision being made by someone not elected by them, not elected by anybody, sitting 2,000 miles away. It's just bad government. It undermines confidence and support in government. Would you agree that's one of the main problems with the EMB proposal?

Mr. DONEY. I absolutely agree. I think that is one of the main dangers of that legislation. But again, I don't think the public in general understands that that is what the process would be, that people in Washington will make a decision on where a plant is going to be sited.

Senator BAUCUS. They would understand it if there were a ground breaking today down on Higgins.

Mr. DONEY. Yes; that's right.

Senator BAUCUS. Could you explain your view on why the EMB would profoundly alter the way the States and the Federal Government have traditionally related to each other? As you know, the EMB would set up a fast track and the Board would negotiate with States the decision schedule. If States don't meet it, then, the EMB could come in and make the substantive decision under State law. But the Board would also have the authority to override State substantive law. Could you explain why that arrangement would so drastically alter the traditional relationship between State and Federal Government?

Mr. DONEY. I think that's a broad topic, but I guess I would have to summarize it by saying traditionally the States have had the role, in the past, of making the resource decisions in their States and, I think, they have done a fairly good job of that. Every State has its own idea of what kind of economic development and environmental protection it wants in its own State. And now for the Federal Government to come in through a process that will not work, in my opinion, and impose on the States those types of decisions, I think is going to considerably change the relationship that we have created in the last couple of centuries in the United States between the Federal and State government. I think it's a disaster for the Federal Government to take that kind of approach because it will find the States opposing everything that the Federal Government is trying to do in the end.

Senator BAUCUS. Why do you think it won't work? The proponents say it's going to cut redtape. It will help us develop energy and it will cut off that OPEC umbilical cord. Why do you disagree with that? Why do you say it won't work?

Mr. DONEY. I think a couple of reasons, Senator. One is the public opposition that I think will occur once the public understands what this thing will do. It will shove down the throats of the people in the States decisions on resource development that the States can't live with. The public will not be involved in those decisions to a very substantial degree like they are now in Montana under our Siting Act. All of a sudden a plant will appear someplace and be constructed that nobody wants or nobody even knew about in some cases. I think that is one thing that will occur. I think the public will rebel with that kind of a process and do all they can to stop the process, lawsuits, whatever else the public can do. Second, is the law itself. I read it, I don't understand it all, but I think it's full of uncertainties. Legal uncertainties that are going to have to be litigated, and at least for the first few years after that law is enacted, there is going to be litigation all over the country testing what the law means.

For example, can the EMB impose on the State a requirement that it has to shorten up its time period. That will have to be litigated. I think probably it can constitutionally, but it will have to be litigated and all these questions will come up that really in the end slow down projects than, I think, it will speed them up.

Senator BAUCUS. I think that's right. I think that it's not only the first project that's placed on the fast track that will face litigation but each of the projects on the track is going to present novel legal

and constitutional questions. It's not necessarily the first, but it might be the 8th or 9th or 10th project on the fast track in which the EMB would attempt to override State substantive law. Whether you are first in line or the 8th is probably irrelevant.

Mr. DONEY. Right.

Senator BAUCUS. In addition to the delay caused by litigation, do you see any constitutional infirmities or problems with the EMB? Do you think that ultimately the EMB, as it's proposed, will be upheld by the courts?

Mr. DONEY. Those are questions that I really haven't researched thoroughly, Senator, nor have I had my staff research them. But as an attorney who has been in this business now for about 10 years, I would have to state that in the end I think the Federal Government will win out. The powers of the Federal Government, I think, are awesome under the Constitution. The supremacy clause, the commerce clause, and from my experience as a practicing attorney and seeing what has happened in the courts, the courts probably in the end will uphold most of the provisions of the EMB legislation. I hate to say that, but I think that's being realistic. But again, I have not researched it.

Senator BAUCUS. I worry that you might be correct in that assessment. What about, the provisions that would enable the Board to very significantly and drastically shorten the period within which either the State or the EMB could make a substantive decision? Don't you run into due process questions by excluding public testimony and by excluding legitimate inquiries? For example, what if the EMB were to say, OK, State, this final decision on whether to site a plant in the Yellowstone has to be made within 9 months. Do you see any constitutional problems with that apart from the commerce clause and supremacy clause question?

Mr. DONEY. Due process. Yes; I do. Again, that will have to be resolved, though, I think, on a case-by-case basis depending on what kind of process is provided. If the public does get their shot and the applicant gets its shot, the thing will probably be upheld even with insufficient data to the impacts of a plant so long as there is some procedure to allow the public testimony in that process. It would probably be upheld.

Senator BAUCUS. What do we do if ultimately the Supreme Court upholds the EMB utilizing the supremacy clause and the commerce clause? Certainly we, in the Montana delegation and other western delegations will do all we can to protect ourselves. We will raise all the arguments we can in support of the West and expain why these proposed EMB's will not be able to solve our problems but will serve as a very bad precedent for other Federal action.

Of course, the more the States can show that they are fairly, reasonably, and legitimately handling those questions, the more we in the Congress can show that additional boards aren't needed. Can you give us some guidance on what other arguments you think we should be making?

Mr. DONEY. Well, I think one thing you have already mentioned and I have mentioned it in my testimony, too, the State has got to get their act together and present a case to Congress that they are doing

their best job in processing these projects through their system. That they are not setting up unreasonable delays and, I think, in Montana we are doing that now. We have got a ways to go. A one-stop permitting law, I think, would be good for our State. But I think that's one thing that you and the other people in Congress can do is make a point that the States are improving their process all across the West, at least I know they are.

The second thing is, I think, that we need to make the point that if you look at the projects in the past that have been delayed, at least allegedly delayed, it's because of Federal delays. We could go back and document that in almost every case.

Senator BAUCUS. I think that would be very helpful. If you could, Ted, for the record, document the Federal delays that you have experienced or that you are aware of in our State that would be very helpful.

Mr. DONEY. I will provide that.

Senator BAUCUS. We could take that information and go back to these agencies and also make the point on the floor of the House and the Senate that it's Uncle Sam that is causing a lot of these problems. It's not the States.

Mr. DONEY. Well, the western Governors in the Western Governors Policy Office did a survey about 3 years ago of project delays in the West, and I was informed that every project that has been delayed was a result of Federal delays in the West and not State government. And I can dig up that research and provide it to you.

Senator BAUCUS. If you could, I would appreciate that very much. I want to thank you very much, Ted. It's been very helpful. Thanks a lot.

The next witness will be Mike Greely, attorney general for the State.

Mike, I'm glad that you are here and look forward to what you have to say. Please proceed in any manner that you wish.

STATEMENT OF MIKE GREELY, ATTORNEY GENERAL, STATE OF MONTANA

Attorney General GREELY. Good morning, Senator. I apologize for being a little late. I had a couple of stops in between.

I appreciate the opportunity to present my views this morning and, I think, if you will permit, it would be a little easier if I could read my testimony. But I would ask that the testimony we have submitted be included in the record.

Senator BAUCUS. It will be included.

Attorney General GREELY. Mr. Chairman, my testimony will focus on three separate matters relating to this issue:

Recent congressional proposals to reduce and limit States' severance taxes on coal; the proposed Federal Energy Mobilization Board; and; current efforts by the Bonneville Power Administration to construct a double circuit 500-kilovolt transmission line across western Montana.

Mr. Chairman, I will state at the outset that my perspective is that of a westerner who perceives a political and economic peril threaten-

ing the livelihoods and the futures of all who live in the American West. The source of this peril goes deeper than the obvious disadvantage we westerners endure in Congress, where we are largely outnumbered by the representatives of the highly populous, highly industrialized regions of the East, the Midwest, and the South. The peril grows from a national preoccupation with the strategy of economic recovery. Notwithstanding the lack of concensus on the specific content of a recovery strategy, we can detect certain trends in the mainstream of today's economic strategizing that almost certainly will manifest themselves in a national economic policy.

One of these trends is the assumption that western energy materials will play a dramatic role in holding down the cost of energy to the rest of the Nation, in reducing America's reliance on foreign energy commodities, in supplying the Btu's necessary to fuel a thorough economic recovery.

Another such trend is the assumption that Federal action is appropriate to guarantee the highest possible profit in the development of western energy resources, regardless of the cost endured by other sectors of the economy. These and similar assumptions have found their way into the vocabularies of Congressmen, Federal program managers, economists—both public and private—and common everyday citizens in places like Philadelphia, Boston, Dallas, and other giant urban centers. In other words, the megacities of the East, the Midwest, and the South rely to a very high degree on the promise of western development to support national economic recovery.

This in itself is not necessarily bad. I certainly don't suggest that the West should resist development that may be requisite to national economic recovery.

What alarms me, however, is the preoccupation with economic recovery to the exclusion of all consideration of western people, their livelihoods and their lands. What alarms me is that the preoccupation with economic recovery—particularly in Congress and in the Federal bureaucracies—lends itself so readily to the abrogation of long-cherished principles of State sovereignty and responsibility, substituting in their stead a Federal system of solving problems and allocating resources, a Federal system that is often costly, cumbersome and unjust.

Mr. Chairman, the prominent issue confronting Western States in this age is Federal preemption of State laws, prerogatives and policies. This issue has special meaning in the area of land and resource management, a primary area of State government responsibility in the West. Federal preemption portends trouble for Western States who wish to produce energy materials on their own terms; that is, with proper attention to the impacts of such development on the resident people, their livelihoods and their lands. In my view, the Federal Government is so preoccupied with removing obstacles to economic recovery that it has come dangerously close to destroying such fundamentally federalistic precepts as the States' right to tax.

At every turn, the Federal bureaucracy seeks to establish and exercise preemptive authority over State laws, State rules, State courts, and State taxes—all at the behest of those interests who require maximum profits in order to engage in the western development which so many view as essential to national economic recovery.

The assault on Montana's 30 percent coal severance tax in the courts and in Congress is a manifestation of this cause to weaken State sovereignty. It also demonstrates the nature of the challenge facing all Western States.

According to estimates by the Montana Bureau of Mines, the State of Montana has about 42.5 billion tons on coal reserves, all of it accessible through the process of strip mining. Our coal reserves constitute about 52 percent of the Nation's low-sulfur deposits, and about 43 percent of America's recoverable coal reserves. Montana coal is attractive to industry because of its low-sulfur content, and its clean-burning characteristics.

Prior to 1968, Montanans mined coal primarily for small-scale local uses, except for the Northern Pacific Railroad which completed its conversion from coal to diesel-powered locomotives in the 1950's. In 1968, however, the Western Energy Co.—a wholly owned subsidiary of the Montana Power Co., the State's biggest utility—reopened the Northern Pacific's old mine at Colstrip. The coal boom officially got underway in 1971, when Montana's coal production jumped from 7.4 million tons annually to around 26 million tons in 1979.

The Montana Legislature addressed the coal boom in 1975 by enacting a tax mechanism designed to pay the costs of administering mining and reclamation laws while providing revenues to mitigate the social and environmental impacts of massive coal production. This mechanism is the 30-percent coal-severance tax which the State levies when the coal is severed from the ground. The tax itself is a percentage of the market value or contracted sales price of the coal, less various production taxes.

Since its enactment in 1975, Montana has collected a little more than $200 million through the 30-percent coal-severance tax. In accordance with the constitutional amendment enacted by the people of Montana by a direct vote, half of that money, or slightly more than $100 million to date, has gone into an inviolate constitutional trust fund. The legislature may appropriate the interest from this fund as it sees fit, but a three-fourths vote of each house of the legislature is necessary to appropriate from the principal. The remaining 50 percent of revenue from the severance tax is allocated by law to various earmarked revenue accounts as follows:

The State general fund gets 19 percent;

Alternative energy, research and demonstration gets 2.5 percent, as does the State's program for parks and cultural development;

The education foundation program gets 5 percent;

A trust fund to assist local governments in meeting coal development-related problems gets 8.75 percent.

The State's education trust fund gets 10 percent;

Renewable resources research gets 1.25 percent, while libraries and county land use planning programs get one-half of 1 percent each.

I have taken the effort to list these allocations in order to demonstrate the careful thought and consideration given by the legislature to the challenge of massive, rapid coal production in Montana. One of the legislature's objectives was to tax a nonrenewable natural resource at a rate that is both fair and adequate to the task of preventing Montana's becoming another Appalachia when our coal is gone. Another

was to insure that future generations of Montanans are not impoverished by our decision to mine the coal now. And yet another was to devise a system of allocating coal tax revenues in such a way as to meet coal-related problems, and do some good in our communities without allowing State government to become addicted to large amounts of revenue that will someday be unavailable.

Montana's 30 percent coal severance tax, however, came under severe criticism, mostly from those nonwestern interests who naturally insist on maximum profits as a condition to developing western coal as part of a strategy for national economic recovery. Two years ago a consortium of utilities, energy interests and coal companies paid their State severance taxes under protest. Then they proceeded to file a lawsuit against the State of Montana, seeking to overturn our severance tax on the grounds that it impedes interstate commerce and is thus unconstitutional.

The State of Montana defended its tax successfully in a State district court, then again in the Montana Supreme Court. There is a good possibility—despite our successes in State courts—that we may be forced to defend our 30-percent coal-severance tax again, this time in the Supreme Court of the United States. The plaintiffs in the case have already filed their appeal with the U.S. Supreme Court. It will be a few months before we determine whether or not the U.S. Supreme Court will accept that challenge. Now, the State of Montana does not shrink from court challenges, Mr. Chairman, and we are very confident of prevailing in any court of law in defense of our coal-severance tax.

I firmly believe, however, that our greatest challenge is not in the courts, but in the Congress of the United States. The energy interests who are bent on destroying State authority over energy development have undertaken a huge effort to pressure Congress into enacting limitations on State severance taxes. This year, thanks to more than $800,000 worth of lobbying, these interests came dangerously close to obtaining passage of a law limiting State severance taxes on coal to 12.5 percent, less than half of Montana's present tax. These energy interests cried to Congress that Montana's coal tax is unfair to the consumers of other States. Montana's tax, they cried, is limiting the amount of coal the State can produce, and is out of line with the taxes of other States. They cried that the tax is eliminating commercial demand for Montana's coal, demand that could be a meaningful part of a national strategy for economic recovery.

To the credit of our Senators and Representatives from all regions of this great Nation, Congress was not quite so preoccupied with removing obstacles to national economic recovery as to ignore the facts. The facts, Mr. Chairman, are quite the opposite of what that consortium of energy interests would have you believe.

First of all, if Montana's coal severance tax is unfair to the consumers who rely on our coal for their electricity, then what about the sales taxes imposed by other States on their own utility consumers?

Consider this:

In Illinois, customers of Commonwealth Edison pay an additional 13 cents a month because of Montana's tax. The Illinois sales tax increases that utility bill by $1.14 a month.

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Iowa customers of Interstate Power pay an additional 6 cents a month because of our tax, but Iowa's sales tax gouges them another 67 cents.

Michigan's customers of Detroit Edison pay an additional 10 cents to cover Montana's tax, but Michigan blasts them with a monthly charge of $2.22.

In Minnesota the customers of North States Power pay 33 cents a month which can be attributed to the Montana tax, and 95 cents a month to Minnesota.

In Wisconsin it's 34 cents a month attributed to our tax, and $1.06 a month to Wisconsin.

Now, there is an inherent irony in the fact that these consuming States can collect so much revenue on sales made possible by Montana coal, yet they endure none of the hardships, horrors, or costs of producing that coal. The irony intensifies with the energy companies' straight-faced assertion that Montana's tax is the one that is unfair to consumers. But that is what the companies would have you assume, notwithstanding that Detroit Edison can buy Montana coal at just over half the cost of buying Appalachian coal, figuring the cost per Btu, despite our coal severance tax.

The assertion that Montana's tax is out of line with similar taxes in other States is dead wrong. Utilities, as you know, compute their energy production costs in amounts per Btu. Comparisons of State energy taxation should also occur in amounts per Btu because percentages of contracted sales prices of specific commodities are useless until you know how much energy a particular commodity will produce. Thus, in 1977, when Montana was collecting $7.11 per million Btu on our severance tax, Texas was collecting $6.36 per million Btu—only about $1 per million less. Louisiana, another of Montana's sister "big energy" States, was collecting $10.26 per million Btu—almost $3 per million more than Montana. Oklahoma came in at $8.13 per million, well above Montana's $7.11, and New Mexico was collecting $7.76 per million, 65 cents per million more than Montana.

The charge that our tax is limiting Montana's coal production and thus eliminating commercial demand is equally wrong. In 1976, the year following enactment of the 30 percent coal severance tax, production of coal in Montana increased 42 percent. The following year production went up an additional 19 percent to a level where it hovered for about 3 years at between 26 and 27 million tons.

This year, 1980, production has jumped a whopping 31 percent over last year's level to more than 34 million tons, and we are projecting an additional 2 million tons of production next year. Couple this with the fact that Houston Power & Light signed a contract last year with a subsidiary of Pacific Power & Light for approximately 250 million tons of coal from Montana's newly opened Spring Creek Mine. This is the largest coal contract in the history of the mining industry. In addition, there are many new Montana coal mines in the planning stages and in the permit stages. Like every other industry in the country, Montana's coal industry relies for long-term expansion on the emergence of new markets and new uses for its products. The facts of production and demand disprove our opponents' claim that our severance tax has damaged the coal business.

The distressing reality that Federal limitation of State severance taxes has commanded the attention of Congress this year bears witness to another fact—one that we must ponder now: Federal preemption of States rights is a poignant and relevant issue today just as it was nearly 2 centuries ago and as it has been many times since. The energy crisis, and indeed the general preoccupation with a strategy for national economic recovery, have added a new dimension to this issue, one that has generated new assaults on State sovereignty embodied in a variety of proposals to circumvent, restrict or terminate State authority over virtually every means of energy production.

I know that you'll agree, Mr. Chairman, when I say that the single most essential facet of a State's sovereignty is the power to tax. Traditionally, Congress has recognized the significance of the State's taxation powers and has declined to impose restraints on these elemental features of State sovereignty. On those few occasions when Congress did move to impose restraints, it did so only on the basis of strong constitutional considerations.

A Federal limitation on a general excise tax enacted by a State government—and this is what Montana's coal tax is, and so is Wyoming's and North Dakota's—is totally without precedent. Congress in its wisdom has never tampered with a power of a State to enact a general excise tax. There have been instances in which Congress has imposed certain restraints on State taxes, but these limitations traditionally have concerned the States' ability to tax Federal instrumentalities.

Congress has taken appropriate steps to insure the States' power to tax does not interfere with specific Federal treaty limitations and obligations, or with Indian tribes. Notwithstanding these legitimate and appropriate limitations, Congress has never acted to limit or restrict the States' power to tax articles and commodities that clearly fall within the States' authority as traditionally defined.

I submit to you today, as I have in testimony before the House Interstate and Foreign Commerce Committee and the Senate Interior Committee, that Federal legislation limiting a State general excise tax would be an unprecedented interference with States' rights. Such action by Congress would open the floodgates of Federal control over State taxation in all areas. Moreover, it would be unconscionably discriminatory. The bills Congress has examined this year specified several States in the West, notably North Dakota, Wyoming, and Montana, for special attention. Despite favorable comparisons of these States' severance taxes to those of other big energy States, Congress has entertained no proposals to reduce or limit the revenues collected by those other States.

Without question, Mr. Chairman, Montana's coal severance tax represents a farsighted and effective means of dealing with the realities of coal production. The tax is proof that Montanans willingly accept the responsibility to supply coal from their vast reserves to meet national energy demands. We braced for this responsibility by enacting State surface mining laws, reclamation laws, a severance tax, and water legislation. We sought no Federal handouts. The specter of severance tax limitation, however, threatens Montana's ability to meet its responsibilities and to shape its own destiny, substituting Federal regulation and rule. Severance tax limitation would be yet one more step

toward total relinquishment of all meaningful State prerogatives and authority—not just for Montana, Wyoming, and North Dakota, but for all States.

Mr. Chairman, let me suggest that any attempt by Congress to establish an "appropriate" level of State resource taxation is itself highly inappropriate. To reach the conclusions, for example, that Montana's coal tax is "too high" requires that Congress reject the reasoning used by the Montana Legislature in assessing the costs of strip mining to society, and in developing a means of meeting those costs that is fair to the coal companies. In reducing Montana's tax, Congress would be trying to quantify costs like the loss of an aquifer to farmers and ranchers in a region where ground water is among the most precious of resources. Does Congress presume to know how such a cost can be measured in dollars and cents? Consider the long-term hardships attendant to "boom and bust" industrial development in a rural, sparsely populated region like Montana. Is Congress willing to attempt a quantification of these costs as well? Can Congress quantify the esthetic losses resulting from strip mining, the dust pollution, social disruption, the economic hardships of fluctuating local property tax bases or the effects of higher crime rates? Reason dictates that Congress cannot reduce Montana's coal severance tax without first concluding that Montana's Legislature overestimated the costs of strip mining to society; to reach that conclusion Congress must first try to quantify costs that cannot be quantified.

Before it can reduce Montana's coal severance tax, Congress must first conclude that Montana's Legislature misjudged the element of fairness to the coal industry. To reach the conclusion that our tax is unfairly high, Congress must presume the ability to quantify the contributions of Montana's State and local governments, as well as the contributions of Montana's society in general, to the success of the coal industry. How can Congress or anyone else quantify the stable and receptive socioeconomic environment provided by Montana to the coal companies? How can Congress or anyone else quantify the protection given the coal companies under Montana law by public agencies at every level of government? The coal companies and the people employed by them enjoy the rights, privileges, prerogatives and protection afforded all Montanans under our laws, despite the reality that these companies' enterprise imposes a particularly heavy burden on the government and society. Can Congress seriously presume knowledge to assert that the benefits given the coal industry by the State of Montana are not great enough to justify our present coal severance tax? Once again, Mr. Chairman, reason dictates that Congress cannot reduce Montana's coal severance tax without first concluding that the Montana Legislature overestimated the benefits given the coal industry by the society and the government of the State; to reach that conclusion, Congress must first try to quantify benefits that cannot be quantified.

I want to direct my closing comments, Mr. Chairman, to the question of an energy mobilization board and the prospective relationships between the Federal Government and the States in our efforts to expand energy production in the West. Of special interest is the present Federal attitude toward the rights and interests of Montanans as they relate to the Bonneville Power Administration's planned 1,000-kilovolt transmission line.

With respect to the Energy Mobilization Board, let me emphasize that I appreciate the motivation of those who have offered the proposal. Every thinking American, I am certain, appreciates the need for coordinated efforts by industry and all levels of government toward expanding energy production. We must take care, however, that our zeal to increase energy production does not compel us to jettison certain fundamental principles of our American republican democracy. Let us remember that such principles as State sovereignty have contributed mightily to this Nation's preeminence, enabling a diverse and pluralistic society to solve a vast array of problems without the imposition of a stultifying central authority. Neither should we forget that energy production is booming here in the West, that State regulation has not dampened the prospect of vast expansion of coal mining, oil and natural gas drilling, marketing of electricity, and synthetic fuel development.

The question naturally emerges: Why do we need an Energy Mobilization Board?

If the supporters of the proposal seek to reduce legitimate State regulation of energy production, substituting weaker, more easily negotiated Federal regulation that is less mindful of Western States' interests, then, I must oppose the idea of an energy mobilization board.

If the hidden motive behind the proposal is to quicken the pace of western energy production at the expense of State-imposed safeguards against social, economic, and environmental ruination, then, I must oppose the idea of an energy mobilization board.

If the objective of the proposal's supporters is to deprive westerners of the fees, deposits and taxes levied through legitimate State regulation, thereby inflating the profits of energy producers, then, I must oppose an energy mobilization board.

Mr. Chairman, I have alluded to the already rapid rate of energy development in Montana. I would remind the Judiciary Committee that this development now proceeds despite the regulations and taxes imposed by the State of Montana. I have difficulty envisioning how an energy mobilization board could significantly speed this energy development. Less difficult to envison, however, is the possibility of an energy mobilization board's overturning the requirements of Montana's Major Facilities Siting Act because of some misguided notion over the effect of the Siting Act on rapid development. Still less difficult to envision is an alliance between an energy mobilization board and the energy industry against State governments, the effect of which would be the federalization of various energy projects, and the consequent exemption of these projects from State taxation and control.

I am apprehensive, Mr. Chairman, over the possibility that an energy mobilization board would merely exacerbate problems as we Montanans already have with the Federal Government on energy development issues, problems that arise from Federal insensitivity to the interests and concerns of Montanans. Consider the Bonneville Power Administration's plan to build the transmission line I mentioned earlier. Here we have a Federal agency. BPA has come to the rescue of private consortiums that wish to market electricity from Montana's Colstrip 3 and 4 to sell power in the Pacific Northwest.

However, they need transmission lines across western Montana. Naturally they want to avoid State legislation of siting as well as State and local taxation. They are saved by the Bonneville Power Administration, a Federal agency blessed with vast condemnation powers in a self-proclaimed immunity from Montana State and local taxes and siting act. In accordance with their agreement, BPA will transmit and market electrical power for the consortium in the Pacific Northwest saving the consortium countless millions in taxes and regulation fees, but depriving Montanans of any compensation for the privilege of having a 1,000-kilowatt transmission line across their mountains, their streams, their forests, their farms and their ranches. Needless to say, Mr. Chairman, Montanans fear that the effect of an energy mobilization board would merely be the institutionalization of existing Federal-State problems writ large. We fear that an energy mobilization board will be yet one more vehicle by which to impose Federal resource policies upon westerners, policies born in corporate boardrooms and bureaucratic offices, policies born in megacities which are amply represented in Congress, policies born anywhere but in the West.

Yet, we Montanans recognize the crisis confronting our Nation in the areas of energy production and economic growth. We recognize the need for urgent planning and coordinated action to facilitate economic recovery. In this vein, let me suggest that Congress consider an alternative to an energy mobilization board having preemptive authority over the States.

We need federally sponsored regional task forces comprised of State Governors, legislators, citizens, and appropriate Federal agency representatives to analyze national and regional imperatives in energy production, and to establish agendas for State, Federal, and private coordination toward meeting these imperatives. These task forces should have permanent, federally supported staffs. The staff members should be assigned to the representatives of the various member groups from the respective States, accountable to their respective task force members rather than to the Federal Government. The task forces should meet regularly to examine alternatives by which to facilitate appropriate energy development within their regions, coordinating Federal, State, and private efforts toward timely approval and licensure of proposed projects. Properly staffed and adequately outfitted with research capabilities, these task forces could do much, in my view, to promote the kind of energy mobilization we must have to bring about national economic recovery. The most important service rendered by such task forces would be to focus Federal, State, and private efforts in a productive and nonpreemptive way, allowing industry to communicate its priorities and concerns within a single setting in which all regulating entities are represented. Through their involvement with the task forces, State governments and regulatory agencies would receive an education from a regional and national perspective, allowing them to formulate State policies which complement rather than impede Federal actions to stimulate energy production.

Mr. Chairman, I sincerely hope that Congress will consider and expand upon this alternative to a preemptive extension of Federal authority over the States.

Thank you.

Senator BAUCUS. Thank you very much, Mike. That is a very comprehensive and, I think, excellent statement.

In particular, I like the way you listed the areas where Montana has dedicated proceeds of its severance tax. It shows that we have taken a very deliberate, a very studied, a very thoughtful way to allocate the proceeds of the severance tax. That's certainly very helpful.

Second, it's very helpful the way you listed the taxes that other States impose on their own consumers in various ways. The more, we can show other States that they, in fact, are imposing greater burdens on their own constituents than is the effect of our severance tax, the more likely we will be successful in preventing a cap from becoming enacted.

One of the questions that I continually hear when I talk to proponents of bills to cap severance taxes is, well, sure. Max, I understand that Montana has a severance tax. It has to pay for some of the costs and dislocation of coal development, but my gosh, not only is it at 30 percent, but half of that 30 percent is not used to pay costs. It's going to a trust fund. You know, it's going off to be spent in the future, it has nothing to do with the costs. What's your answer to that?

Attorney General GREELY. Well, I suppose there could be several answers. But I think the most important is that clearly Montana has seen the devastation that energy production can create in other States, and we always use Appalachia as an example, and I think it's a good one.

Recently in Montana we had the Anaconda Co., which was taken over by Arco, withdraw a lot of its potential business in the State of Montana, particularly in two communities. We have people out of work, we have a plant that's sitting there essentially idle. These are things and costs that have occurred long after Anaconda first came to Montana. Something that wasn't anticipated at the time the development first took place. Many costs associated with coal production, especially strip mining, cannot necessarily be predicted. We don't know what's going to happen 10 years down the road, 20 years down the road. We don't know how extensive the development is going to be. We don't know what is going to happen when all the coal is gone. We don't know what effect it's going to have on the agricultural communities in which strip mining takes place. I think the idea of a trust fund is a good one because the people of Montana feel that the coal in Montana belongs to all the citizens of Montana, both past and future, and that they are entitled to receive the benefits from it. But the most important thing is that we are not trying to take this money, rely upon it, maybe even have to raise the taxes even higher because we become so dependent on it, but to put it away for future needs, particularly with regard to the needs that may occur in the affected areas.

As I suggested in my testimony, as we have suggested in court arguments, there is really no way to quantify the costs that the development of coal production, the coal energy in the State of Montana, of what the future costs will be. Because we don't know down the road what might happen, and I think it's important that we plan for the future and that we have set aside some of that money to take care of those problems that may occur.

Senator BAUCUS. I agree with that. The problem I have is convincing others of the potential future costs that might occur. I often refer to aquifer damage. Strip mining the coal damages the aquifer and we don't know what the costs of that are going to be today. Sometime those costs surface, 5, 10, 15, or 30 years down the road.

In addition, I'm wondering whether we should have to establish 100-percent correlation between the tax and costs. It seems to me that the question is really whether and to what degree Congress can limit a State's power to tax its own resources. Alaska has a tax on oil and gas. They are using the revenue for many things. There are some costs associated with oil and gas development, but certainly fewer costs than are associated with coal development. As a matter of constitutional law, it would seem to me that we have a very good argument that our tax, even to the degree it may or may not be related to coal development costs, should be upheld until it can be shown to significantly damage interstate commerce. It seems to me that the commerce argument doesn't have any validity here. Montana is not impeding interstate commerce. You have already demonstrated in your testimony how much our development has increased since we enacted the coal severance tax. If anything, we are enhancing commerce, not impeding it.

When you analyze the constitutional issues here, Mike, to what degree do you see merit in the point I'm making here that we, as a State, have a right to impose taxes that we want and constitutional efforts to limit our taxes really strike at the sovereignty of a State. Furthermore, Congress should meet a very high burden of proof before it can limit a State's taxes apart from whether there is a correlation of the costs.

To what degree do you think, as a constitutional matter, that is a valid argument?

Attorney General GREELY. Well, the problem is that you, as an attorney, are very much aware that there is a legal argument that's called the benefits burden argument. The trouble from the benefits burden argument is that to a layperson it means something that you could put your finger on. In other words, a dollar-for-dollar relationship. What it essentially means is that a State has only the right to tax an industry or enforce a tax to the relation to the benefits that the State provides for that particular industry. The problem is that the opponents of the coal severance tax have tried to do this in a quantifiable manner. They have tried to say that for every $3 of tax that we take from the coal companies we have to provide $3 worth of services. To a layman or to somebody back in Congress, you are trying to explain things so if you can't make some kind of a general relationship between $3 and $3—$3 of tax for $3 of benefits the State provides—then, they have difficulty understanding how we can tax at the rate we do.

The problem with the benefits burden argument is that when you are dealing, especially, with the production of coal, you are not dealing with quantifiable figures. You cannot say that so much tax is needed to do so many things. We know what the costs of local governments are; we can quantify those. But we can't always quantify the social economic cost to the people in the communities when the coal company leaves or when they first come in and they have to build new schools right away.

So, there doesn't necessarily have to be a direct relationship between the dollar of tax for each dollar of benefit that the State provides, and I think that this is the argument that somehow you have to get across to your fellow Congressmen, if it's at all possible. Because the coal companies benefit just by being in Montana because Montana has a structured governmental society by which they can live and which they can compete in their various industries, and this is a great benefit that has no dollar value that we can assign to it. But it's definitely a benefit that the coal companies receive, just like many other benefits that are hard to quantify and that's the difficulty.

I think basically we have tried to indicate that the benefits burden argument is not the type of court argument or the type of argument before Congress that is fairly used. That we should not be in a position of having to show that every tax dollar we use or every tax dollar we assess goes directly into the back into the coal development problems. Because for one thing there are things that you cannot quantify and it's a difficult argument, I guess, to promote because people expect you to be able to say for each dollar of tax you are going to have that dollar of services. But it just doesn't work that way.

Senator BAUCUS. Another argument I hear is well, gee, that's Federal coal. Kansans and Texans say that's their coal and that Montana doesn't have a right to put a tax on their coal.

Attorney General GREELY. Well, I guess there are two answers to that: One is, of course, that the Western States, and this is why we are having a problem today, the Western States came into the Union under a little different circumstances than some of the other States did. When we did come into the Union, many of the Western States came in with a lot of Federal land that is retained by the Federal Government, and that was basically really a fact of history as history developed. Some of the States like Nevada and Idaho have over 75 percent of their land owned by the Federal Government. Montana is in a much better situation. We only have 28 percent of our land. But how much Federal land is there in any of the Eastern States? There is none to speak of. In fact, I think of all the original colonies, I don't think there is any Federal land unless there has been some parks or something like that has been developed.

The second issue is that it's no more——

Senator BAUCUS. Well, the first point you are making, is that it is an unfair argument. When Montana became a State, one of the conditions of becoming a State entering statehood is that the Federal Government retain a certain percentage of the land, and also retain mineral rights to a lot of the land.

Attorney General GREELY. And just like you don't have to be an attorney to know that if the Federal Government or the State government, for that matter, wants to sell the rights to mining coal or leasing oil, drilling for oil, that you are entitled to do that. And once the government makes a contract with a private industry, that coal or that oil becomes the property of the private industry. They have it as a matter of right and title from the time it's severed from the ground and becomes the private industry's, and what they do with that coal or what they do with that oil is entirely up to them, and it's no more belonging to the people that sold it originally. Because the procedures

the Federal Government has a right to sell the coal at whatever costs they want or whatever cost they can negotiate. Once they have done that, then, the people of the United States have been benefited by that, and that money goes for whatever purposes the Federal Government sees fit, and the coal no longer belongs to them.

So, at the time that the coal was severed, it's actually the property of the coal company, and we are really taxing private people. We are not putting a tax on the coal that belongs to the Federal Government. We are putting the tax on the coal that belongs to the company, and it's the companies we tax, and not the Federal Government.

Senator BAUCUS. So you are saying that certainly Montana's efforts to tax its coal is constitutional, and I agree with that.

But second as a constitutional matter, it would be unconstitutional for Congress to enact the Bumpers bill setting a 12½ percent cap on the States' coal severance taxes. You do believe that the Bumper's bill is unconstitutional; is that right?

Attorney General GREELY. Well, I don't think you could ask that question categorically and say that an attempt by Congress to limit the coal tax is unconstitutional. I'm afraid.

Senator BAUCUS. I'm saying I think it is.

Attorney General GREELY. I would like to believe that that's the case. I think it's something that has to be decided. I can say this: It certainly is unprecedented. It's never been done before by Congress. I think it's the type of thing that if Congress would allow itself to do that for coal, then, there will be oil and gas that will be next, and any other energy resource. I think any limitations on States' taxation is contrary to all our historical precedents. I think that you learn in grade school, you learn that the power to tax is the power to destroy, and the power not to tax is the power of being completely helpless. If the State is not allowed to have a free taxing system, then, we become dependent on the Federal Government.

Senator BAUCUS. I think that's the point. Even though the Constitution provides that Congress can pass laws affecting interstate commerce, and arguably a cap on the States' coal severance tax does at the very least affect interstate commerce that there is a constitutional principle deeply imbued in the 10th amendment which reserves certain powers to the States. Second, the point you are making, is that the power to tax is the power to destroy. The power of Congress to limit State taxes is the power to destroy States. Once you establish the pernicious precedent that Congress can limit States' taxes, resource taxes, income taxes, severance taxes, whatever they may be, then, you are very significantly limiting the ability of that State to function and to operate.

There is another point here as a matter of public policy, and that is that the more that Congress limits the States' ability to tax, the more those States are going to go to the Federal Government for a handout. Because we have got to reclaim the land, we have to pay for all the costs that you very well documented. And if we, in the State, can't pay for those costs, we are going to have to look elsewhere, and the usual direction is Uncle Sam. I think Congressmen certainly should be, as a matter of public policy, aware of that argument because we are trying to balance the budget. I'm sure most New Yorkers

and Texans and Kansans and Minnesotans would much rather Montana pay for dislocations than for the Federal treasury to be further out of balance. Congress would have a greater budget deficit if the Federal Government were paying for these costs.

Do you know whether the Federalist Papers are helpful in this regard? The more we can show to the conservatives that the Federalist Papers say that this kind of tax limitation does not make good sense, the more arrows we have in our quiver. Are the articles in the Federalist Papers that deal with taxation helpful here?

Attorney General GREELY. Well, I'll answer your question in a minute. But I want to make clear for the record I was a little unequivocal on your question of the constitutionality of the tax. I can say this for the record, and you can take this back to your fellow members of the Judiciary Committee. While I won't sit here today and say that Congress enactment of a 12½-percent limitation on a State severance coal tax is unconstitutional, I will say that the attorney general of Wyoming believes that it is.

I will also say that if such a tax were ever, such a limitation was ever passed by Congress, you could be certain that we will go to court and find out whether or not it is unconstitutional, and we will make an effort to show that it is. Because I think there are some arguments that would indicate because of the unprecedented nature of it the question whether Congress can limit the States' power to tax is not a cut and dried question. So, it's one that is certainly going to have to be litigated, if such legislation were ever passed, and certainly we will do everything we can to see that it's brought to court.

Senator BAUCUS. Is the *Usery* case helpful in our efforts to argue that such a limitation is unconstitutional? That's the case where the Federal Government said that States had to pay certain minimum wage rates to their employees. That was held as an unconstitutional Federal intrusion into the State's right to determine its own policy.

Attorney General GREELY. Well, I'm not sure, because we have been so busy just doing the research with our court case that the issue of constitutionality of the legislation obviously hasn't come to blows at this point in time. I haven't had an opportunity to look into the question in great depth. But I think that your question about the Federalist Papers lends itself to the answer to the question, and that is that we have a theory of a federal system of government that really talks about and originally started as 13, and now 15 independent States that have a lot of autonomy and that they have their own self-government powers, and within reason the self-government powers are necessary to make each State an equal within the Federal Union. And that there has to be a balance of this power between the Federal Government and the States, and that if the Federal Government were to infringe on such an important aspect of State sovereignty as their ability to tax, which is their ability to carry out their government, then, you are getting very closely to a situation in which the States would no longer be able to act on their own accord because they wouldn't have the power of government. They wouldn't have the ability to raise the money to function. I think you are treading very dangerously when you limit States' power, traditional State powers and I think the tax is traditionally a State power, the ability to tax.

The only time it's been challenged is when the State challenged the State's power, which is appropriate, I think, and has been held so by the court. So, you are dealing with what we consider to be a federal system of government. But you cannot completely emasculate the States and not allow them to maintain the strength of their government, and tax is probably the first area you would look if you were trying to do that.

Senator BAUCUS. You know, it would be helpful if you could, Mike, provide for the record, and we will keep the hearing record open for 10 days, all the evidence you can, particular material that show the costs that we incur in our State that are caused by coal development. The more we can establish all the costs and the future potential costs the better able we are going to not only withstand efforts to cap our tax in the Congress but also efforts to negate our tax in the courts.

Turning to the proposed Energy Mobilization Board. It's my view, that the Supreme Court would hold an EMB to be constitutional. Do you share that concern?

Attorney General GREELY. Well, unfortunately the greatest danger that I see in the EMB is the ability to supersede or essentially strike down State laws. The current situation that we have is that any time Congress wishes to pass a law that directly conflicts with State law, that we have the supremacy clause of the constitution which requires that the Federal law to prevail. With that as being the greatest danger of an EMB, I would say that if the legislation is properly drafted that Congress would have the power to essentially circumvent State laws.

It would depend somewhat on how closely related the EMB legislation was to the State laws. In other words, you can't do it by implication. There would have to be a direct statement, which there has been in the proposed Energy Mobilization Board that State laws could be superseded in order to speed up the energy development.

Senator BAUCUS. So, you do share that concern?

Attorney General GREELY. I'm afraid that it would be probably constitutional, even though it is unworkable apparently. One of the things about the EMB that bothers me the most from the standpoint of trying to seek redress in courts is the fact that the legislation calls for the Federal courts in Washington, D.C. to be the site for any legislation that is filed in relation to EMB problems. I think that's quite unfair to the States for several reasons, not the least of which is just the cost of having to litigate something by going back to Washington, D.C. and spending a good deal of time back there in a special court set up just for this purpose.

It seems to me there is no reason to disassociate ourselves from our court system and a logical place for a court suit would be in the State of Montana. If it was the case of the EMB with the problem it would be in the Federal courts of the State of Montana is where the process should probably properly be litigated. So, that is one development that really concerns me. It's fairly minor, I guess, in the impact of the entire EMB legislation, but it does concern me tremendously and it seems to me that could be something that would be helpful to change.

Senator BAUCUS. Well, I agree with you. I think the EMB is unworkable. I think it's an outrageous interference and it's shortsighted and poorly conceived.

But what has happened to the 10th amendment? Does it mean anything in energy development issues? It seems to me that as a practical matter the 10th amendment doesn't have much meaning in this area. Any ideas how we can breathe more life back into the original intent of the 10th amendment in this area?

Attorney General GREELY. I don't know where we are going. I have tried to talk about it and my testimony about the national energy policy, and I guess the problem really arises as to how far the Federal Government wants to go in controlling the various aspects of our lives.

Now, energy development is very important for the country as a whole, but we consume energy in Montana just as much as they do someplace else. I don't have any problems with the Federal Government or the President in his administration in developing economic policies or energy policies. But it seems to me that the Federal Government should be very careful about preempting everything else in the field. Because as I said in my testimony, that the effect of a national energy policy that doesn't respect the rights of individual States, both energy-producing and energy-consuming States, is one that we are in a situation where the Federal Government is running roughshod over the States. I think it has to be pretty important. I think in foreign policy rightfully so the Federal Government should be supreme. But when it comes to national policies, I don't think that we should develop something that's going to unduly interfere with one set of States or one region of the country with another region of the country, and that's what I see the suggestion that the Federal Government has a national energy policy, that it really means to us out here it means exploitation of Montana at the expense of our States rights.

Senator BAUCUS. It seems to me that probably the answer lies in the words of Thomas Jefferson. The more States take measures to protect themselves and responsibly address issues the more the 10th amendment is going to have meaning.

Attorney General GREELY. True.

Senator BAUCUS. The more States set up reasonable procedures and measures to husband their resources, the more unlikely it is that Congress will step in and try to impose Federal dominance in that particular area; and second, even if Congress does attempt it, it will be more likely that the Supreme Court will find the 10th amendment means something.

If the States are active, if the States are progressive and farsighted and imaginative the more unlikely it is that Congress will act.

And that goes to another set of questions. Ted Doney talked a little bit about efforts in the legislature to set up a one-stop permitting procedure in the Siting Act. I just wonder whether you support that approach and whether you could explain why that approach would or would not be in our best interests to resolve these kinds of questions.

Attorney General GREELY. No; frankly I disagree with the one-stop permit aspect. Because I believe in the State of Montana that, and I think the industry had said this, industry in general has learned to comply with the various regulations that we have set up. They know where to go to get their permits and they can do it in a reasonable and timely fashion. I don't believe that the current system we have for the Siting Act or for a strip-mining act that the necessity of getting per-

mits for these particular, these two in particular, that we would necessarily need a one-stop shot. There are several agencies in the State of Montana that are involved in the permitting process, and most of the, and each has a very important function to serve. I feel that the industries have learned to date and have said that they have learned to date how to go through the process, and I don't really think—I think it's somewhat of the wool over the eyes to say that just by going to more than one agency for a permit that this somehow slows up the process. It could, and maybe it does in other States, but I don't think it does in Montana.

Senator BAUCUS. Well, if we had a one-stop procedure in Montana, couldn't applicants adjust to that quickly. We then would have a procedure that's even more efficient or expeditious than the system they are used to? Arguably one could get used to a thousand agencies. I'm just wondering whether industry couldn't adjust to a one-stop procedure. I'm just looking for ways to show that we are handling the problem out here in Montana so that we can tell Congress to keep their hands off.

Attorney General GREELY. Well, here we are handling the problem in Montana, Max, and I think you know that very well. Our Montana Strip Mining Act was used as one of the acts that was used very heavily relied upon by the Federal Government when they passed their Strip Mining Act. We were first. We had the act passed and in fact when the Federal act was passed, when we had to comply with the Federal regulations we had very few changes to make. Because our act was the one that was used, and I think the point is well taken.

Now, unfortunately I think Congress sees the problems of the States, the States rights. In fact recently in presidential campaign rhetoric the words States rights came up and everybody reacted to it as States rights meaning discrimination and because of the experience with discrimination back in the 1960's in which States were discriminated against various people because of race, color, or sex, and the Federal Government felt compelled to step in and handle the problems, and it was a States right issue and that is correct, it was. But the States happened to be wrong and they should have been corrected.

But in this area of energy development and in strip mining and in licensing and permitting of the operation of energy development in the State of Montana, I think we have a right in Montana to control development. I think our legislature has done an outstanding job and that the system that we have in Montana at the present time is not that counterproductive. We are having development. Yes; it's gradual. Yes; it's slow. But I think it's very necessary and you and I know we could walk down the streets of the small towns of Montana and people should know us by name. We talk to them on a first-name basis. Now, you go back to the Federal Government and it's very difficult to get anyplace back there, and I believe one-stop shopping at the Federal Government, I wish I could go back to the Department of Justice and get one thing done, but that can't be done. But in Montana it can because we know everybody on a first-name basis. It's not that difficult for industry to know that there are 19 departments in State government and maybe 4 of those departments have something to do with permitting for energy development, and we pride ourselves in Montana on the ability

to know people in State government. We pride ourselves on the ability to get things done, and we have to continually improve ourselves at all times. We don't have the bureaucracy. I think you are aware of that, you are in the Montana Legislature. We don't have the bureaucracy in the legislature that we have in the Federal Government. So, when the Congress people think about problems of one-stop shopping, they ought to quit thinking about the Federal Government. They ought to come out here to Montana and see how relatively easy it is to know which agencies are involved in the permitting process, to know the individuals who are responsible for those permits, and to know that they can go to those agencies and get something accomplished in a relatively short period of time.

I feel that this can be done in Montana at the present time and that we don't need a one-stop permitting agency in Montana, That would facilitate things possibly. At least it would enable industry to go to one location. But they would still have to take the application and go to each agency that has the responsibility in the permitting process to follow through with their EIS's or whatever else it is that they have to do. But it has been relatively simple in Montana. I think industry on a whole has stated publicly that it hasn't been a problem as far as knowing where to go and getting the job done. Now, sometimes they have complained about the length of time and I think that, of course, has to do with the staff available to handle the development as it progresses and the more industrial development we have and the rapidity it comes with the longer it's going to take for our State to adjust by getting more people on staff to take care of the permitting problems. But basically I think the transition in Montana has been slow and we have been able to handle it.

Senator BAUCUS. I think that's right. Some of the earlier delay is due to the novelty of the regulations and the procedures. Once you go through something one or two times, the third or fourth time is generally quicker.

I want to thank you very much for your testimony, Mike. It's been very helpful. I worry that this is going to be a question we are going to be faced with for quite some time. The more all of us in the State can put our heads together and come up with ways to address it, the more likely we will be successful.

I'm very worried about EMB's limits on severance taxes and congressional efforts of that kind. Because those people in other parts of the country want our coal. They want our resources and, frankly, they don't care that much about how they go about getting it. They just want it and so we have a major effort before us.

Attorney General GREELY. Well, Senator, I want to thank you on behalf of the State of Montana because I know of your efforts in all these areas that you are a very strong advocate for the State of Montana, and that we have to have more people like yourself, particularly in view of the fact that you have managed to cooperate with your fellow Senators not only in the West, but in other areas of the country, and this is the only way we are going to be able to make our point clear. I know we are going to have to be into Congress next year on the same sort of legislation and it's helpful to know that you are back there. You have always cooperated with our office, you have always let us

know when the bills have been introduced and what times the hearings are set for. I thank you very much, especially we are grateful that you are here during the recess so you can get this information from Montana to take back so we won't have to make as many trips back there. You will be able to have some record as the next bill comes up.

Senator BAUCUS. Thank you. We are going to recess the hearing at this point to 1:45. We have five witnesses this afternoon. I would like to ask the witnesses not to be repetitive. It's easily asked and I know it's sometimes hard. I would like the afternoon witnesses to focus on some of the constitutional questions and on ways that we in the Congress can lay the foundation to make sure that when the decisions are made down the road that we have all our ducks in line and we are more likely to prevail.

So, thank you very much, and we will recess until 1:45.

[Whereupon, the hearing adjourned at 12 o'clock to reconvene at 2 p.m.]

AFTERNOON SESSION

Senator BAUCUS. The committee will come to order.

The next witness will be Mr. Roger Tippy of Helena.

STATEMENT OF ROGER TIPPY, ATTORNEY

Mr. TIPPY. Thank you, Senator. I have a short written statement which I will read through quickly, perhaps summarizing here and there. If I may also extemporize at a couple of points that I have already warned the reporter on.

Mr. Chairman, for the record, my name is Roger Tippy, an attorney presently in private practice in Helena, Mont. By way of background, I was employed by the Montana Legislative Council as staff attorney from 1973 to 1977 and participated actively in the drafting of the Montana coal-tax legislation in 1975 and in the research in 1974 which preceded it. I then staffed the legislature's Coal Tax Oversight Committee for 2 years and after opening my own practice was retained by the coal board as counsel in 1978. While none of my present clients are involved in the coal industry or in the expenditure of coal taxes, my past involvement has been sufficient to keep me interested in these issues.

Today I will comment somewhat obliquely on the topic: What are the dangers of a Federal policy which strikes at the heart of a State's ability to provide adequate government services to present and future generations. The danger such policies would pose to our vertical checks and balances is obvious. I submit that more subtle dangers are posed by the continuation of the debate over Federal limitations; whether that debate is had in Congress or in the Supreme Court.

Within the American political system, the States are the social laboratories where political experiments are tried. Universal suffrage, graduated income tax, prohibition, environmental protection, these and many other ideas were tried in the States before moving on to the national stage.

Now, every laboratory in which scientists are experimenting shares some common features. The experimenters will be tinkering with, fiddling, and adjusting the object of the experiment. In natural science,

the purpose of all this fiddling and tinkering is often to isolate the variable factors or the constant factors. In political science one fiddles and tinkers in order to fine tune the object to the greatest satisfaction of the largest number of interests.

However, when the experiment is attacked from outside, the scientists are apt to leave off tinkering and keep the experiment just as it is. A siege mentality sets in, which dictates that the experiment be defended in detail exactly as it is constituted then. Any thought from within the lab of a bit more tinkering is hushed quickly: Loose lips sink ships.

For example, I read last summer that some of the Montana officials who had been critical of the coal board's impact assistance policies were castigated by other State officials. Why? Because the in-State criticisms of the coal board had been quoted by proponents of the Sharp bill at the House Interstate Commerce Committee hearings.

Now, I happen to hold the opinion that the coal board's impact assistant statute is one of those that could certainly benefit from some fiddling and tinkering. One of its deficiencies is that the board's authority to transfer funds to other State agencies for public services in the impacted area is limited to 5 percent of available funds. A good case could be made for transferring a third, maybe a half of the impact assistance funds generated next bienium over to the Department of Highways.

The 1975 coal tax legislation allocated a slice of the next 4 years' coal taxes to the Department of Highways, and when that allocation ended in 1979, the sum of $15,117,191 had accumulated for the upgrading or reconstruction of 11 different primary and secondary routes near the coal mines. The expectation that this amount would fund all 11 routes was based upon the hope of matching each State dollar with 3 Federal dollars from the U.S. Department of Transportation.

While the past 5 years have made it abundantly clear that no such matching moneys will be coming out of the DOT, and I would ad lib a little bit more in support of that. The highway reconstruction project was the brainchild, as it were, of State Senator Manning from Hysham. Dave Manning had given very geneously of his time and energy to go back to Washington a number of times and testify, at least on one occasion when I accompanied him, to the Senate Public Works Committee in 1976 explaining what these 301 miles of identified roads that go up to the various coal mines and the towns which house their workers, what sort of highway work was needed to bring those generally dirt or gravel or lightly-paved roads up to the heavier standards that an industrialized region requires. The Department of Transportation, the funding subcommittee has been unable to see any reason for loosening up access to the Federal highway trust fund to assist the State or Montana on the usual 3 to 1 basis in building these roads. They have acted like it's all our problem. So, this summer the State Department of Highways has looked the inevitable in the eye and said OK, we will do what we can with 100 percent State money, and you know what the 15 hundred million, et cetera, will be sufficient to do with no Federal matching? One of those 11 routes. It will build about 30 miles of the Forsyth to Colstrip highway, one of those most heavily traveled. It will separate some of the grade crossings which

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are held up by the long coal trains now. It will deepen the pavement, widen the road, and then it will all be done. The other 90 percent of the highway network in that region will not be funded at all. The State coal tax money will be gone, the other 10 routes will have to wait for the normal pace of primary and secondary matching, and maybe rebuilt on that basis in a half a century or so. Yet, several of those routes, like the Busby-Decker Road in Big Horn County or the Sarpy Creek Road in Treasure County should be rebuilt now on the basis of present traffic loads. The additional mines that Attorney General Greeley mentioned this morning will bring heavier traffic roads on many of the 11 other routes.

It galls me to hear proponents of the congressional limitation bills argue that we must have dealt with all the impact in southeast Montana because some of the coal board's grant decisions have been criticized in Helena. As the highway example shows, there are various types of impacts which the coal board is not set up to deal with, and yet which are sitting right out there today. If we felt free to run an unhindered political experiment, the next session of the legislature in Helena would evaluate local government needs through the coal board versus highway user needs through the Department of Highways, and appropriate funds accordingly. However, if that siege mentality silences any real debate on the coal board's need for its maximum possible allocation, this sort of possible quite useful tinkering with our experiment will not be done.

Another part of the experiment which should be subject to tinkering is this matter of trust funds. For reasons never clearly articulated in the State capital, the legislature left its statutory education fund from coal taxes intact after the people voted in the constitutional trust fund in 1976. Today, 50 cents of every coal tax dollar is invested in the constitutional trust fund, and another 9 and three-fourths cents is invested in the educational trust fund whose interest benefits the public school foundation program and the university system. While there is apt to be some degree of debate in the State legislature on whether two trust funds are justified and whether the university system is entitled to the highest priority on the interest income from the constitutional trust fund, we really should clear the air on the relationship of these two, and I fear that as long as we are guarding the fortress we may not be able to have that sort of debate in Helena.

To extemporize a little bit more, Senator, on the role of our trust fund and perhaps its origins so you can explain it to the Senator from Arkansas better. I would guess its creators were two longtime observers of the Montana scene from just south of here in Ravalli County, Professor Toole and the late Miles Romney who was serving in the State Senate at the time the coal tax came through. Professor Toole on any number of occasions has reminded policymakers of the boom or bust cycles we have experienced in the past. The buildup and decline of the cattle industry, the honyockers, the underground mining in Butte and the inevitable contractions that have followed each of these boom periods and the way we have just ended up holding an empty bag. He reminds us that impact is not only something experienced on the front end as the tide is building up to develop some-

thing. But even more severely on the back end as the tide washes out. If we need a vital current example, we need only go to Anaconda or Black Eagle to see the backhand of impact. I wish the New York Times, the TV networks would do a joint feature on Anaconda and Forsyth to see one town in Montana waxed while the other is waned, and to remind their viewers or readers that Forsyth, Hardin, those towns, will get their pink slip from industry in some future years the way Anaconda and Black Eagle got theirs in the past month. When that happens, the tax on the current production of coal that the Board would be able to spend to deal with front-end impact will not be available. You will have only the trust fund to pick up the back end.

Finally, on the input side, we could even tinker with the sacrosanct 30 percent if we weren't under siege. I have long been somewhat surprised at those interests who favor exporting the coal rather than the electricity, those who say load-center generation is better than mine-mouth generation, have not urged a tax incentive to bolster the regulatory disincentives, at least what powerplant builders would see it as powerplant disincentives, now on the book. Suppose the State of Montana said to a Midwestern utility, we'll only tax your coal 28 percent if you put it all on the train and burn it back there, but the tax stays at 30 percent if you burn it here. How such a change in the law would (1) change the siting economics more in favor of load-center generation, (2) undercut much of the opposition's argument that our tax uniquely burdens interstate commerce, and (3) tie the highest tax rate to the type of operation which causes the most local impact. However, any legislator putting in a bill like this in Helena next January would probably be put in the stocks for offering aid and comfort to the enemy.

In conclusion, I submit that if the State of Montana were left alone with its coal tax experiment, if we could freely debate its details among ourselves without fear of how we might be quoted out of context in some brief or committee testimony back in Washington, the coal tax would evolve into a political institution with a broad consensus of support both within and without the State. As long as the siege continues, the evolution will be inhibited. We must hope the siege will be lifted soon so that we can get back to the tasks at hand.

Senator Baucus, thank you for giving me the opportunity to express my views today.

Senator BAUCUS. Thank you very much, Roger. I particularly appreciate your remarks about the need for a trust fund to pay for the back-end costs when development reaches the bust end of its cycle. I think it's a point that needs to be made more strongly when we talk about the trust fund. It's a valid point and certainly Arco in Butte-Anaconda and Great Falls is a very good example.

I asked the Attorney General if during the next 10 days he could, for the record, provide arguments and documentation of the costs of development. I would ask you if you could, for the record, expand your statement with respect to back-end costs. How can we best evaluate the problems that the communities have to face and the costs that the communities and States incur when an industry leaves, particularly when it leaves quickly?

We could take some cues from Anaconda. The cost in Anaconda is going to be astounding: the costs of retraining workers, relocation costs, and the costs of incentives to bring new industry in, employment compensation costs, trade adjustment assistance costs, medicare, medicaid. These are just a partial list of the costs.

Mr. TIPPY. The property tax base for Anaconda-Deer Lodge.

Senator BAUCUS. There are countless examples of the costs that communities must face when the development reaches its end. If you can help us identify these costs, it would be very helpful. Beyond that, it's an excellent statement. I really appreciate it.

I also appreciated your point at the end about taxes on power. That's an argument we can use and develop much more fully in order to make our point. It's an excellent point and one that has not been raised very often. I want to thank you for raising it here.

Mr. TIPPY. Senator, can I ask if you have anything in the record on what the total cost of the highways in the three-county region would be if they are entirely funded as State projects? If not, I will ask the Department of Highways to submit that information to you.

Senator BAUCUS. If you could, I would appreciate that.

Thanks, Roger; thanks very much.

Our next witness will be Marjorie Harper, who is president of the Clark Fork Basin Protective Association. I appreciate your time, Margie. If you have a statement you want to read, fine. If you want to summarize it, fine.

Mrs. HARPER. I will just read it.

Senator BAUCUS. Fine.

STATEMENT OF MARJORIE HARPER, PRESIDENT, CLARK FORK BASIN PROTECTIVE ASSOCIATION

Mrs. HARPER. My name is Marjorie Harper. I'm a housewife and I reside at 3000 Marshall Canyon Road in Missoula. I am presenting testimony today on behalf of the Clark Fork Basin Protective Association.

We'd like to thank you, Senator Baucus, for taking the initiative in scheduling these hearings. We believe that the issues raised are of vital importance to our future. We appreciate this opportunity to have input into the federal machine.

Perhaps it would be helpful if I explained why our citizens' groups was organized in the first place. We have been attempting to gain some measure of control over the Bonneville Power Administration in its efforts to site twin 500-kilovolt transmission lines across our homes, neighborhoods, streams, and pastures. The BPA is acting as a classically renegade federal agency. It claims it is exempt from the payment of taxes. It also claims that it is exempt from Montana's laws that regulate the siting of such projects, the Major Facilities Siting Act. The BPA is a federal agency that is accountable to no one but itself, and therein lies our problem.

My testimony will emphasize our fears of the effects of an Energy Mobilization Board and Congressional attempts to limit taxing authority based on our experiences with the aforementioned BPA.

First, to the severance tax. Any Montanan intuitively knows and values the wisdom of our coal severance tax. It is a monument to our

farsighted efforts to avoid the rip, profit, and run practices of the past, and the unfortunate present. What is not as well known is the constitutional crisis that attempts to limit State taxing authority at present.

The attempts by large utility interests, acting under the guise of consumerism, are nothing more than a frontal assult on our Nation's Constitution. All of the States, not just the targeted States of Montana, Wyoming, and North Dakota, must resist and prevail against this infringement of their sovereign powers. The power of the States to levy taxes must not be infringed upon.

Next we must focus on the wholly misquided efforts of Congress to establish an Energy Mobilization Board. The EMB, both in its inherent philosophy and in its proposed execution, runs straight against the grain of our democracy. The very idea of creating a board with the power to waive laws, whether they are Federal, State, or local laws, is repugnant to what this country stands for. If the law is unclear, rewrite it. Don't hack the laws to bits with the meat cleaver of federalism and some misguided sense of national urgency.

Ironically, the very redtape that an EMB seeks to cut through appears to be the redtape of the U.S. Constitution. Why not cut the redtape of due process, the redtape of access to the courts, the redtape of life, liberty, and the pursuit of happiness, and finally, the redtape of the Montana State Constitution which in article 9, section 2 guarantees a clean and healthful environment to all Montanans?

Why not? Because to do so would be to sacrifice the ideals and practical experiences of the American process. No sacrifice is worth that cost.

Now, to the practical problems that we have experienced in dealing with the self-annointed, "fast track" Bonneville Power Administration. Dealing with the BPA, which is a self-contained Federal agency, is very frustrating for private citizens. The BPA repeatedly sends people to talk to us who have no decisionmaking authority. They are basically arrogant and patronizing. One example of this recently occurred on a large range on the outskirts of town. The owners discovered that a hole had been dug, filled with cement and the BPA's market, and a helicopter landing site had been established approximately 300 feet north of the current BPA easement, all without notification or consent of the landowner. How do we deal with a Government agency that violates private property rights?

With a government that functions on the principle of the greatest good for the many, a sparsely populated area like Montana can easily become a sacrifice area. It is up to our State government to protect its citizens. It is up to our State government and the citizens involved in the decisionmaking process to decide when, and where, and how development will occur. If Montana and Montanans do not control the development of all of our resources within our boundaries, but especially our energy resources, then we will have no say in our future.

We are going to the State Land Board next week with petitions asking them to uphold our State laws that we feel control the BPA in regard to these powerlines. What would our lives be like if we had the added oppressiveness of a federally mandated Mobilization Board that is empowered to ignore our thoughts, ideas, and decisions? The present intolerable situation would be inflated to the breaking point.

We who must live with the results of these major decisions on energy use expect and deserve to have our rights upheld by the laws of the land. We do not deserve to be the victims of those laws. Nothing more is acceptable, under both our system of law and our rights as human beings.

Senator BAUCUS. Thank you very much, Margie. That's a very good statement. I particularly like your observations about the BPA. In many respects the BPA is like an EMB. If we have an EMB, heaven forbid, it will consist of three people who are not elected. They would be appointed and sit outside of our State. They won't even come to our State and would make decisions that affect us more directly than the decisions affect the ultimate consumers of the production. I think that the problems of the proposed EMB are very similar to those of the BPA.

You know, Americans legitimately are concerned about unaccountability in government these days. It's partly because bureaucracy has grown so large; it's partly because of the failure of the Congress to force more accountability.

But the problem is even worse when it comes to the BPA. It's even difficult for the Department of Interior or Department of Energy to get a handle on BPA, let alone anybody else in this country. I frankly think that the BPA is an agency that all of us have to look at. The BPA if unchecked, can adversely affect those of us in the Northwest and particularly those of us in Montana who are that much farther from Portland, which is the main office of BPA. I thank you very much for your statement. It's very helpful.

Our next witness is Mr. Luke Danielson from the National Wildlife Federation.

Luke, I want to thank you for coming today. Before we begin, I want to show you how your statement came in the mail.

Mr. DANIELSON. I'm very sorry about that.

Senator BAUCUS. No problem. It's just that I got a chuckle out of it. On one hand it's appropriate for the organization that you represent. I don't know whether this came by deer or by bird or what, or whether it's a commentary on the U.S. Postal Service and the Federal Government.

Mr. DANIELSON. I think the latter, Senator.

STATEMENT OF LUKE DANIELSON, NATIONAL WILDLIFE FEDERATION

Mr. DANIELSON. I very much appreciate being here. The National Wildlife Federation is America's largest private conservation organization. We have over 4½ million members and supporters nationwide, and we have been vitally concerned about both of those issues, the Montana coal severance tax and the Energy Mobilization Board. I would say that to start it may not be obvious why we are concerned about an issue like the Montana coal severance tax, and I think, it boils down to this: We believe very strongly that decisions made locally responsive to local wishes in a pluralistic society are the best decisions and therefore, unless some major need is demonstrated for centralizing

that authority somewhere, we think we are likely to get weaker decisions from a central authority than we would get from local government. I would like to touch very—I'm departing from the prepared remarks, which I hope you have a better copy of by now.

Senator BAUCUS. Oh, yes, we have a very good copy here.

Mr. DANIELSON. I would like to just very briefly summarize the major points I would like to make. First, we face a fundamental problem here of deciding what we are going to do about diminishing resources such as fossil fuels and coal, while it is in more abundant supply than oil or gas, is certainly not in unlimited supply. We face the initial question of how we are going to allocate that resource taking into account both the needs of this generation and future generations.

What do we do about this? Mr. Justice Jackson in his dissent opinion in the 1943 case of *F.P.C.* v. *Hope Gas Company* looked at the issue there in which the Supreme Court upheld Federal Power Commission regulations of an interstate gas company transmission line on the principle of cost of service plus fair rate of return. Mr. Justice Jackson said that may be fine when we are regulating a railroad or a telephone company, but what of the future generations? If we are going to price this resource on that kind of a basis we are not adequately taking into account the availability of this resource for the future.

When we look at the Energy Mobilization Board, therefore, our first question is to ask how does or how does this or how is this Board going to solve any of our energy problems. We believe that this is essentially a siren song. If we look at the real causes of our energy problems and if we look at the real obstacles to implementing a national energy problem regulatiory delay comes very far down indeed on the list. Before we go with a solution, such as the Energy Mobilization Board which would profoundly affect the way States make decisions and the balance of our power between the Federal Government and State and local government, whether or not that act is constitutional, I think, the proponents of that legislation bear a very heavy burden of showing that it's needed, that it would be effective and that it would accomplish anything. My experience, frankly, has been that virtually every State and local government is willing and indeed anxious to get the increased employment, tax base, and revenue that a major energy project provides, provided certain minimum conditions are met, and that certain State and local needs are taken care of. In fact, I find that most State and local governments go out of their way to solicit increased economic development in their areas, and find very little evidence that there is any major problem with State and local recalcitrants as a cause of our energy problems.

Our energy problem is a real one. We have to start looking at the causes of that problem. It's very easy for us to say there is an easy solution if only we would do this, if only we would do that the energy problem would be solved. If only we would open up all wilderness areas to oil and gas exploration we would immediately have a bonanza and gas would cost 39 cents a gallon again. If only we would allow unrestricted drilling on the Continental Shelf we would have cheap gas and oil. In fact, if we look at the various energy technologies that are available to us, regulatory delay has virtually nothing to do with the problems. With coal the problem is not coal production. The problem

is not coal transportation. The problem is coal utilization. If we look at the nationwide status of our utilities, we find on an average coal or electric utilities have a 40-percent overcapacity situation. They have 40-percent more capacity on average than they need to meet their customers' needs. Now, that's not always the case. Certainly in a rapidly developing area, like the West, there may be an undercapacity problem or shortage problem. But nationwide we have more utility capacity, largely coal-burning capacity, than we need to meet the customers' demands.

Senator BAUCUS. Has that changed over the years?

Mr. DANIELSON. Yes; the overcapacity situation is getting larger on a nationwide basis.

Senator BAUCUS. Do you have any figures for the record to document that?

Mr. DANIELSON. I can provide those. I believe the Sawhill report, which is either out or almost out, will use the 40-percent figure.

Senator BAUCUS. Thank you.

Mr. DANIELSON. At any rate, I want to point one important thing out. When we are looking at a particular energy technology, then, or a particular part of an energy technology, we have to pinpoint the key bottleneck, and as an example, I would say this: If we have a situation as we have had in the past where coal mines are shutdown, where coal miners are idle, and where the demand for coal is simply less than the market is willing to absorb, then, a delay in permitting a coal mine may be extremely frustrating to a coal company and may be undesirable for other reasons. But it's not hampering the national energy policy of turning to coal as a resource. That's what I think we have to point out. The key problem with coal is that we lack or in the long run maybe it will lack sufficient facilities to burn it. It's not that we don't have enough mines, we don't have enough resource.

When we get to oil and gas, we find a different problem. There is simply not enough resource and everyone, whether industry, Government, environmentalists, who study this problem in detail has concluded that nothing that we can do is going to increase annual production of oil and gas from conventional domestic reservoirs. Anyone who pretends to be contrary is doing a disservice to the American people, I believe.

My feeling that environmental delay or regulatory bottlenecks is not a significant problem is borne out by the form 12E2 which is incorrectly referred to in the written testimony I submitted as 1232. But it's 12E2, which utilities submit to the Department of Energy in which they explain the reasons for changes in their construction schedules for powerplants. If you look at those forms, which are sitting in the Department of Energy offices in Washington, you find all kinds of reasons given by the utilities themselves subject to no independent verification by anyone else for delays. The major delay, sources of delay, are high interest rates, labor problems, bids coming in over original estimates, lack of demand. Way, way down on the list in an extremely insignificant category do you find regulatory delay of any kind.

I then say that even in the cases where there are regulatory delay we have to look at the character of the proposals which are delayed.

It would be foolish to pretend that every energy project which has ever been proposed is a wise and sensible proposal. If a proposal is unwise or overlooks important factors, then, it's important that it be delayed and I can give you an example of the natural gas development in the overthrust belt south of here where two companies proposed a natural gas project despite the fact that they knew that there was the largest bald eagle roost in the State of Wyoming in the way of a railroad that they proposed to build. They continued for many months insisting that the only way this project could go forward was to build their railroad right through this bald eagle roost where there were approximately 250, 200 to 250 bald eagles wintering. This caused some delay. The delay has now been resolved by an alternative route and they are going forward.

But they complained about regulatory delay when a more sound project design could have avoided this problem in the first place, and I think there are some such examples. Particularly when we get to synthetic fuels we have to realize the problem is that we are forcing the limits of technology. People are coming with proposals to build kinds of plants which have never been before built. No one knows how to get oil shale out of oil in an economical manner. There are many unanswered questions about some of the coal gasification technologies. We lay all this on an agency and say to that agency, now, we want you to give us a permit for this, and most of these proposals are, in my experience, only half formulated. The companies come in with a request for a permit when they can't tell you what they are going to emit from the plant. They can't tell you what water pollution problems the plant is going to have, and that points out to me one of the fundamental problems with this act. In section 301C of the proposed act, it lists the information which has to be submitted to the Energy Mobilization Board before a project can be designated as a priority energy project, and it's extremely sketchy. A design proposal for the energy project. If you look for the design of the SPC–2 demonstration plant, you will see that that plant is only sketched out in the most rough manner. They can't tell you what it's going to emit, what the occupational safety and health aspects of that plant are going to be, how much character of solid waste it will produce, and that's the kind of thing we can expect under this proposal. So, we get a half-baked proposal with no specifics about the potential environmental consequences. The Energy Mobilization Board then goes to the State agencies and says how long is it going to take you to come up with a permit for this proposal, and the State agency has no idea what the potential problems are going to be.

We face that problem very strongly in Colorado with oil shale. Each of the different oil shale technologies has different problems. Most of them involve at least, in at least some stage of the process, potential worker exposure to carcinogens and mutagens of the chemical. Methods for identifying those substances do not exist yet. We don't know what will be in the spent shale. It's clear there will be a variety of heavy metals and other toxics including possibly the carcinogens and mutagens. We don't know what will be in that waste, yet we are being asked to accept something, if you believe Exxon's proposal, on the order of 4 billion tons a year of this waste. We are being asked to accept this before we are told what the waste will con-

tain or how to control it. There is no demonstrated technology for revegetating spent shale piles. Experiments to date have proved largely unsuccessful in the long run. Yet, we are asked to buy this technology on the promise that someday the technology will be available.

So, what I point out is often when there is regulatory delay, it's because we are pushing the limits of our knowledge. We are going into the unknown, and when a State or Federal or local agency is asked to buy the unknown, there may be some justifiable hesitation, some demand for increased information which might not be available and which may take some time to generate.

I would like to use as an example of why the EMB is unwise, the Atomic Energy Commission. The nuclear power program, which is clearly not affected by the EMB proposal, is on hold. We are not building new nuclear plants. The nuclear industry is not expanding and why is this? I think in large part it's due to a crisis of credibility caused by the fact that we entrusted an agency with two fundamentally different roles. One was promoting the energy technology, and the other was guarding the public from its potential side effects. We created a crisis of credibility, yet we are doing that same exact thing again with the Energy Mobilization Board. We are putting an agency, whose primary and overriding purpose is the promotion of energy development, in charge of tinkering with health, safety, and environmental standards and those two roles cannot be reconciled.

Finally, I would simply say that this act has, I think, some very, very significant problems. In the judicial review provision I think that's a nightmare. I think that the first number of projects that get ensnared in that provision are going to wind up creating a legal morass, the likes of which we have rarely seen. For example, 402(a) of the act says the temporary emergency court of appeals has jurisdiction over everything that the Constitution allows it to have jurisdiction over; 402(b) says whatever the Constitution didn't allow it to have jurisdiction over, the State courts have jurisdiction over it. Well, as a lawyer, I can tell you whether I'm representing industry or the environmental side or anyone else faced with that situation, I would advise my client to file in both forums so we would wind up having two sets of litigation proceeding, and until we decided whether this was a 402(a) type situation, in which the Federal court had exclusive jurisdiction, or a 402(b) situation, in which the State court had jurisdiction, we would wind up with two sets of lawsuits going on. Suppose the State court says well, the way we read the U.S. Constitution the Federal court's jurisdiction can't extend to this kind of controversy, and therefore, we have jurisdiction. If the temporary emergency court of appeals disagrees, it can enjoin the State court from proceeding further. But there are all kinds of other possibilities. Suppose the State court says we lack jurisdiction and the temporary emergency court of appeals also says we lack jurisdiction. That's quite possible. In that case, neither court would have jurisdiction.

I think that the key issue here goes deeper than that, however. The Supreme Court since the days of Justice Marshall has taken the wise policy of refusing to decide constitutional issues when a result can be reached on some other ground. Yet, this statute repeatedly requires a decision on constitutional matters on every issue that's brought up.

It requires a constitutional decision in every case. Under 402(b), the Court has to decide what the Constitution says in order to decide who has jurisdiction. The Court has to decide whether the Constitution allows judicial review or disallows judicial review. So, we make every case into a constitutional case. We force every case to be filed in both State and Federal court, and we create a number of other significant problems.

The State judiciary is an integral branch of State government, and if we start telling them you have 30 days filing deadlines or you can only issue injunctions for 120 days, we are tinkering with that State judicial process in a way that, I think, is clearly prohibited by the National League of Cities Doctrine. There is no warrant in that doctrine for Congress to tell a State court how long or what its filing deadline is going to be. There is no warrant in the Constitution for the Federal Congress telling a State court how long its injunctions can run.

I think there are some extremely significant problems, and was pointed out earlier one of the problems with energy development on this scale is the benefits and the burdens are felt differently. There may be an extremely generalized benefit to consumers in a certain region where there is a very strong and concrete burden on people in some local region. And the idea of first saying that an unaccountable board in Washington is going to sit as a county board of zoning appeals distresses me greatly. When you say that anybody who wants to challenge the action of that agency when it's pretending to be a county board of zoning appeals has to go to a Federal court in Washington for review on very limited grounds on a constitutional case, that distresses me even more greatly. The Constitution has made it as long as it has because people haven't chosen to test it every time they think they can get away with it. I think the Congress has a responsibility coequal with the other branches of government to decide what it is that they want and say that in a statute. This simply dumps the whole mess into the laps of the Federal judiciary requiring them to decide constitutional issues at virtually every turn.

I would say in conclusion that I am more than a little perturbed at the idea that this board or that this legislation might go through without any more justification than what we have seen. The proponents of this legislation have a heavy burden of proving that there is really a problem. The problem is with our energy policy and not that State regulators or local regulators are sitting on decisions. The problem as I have pointed out with coal, which is the cornerstone of our national energy policy, is lack of demand. I mean, it's growing, certainly it's growing. But if we want it to grow faster, the problem is building more facilities and, as I have said, the utility industry has an overcapacity situation and it accounts for five-sixths of the coal demand that we now have for lignite, anthracite, and bituminous coal.

The other kinds of problems that are suggested, for example, I have heard oil wildcatters say, "I had a heck of a time getting BLM permission to go on BLM lands to drill an oil well." I'm sure you have heard that, too. People say we can't get BLM or Forest Service right-of-way. Well, the oil wildcatting industry is not susceptible to any kind of help from this board. We have got literally hundreds of com-

panies drilling in virtually every one of the 50 States. Their problems are highly such specific and no energy mobilization board is going to go in there and say this particular oil company's well that it wants to drill on this particular piece of land is being unduly held up. That would involve the board in thousands of individual decisions. Something that it is just not suited to do. That's a policy, if there is a problem, I'm not sure there is. If there is a problem, it's a general policy problem, one that can't be solved by board intervention in specific actions. A lot of problems that are alleged to have occurred are exactly that kind of problem. Problems of general policy going over hundreds or even thousands of different individual projects proposed by hundreds of different companies, and the board can have no effect on that kind of a situation.

The board has no effect on nuclear power. That's exempted from its provision, so it's not going to do anything for us on that front. The few instances in which there have been regulatory delays or Congress thought it was really frustrating in some of the policy Congress has been able to act and take care of that problem. The National Electric Gas Transportation Act of 1976, not that we supported that act, but Congress clearly could point to a facility and say we want something done with that. Didn't need to create an energy mobilization board to do it.

Senator BAUCUS. Anything like Teleco?

Mr. DANIELSON. So, the point is that the problems that beset us don't have anything to do with regulatory delays, and that's a sham issue. It may be an issue in very few cases, but those cases can be dealt with. This Board can't be justified because somebody wanted a permit that he didn't get. The act can only be justified if we can point to a broad pattern of delay of projects that are really at the bottom. If there are cars backed up on the freeway for 10 miles trying to get into the parking lot of a football stadium, we don't say we need to widen the highway to eight lanes because it's clear where the bottleneck is. And if we look at the real bottlenecks in national energy supplies, they aren't being significantly affected by regulatory delay. We have got a profoundly changed economic and energy picture out there. Interest rates are high, demand is doing funny things. People's ability to predict future demand is subject to a lot of questions. So, I would say that one thing that we might suggest as an alternative, and I would say before we do anything this drastic we ought to try the less damaging alternatives first.

In my experience a lot of the State and Federal agencies are just undermanned and understaffed. We have got situations in Colorado I know of where State agencies maybe have 3 professional staff members with 20, 30, 40 major extremely complex licensing applications on the frontiers of technology doing things that nobody has done before pending before them, and they are trying. They are working hard but they are simply overwhelmed. Perhaps one less damaging alternative might be a system for identifying regulatory bottlenecks, providing Federal grants and aid to State and local agencies that don't seem to be able to make decisions at the bottlenecks.

Now, as I said, if we have got overcapacity in the coal mining industry, it may be very frustrating to an individual coal operator

policy. So, if we can identify these key places, if they are anywhere at the bottlenecks in the energy supply picture, a State agency or even a Federal agency doesn't lack or doesn't have the staff or doesn't have the money to evaluate these things in the kind of manner we would like, then the solution is——

Senator BAUCUS. I think that's a good point. I have always thought that the administration, if it wants to, could meet its objective better by sending its troubleshooter Robert Strauss into the area. He could talk to Governors and to Congressmen, Senators and agency heads, determine the cause of delay and get the project moving.

I'm also very impressed with another point you are making. That is that the EMB will make decisions based on political considerations. The EMB will be forced to evalauate proposals prematurely rather than letting economics and competition flush out which projects make more sense.

An example is the proposed Northern Tier Pipeline. Whether or not that goes through, I think, should depend in large part on economics. Does it make sense for the Midwest and Montana or other investors to commit to that kind of a transportation system. It may not make sense as an economic matter for an investor to invest in the pipeline due to the uncertainties of the energy world these days. But that's how it should be. In large respect it's an economic decision that investors should evaluate rather than a decision to be made prematurely by a group of three sitting in Washington, D.C. I think there is a greater probability that the EMB proposal will result in more white elephants.

Mr. DANIELSON. I clearly also favor large decentralized technology. If you look at, for example, the recent studies by Los Alamos Scientific Laboratory they are finding that the optimum size for a coal-firing generating unit in terms of its economics taking into account the fact that if you have a big plant, you have to have more capacity to compensate for times when that plant is unavailable for maintenance. It may be down more often, you may be building one-of-a-kind boilers, things like that. But the optimum size might be somewhere in the 600- or 700-megawatt range. Well, the EMB by its very nature might be promoting 1,200- or 1,500-megawatt plants because it can only get involved in a very small number of projects. And as you suggest, if we have a limit of 12 projects that it can designate, I would hate to be around when the 10th has already been designated and there are 20 more people standing in line for the last 2 slots. My arm might get twisted out of joint.

Senator BAUCUS. It certainly would be a great temptation for the EMB to put the biggest, most glamorous projects on the track, even though they were perhaps premature in their conception and design. That would be a real problem.

Mr. DANIELSON. It is not going to put any windmills on the fast track.

Senator BAUCUS. What constitutional problems do you see with the provisions which allow litigation to bypass State and local courts and the Federal courts, and only provide for TECA as a forum? What constitutional problems do you see with those provisions?

Mr. DANIELSON. Well, the professor who taught me constitutional law he said there are two constitutional law problems: One has a big

"C" and that's the kind where the Supreme Court tells you that you can't do it; and the other is a small "c" and are cases where you are altering that balance of power in Congress as a coequal branch of Government should be thinking about what it's doing while it still may be in a range of issues where the Supreme Court won't slap it down. I would say that there is a real problem in deciding what or in taking away from States the authority to decide what their own law means. The State has an air quality control commission that's subject to certain statutes. Somebody says you issued this permit in violation of the statutes of the State of Montana and the State of Wyoming and Colorado. That's an issue which I think ought to be resolved by the State judiciary and the State judiciary is particularly competent to do that. It knows what the State statutes mean, they know where they came from. It's probably interpreted them in the past and, therefore, I think there may be a National League of Cities kind of problem in telling the State that its judiciary can't pass on its own laws. I think there is the arising underproblem there, too, that the Constitution gives the Federal judiciary judicial power only under cases arising under the Constitution and laws of the United States. When a county board of zoning appeal says this isn't an undue hardship and, therefore, we are not going to grant a variance, it's very hard to see how that arises under the Constitution and laws of the United States, and if we have TECA or somebody like that trying to assert jurisdiction, we once again have got a clear constitutional issue. As I said, that's one of the things that really bothers me about this is that all of the cases that are brought under it are going to be constitutional cases, and I don't think the Constitution should be twisted and torn like that.

But at any rate, I think that's a clear problem and the Supreme Court might very well rule that in some cases they simply lack jurisdiction and TECA lacks jurisdiction because Congress can't create jurisdiction outside the limits set out in the Constitution.

I think there is also there, as I said, a National League of Cities problem in telling a State judicial branch that it can't tell you what State law means. As I understand it, if TECA rules on an issue of State law, it's supposed to apply State law as if it were sitting as a State court. So, a lot of questions arise about why you should have TECA ruling on a Montana statute telling the Montana Supreme Court that it's enjoined from ruling on that issue when we would get a, I think, a better interpretation of the Montana law out of the Montana Supreme Court. I wonder, or I have serious doubts whether Congress has the ability to do that, and I particularly have doubts about whether they can do such things as tell the State court it can't entertain any petition that's filed in more than 30 days or can't enter injunctions that last longer than 120 days. If something is properly in the State court and then the State court should be free to deal with that matter according to its own rules.

Senator BAUCUS. Luke, in your written statement you refer to a memorandum from the Office of Legal Counsel of the Department of Justice.

Mr. DANIELSON. Yes; I meant Office of Legal Counsel. It says legislature; I made a mistake.

Senator BAUCUS. As you know, the memo is from John Harmon who is Assistant Attorney General for the Office of the Legal Counsel. It's a memorandum to Stuart E. Eizenstat, who is the Assistant to the President for Domestic Affairs and Policies. The last paragraph states, and I will read it, because I think it's important for everyone to know this.

It is our opinion that authority—

that is the authority provided for in the EMB bill—

may constitutionally be granted to subject state and local agency decision making to the Schedule, to waive nonconstitutional procedural requirements imposed on those agencies by state law, and to act in the stead of such agencies when they fail to meet the Schedule. If the Schedule is met, then state sovereignty is respected; if the Schedule is not met, then decision-making power passes to the EMB. We reach these conclusions acknowledging that these are novel questions of constitutional law for which there is no direct precedent either in judicial decisions or historical experience.

We also believe that the jurisdiction may be vested in the federal courts to hear all challenges to approve of decisions made by state and local agencies even in cases involving questions of substantive state law and that the EMB may be made a party to any such actions in order to assure that the interests of the United States are adequately represented and that the requirements of Article III are met.

According to the memo we have a problem. In Mr. Harmon's opinion these provisions could withstand any constitutional challenges.

Mr. DANIELSON. In our statement we analyzed that. We found that that opinion relies pretty much on four cases, and we said why we felt those cases didn't apply. It is a novel question.

Senator BAUCUS. I'm going to place this memorandum in the record at this point, and I will also have your full statement in the record. When one reads this hearing record, readers can see your analysis of the memorandum.

Mr. DANIELSON. Again, I would suggest that one of the things that troubles me about this is that while I do see very significant constitutional problems with this bill, and a lot of them may be small or even though it's something that the Supreme Court would not feel it could prohibit Congress from doing, Congress would still be altering the State balance of power in a very major way which it shouldn't see done without considering how it wants the Government run. But the underlying question that we keep coming back to is would this Board really do any good, and I'm really appalled by the lack of any kind of in-depth analysis anywhere in the record of any of the hearings that anybody has held on this of such things as the forms 12–E–2 and other regularly reported information from industry about why things haven't been going forward. It's very—and you can find some energy company executives who will come in and say we han't built this project because of regulatory delay. You first ask the question, well, is that a problem unique to you or is it really a problem that is affecting the national energy supply situation.

Second, I think you have to ask isn't it fairly tempting for people to come in and give a reason other than or own failure to predict the future accurately or our inablity to attract capital. How many energy

companies are going to come in and say we went to the 22 bankers with this and none of them would give us a loan or the best loan we could get was at 18 percent and it doesn't look very attractive at that kind of a figure. You are not going to get very many people coming out public and saying that kind of thing or there is no demand for our commodity.

Senator BAUCUS. You are right. There haven't been good hearings and the record is not clear. That's the reason we are holding these hearings. We want to establish a more complete record.

Our position is aided a little bit, though, by the memorandum to the chairman and members of the Senate Committee on Energy and Natural Resources dated July 24, 1979, from Jim Pugash, who is staff counsel to that committee. The memo's subject is the constitutional issues associated with congressional override of State procedural and substantive law. This memorandum is inconclusive, but it does state that there are very significant constitutional problems with the override of State law. So at least the staff counsel to the Senate Energy Committee believes there may be constitutional problems too. That should help, and that, too, will be placed in the record.

[The documents referred to above appear in the appendix.]

Mr. DANIELSON. I would just say one other thing, too, which is that this bill seems to have several underlying purposes, perhaps several different groups of supporters having several different motives in proposing it. But at least one of the things that it does is take health, safety, and environmental decisions away from agencies whose primary mission is to protect the health, safety, and environment and give it to somebody whose primary mission is producing energy in a hurry, and like I said, I think that that same situation has created or with the old AEC created a credibility gap which the nuclear industry still suffers and, I think, that those, that at least some of the problem here is not the people think that decisions are taking too long, but they want them to come out the other way.

Senator BAUCUS. Thank you very much, Luke. That was a particularly fine statement and it has been very helpful. Thank you.

Our next speakers will be Jackson Battle, associate professor from the University of Wyoming College of Law and Jan Laitos from the University of Denver Law School. We will hear them together as a panel. You can proceed in any order that you wish.

STATEMENT OF PROF. JACKSON B. BATTLE, SCHOOL OF LAW, UNIVERSITY OF WYOMING

Professor BATTLE. Senator Baucus, my name is Jack Battle. I am an associate professor of law at Wyoming. Before that I was in Florida and before that in private practice in Texas.

Thank you for inviting me here today. I certainly have learned a lot myself in listening to previous testimony, especially I have learned of the strength of the State opposition to the Energy Mobilization Board as presently proposed. And as much as anything else, this further strengthens my opinion that it's a bad proposal, and as much for this reason as anything else it might well be found to be unconstitutional in significant part.

Now, everyone here today can see that there is an energy crisis, and I think, we may be in a minority right there. But hopefully at least the opinion leaders in this country do recognize and admit this today, and I think all of us admit that it's intolerable to be as dependent as we are on foreign oil. Apparently everyone here today accepts the fact that increased domestic energy production must necessarily be some part of an immediate solution. The question is, though: Is the proposed EMB legislation called for as an appropriate response? Now, as I state in my prepared text, which I am, of course, not following, but I assume will be in the record.

Senator BAUCUS. Yes, both your statement and Professor Laitos' statement will be included.

Professor BATTLE. His is more complete than mine, for which I have been very appreciative already in reading it. My answer to the question which you posed in the beginning is: Is this the appropriate response? I'm not yet ready to see such radical departure from traditional principles of federalism.

Now, there are several reasons for this response on my part. First, as pointed out very well by Mr. Doney this morning, States really have not been the problem, and to the extent that, which is a very great extent, this proposed legislation intrudes upon the States, there is no need for this intrusion. The problem has been, and it has been a problem of the Federal agencies' inability to make hard decisions quickly or perhaps at all.

The second reason that I oppose this proposed legislation is that it does perhaps, at a breaking point, stretch traditional constitutional principles.

Now, whether it's a big "C" or a little "c," as Mr. Danielson adequately characterized it, we do have very significant constitutional problems here. First, of course, the problem of intrusion upon state governmental functions, the National League of Cities problem, the federalism problem. Also, we have very real departures from what is usually labeled due process. But by this what we really mean is a process of poor recent decisionmaking and this action whether it's taken by the Board or is forced upon State agencies, is a radical departure from this principle as much as anything else.

Also, there is a problem, which is usually labeled a problem of delegation. Delegation doctrine, which is just about a dead letter but not entirely, and what the delegation doctrine really stands for is a constitutional requirement for separation of powers of between Congress and the executive agencies. Now, in this legislation what we have is a provision that invests in a three-member Board essentially an executive agency the power to undo laws made by the Congress of a considered treatment, laws made by the States, and laws made by both State and Federal agencies and expertise. I think that's a problem.

My third reason for saying not yet to this legislation is that it may not work. Now, some people say that it won't work merely because it will create an additional bureaucracy that will merely lead to further redtape. If that helps defeat the legislation, then, I will agree. But in truth, I don't see that. Indeed, I see this legislation is very carefully drafted to be an engine of destruction to virtually anything that gets in the way of its primary mission, and that mission is mobilization of

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energy projects. There is very tight deadlining, there is very restricted judicial review, there is every opportunity to delay in litigation. Indeed, all jurisdiction over anything of consequence is placed in the Temporary Emergency Court of Appeals review in the Supreme Court. So, I can't see a project or decision becoming bogged down. I don't think the legislation will not work because of that. I think that it may well not work because it will be dismantled by the courts, even by TECA and the Supreme Court. Like any other very complex finely tuned experimental engine, which this is, is subject to self-destruct if anything breaks down, and there are several provisions here very vulnerable to judicial destruction.

Now, I have ceased trying to predict what our present Supreme Court will do. I am prepared to voice an opinion on the likelihood of various provisions in this legislation being sustained. You, Senator Baucus, I am sure are very familiar with these vulnerable provisions. If you would prefer, I will wait and field questions along this line which you pose, perhaps when Mr. Laitos is through with his introduction.

Senator BAUCUS. OK, fine. Thanks a lot, Jackson.

Mr. Laitos?

STATEMENT OF PROF. JAN LAITOS, SCHOOL OF LAW, UNIVERSITY OF DENVER

Professor LAITOS. For the record, my name is Jan Laitos, University of Denver Law School. Coincidentally, before I worked at the University of Denver Law School I was an attorney with the Office of Legal Counsel, which was the same organization that drafted this. I know they gave it long and hard thought and this was publicized fairly widely when they came up with this conclusion, and this is, of course, the recommendation by the Department of Justice as to the constitutionality of this Board which, of course, Congress nor the courts are bound by, but within the executive branch it certainly is the binding document as of this time.

Senator BAUCUS. You didn't help draft that memo did you?

Professor LAITOS. I did some early work on it about 4 years ago, but nothing to this extent.

Parenthetically I note that one of the purposes behind the Energy Mobilization Board is, of course, to enhance the supply side of the energy problem to make it easier for us to add energy facilities in the United States. What it does not do, and perhaps some thought should be given to this, is to work on the demand side of energy. We consume somewhere between 75 and 80 quadrillion Btu in the last couple of years, per year. If we could reduce that to 65 quads, we might be better off. The EMB is assuming that the only way this country is going to continue functioning the way it has is by increasing the supply of energy. That may not necessarily be the case. In fact, there are many studies out that suggest just the opposite. So, I would offer just parenthetically that perhaps working on the demand side on conservation and perhaps renewable energy resources might be a bit more intelligent than try to just work strictly on the supply side.

But as to the Energy Mobilization Board, my testimony, which you have, addresses mainly the constitutional questions that are involved

with this Board, and what I would like to do now very briefly, because we are running out of time, is just to summarize what I consider to be the main issues and then the details will be in the testimony.

Senator BAUCUS. I would appreciate that.

Professor LAITOS. There are really four questions which I think ought to be addressed by anybody that will take a look at this proposal. The first is whether or not there is constitutional authority to create the thing in the first place.

The second are federalism issues to the extent to which it involves intruding upon States' powers.

The third is preemption.

And the fourth is judicial review questions which Luke Danielson has already addressed. I will just quickly address my remarks to those four areas.

Senator BAUCUS. Before you begin, if we have time, I might ask Luke and Ted to also come up here just so they can help us kick around some of these issues. While Jan is testifying, you two might think of some points you wish to make. I want to take advantage of all of your heads together here. Excuse me, go ahead.

Professor LAITOS. Sure. There are three provisions in the EMB proposal that raise constitutional problems in terms of authority and federalism. That's the schedule setting, that's the waiver provisions, and then this supplantation problems where the Board is granted preemptive decisionmaking authority over State powers.

The question is initially, is there a constitutional authority found in article I, section 8 under the Commerce Clause to go ahead and have those three authorities. Now, the Commerce Clause used to be basically do we have some contact with interstate commerce and the answer here is clearly yes, we do. There is a relationship, a rational relationship between energy and interstate commerce. So, there it does not seem to be a problem. But after the National League of Cities case, there is another question that has to be raised under the Commerce Clause, and that is whether or not there is a 10th amendment problem as well. Because the 10th amendment now seems to be acting as a check on the article I, section 8 Commerce Clause powers. A lot of testimony has been presented today on the meaning of the National League of Cities case, and let me for 30 seconds pass on my views about that case.

What it amounts to is that case could be an anomaly and could be something that we may not necessarily need to worry about too much for the following reasons: First of all, we have not had any cases like National League of Cities before National League of Cities. It was really precedent setting. It was a very unusual case.

Second, National League of Cities was a decision that came down the way it did largely because of one judge, and that's Justice Blackman who was the swing vote. He swung over to the majority opinion for a totally different reason than the four other opinions, which were based on whether or not the Federal Labor Standards Act, which were applicable to local and State governments; and Justice Blackman said the issue is not whether or not it will interfere with State and local decisionmaking. The issue is only whether there is a balance that should be weighed in favor of Federal or State regulations, and he

was the swing vote. Now, if you can convince Justice Blackman that energy problems are national in nature and not State in nature, he may hold just the opposite of what he did in the National League of Cities case. So, that case is not, because it was a 5-to-4 decision, is not necessarily a case which is of such binding precedent with the entire court behind it that it may be, it maybe should be watered down a bit more than we have assumed it to be today.

So, I will maintain that in terms of a constitutional authority I don't believe that the National League of Cities case is going to really stand in the way of any of the schedule setting, the waiver of the preemptive questions that are found now in the EMB proposal.

Also, the National League of Cities did not overrule the *Fry* case, which is a 1975 Supreme Court case, which held that you could interfere with substantial State and local functions so long as there was a national need to do so. And Usery did not overrule that case. It explicitly decided not to. Some lower Federal cases have also limited the holding of National League of Cities. It's not, perhaps the 10th circuit and 9th circuit point of view, as much of a barrier as we might otherwise think it is.

All right, the second question is federalism. This whole notion as to what extent may States powers and States right be interferred with by an EMB proposal. Federalism concerns have been raised throughout today. It's hard to really add to that without being redundant. All I can say about federalism is that we do have a number of cases and a number of policies found in the Supreme Court which seem to suggest that it is important to retain a certain amount of State autonomy not even found in the 10th amendment, but found in a limitation of Federal powers. But given those cases, plus the National League of Cities we have, we do have a real constitutional problem in the EMB with respect to federalism concerns. They do not have to do with schedule setting in terms of designating a time period. That does not seem to be a real problem, because under National League of Cities we still have the ability to have a State decision. All we are doing under the schedule setting provision is merely deciding when we will have the decision made, and that's not really interferring with State functions. But we do have a problem with preemption when we have the EMB having the power to replace the decisions of States with the EMB's decisions, and that gets in the way of a number of lower court decisions found in the 9th circuit and 10th circuit and other circuit court of appeals that interpreted some environmental protection regulations as being in violation of the 10th amendment.

When we had a situation when the Federal Government compelled the State to enforce a Federal law, and that, those cases are really EMB looked at backwards, EMB would do just the opposite. It would require a Federal agency to interpret a State law to preempt a State law. Those cases could be held, though they aren't Supreme Court cases, they could be really held to stop the preemption part of the EMB.

Then, the final question, the waiver question. Suspension of existing laws could pose a real federalism problem because those States are often interpreting Federal law into their State laws, and this is especially true in water and air pollution control statutes. In that kind of situation by waiving Federal law or waiving State law we may be violating Federal policy. So, we may have a federalism problem there.

Preemption doesn't seem to be that much of a problem so long as there is a clear intent to preempt found in the EMB proposal, and I would urge, if this is ever to be drafted again, that constitutional intent to preempt has to be clear. Otherwise, there are series of questions which hold that otherwise there will be, it will be improper Federal coercion of general State functions, and that is improper under the preemption doctrine. The intent to preempt has to be explicit. It is not now explicit in the EMB proposal.

With respect to Federal lands, the EMB proposal does affect what the States can do in Federal lands. That does not seem to be a problem because of a number of decisions, especially the *Kleppe* case and the *Ventura County* case seem to affirm the notion that under the property clause of the Constitution we can have a fair amount of Federal preemption, the capability, over Federal lands having to do with the environment.

All right, finally the notion of judicial review, which has been addressed already by Luke Danielson, I would concur in his assessment. I would dispute the Justice Department's conclusion with respect to the constitutional provisions having to do with judicial review. I think there are four issues under judicial review, and I will summarize them real quickly. One is whether or not you can have Federal courts decide State questions, the TECA question. That doesn't seem to be a problem. There have been a number of cases where there has been that kind of divestiture of State function.

Second is whether or not you can deny State court jurisdiction over the EMB and over the EMB questions and put it into Federal court. That doesn't seem to be a problem, either, constitutionally so long as we don't have a National League of Cities problem, and that would probably be determined as to whether or not a State decision gets in the way of some national policy. It that's not the case, I don't think that will be a problem.

The third issue is the one that Luke Danielson addressed which, I think, is the major issue, and that is whether or not we do have article III jurisdiction in the Temporary Emergency Court of Appeals. And that is a problem because we only have two methods of jurisdiction: One is pendent jurisdiction, and the other is prospective jurisdiction. Neither of those rationales, both of which are noted in the Justice Department memo, are as clear as the Justice Department memo seems to imply it is. It is a real tough question as to whether or not we do have pure Federal jurisdiction in terms of this Temporary Emergency Court of Appeals if we have strictly a State or local agency that's involved. I think that the easier way of assuming and assuring article III jurisdiction is to make sure that State law is incorporated as the Federal law of the decision and then, we will have article III jurisdiction or at least we would have it more likely.

Then, the fourth issue which I note in my testimony is if we disallow judicial review all together, even in a Federal court of an administrative agency decision, that is, the EMB's decision, if we disallow all judicial review of that decision, which seems to be the proposal now, we have a real constitutional problem. We have a number of U.S. Supreme Court cases which say it is not the function of an administrative agency, but the function of the courts, to decide ultimate questions of law, such as whether or not the energy project would or the EMB's

decision would have a substantial impairment or impediment into the implementation of a priority or energy decision project; and to disallow all judicial review of that decision gets in the way of basic issues and basic requirements of judicial review. I note the cases which establish that principle.

So, those are the four major issues that I think there are. I don't believe there is any constitutional problems with the grandfather clause provisions which allow laws not to be applicable after something has been granted priority energy project status so long as we don't have an improper delegation of decisionmaking authority to the EMB.

There are a few practical concerns; I note that in my testimony. But I would like to focus mainly on the constitutional issues.

Senator BAUCUS. Why don't you, Luke, and Ted come on up here. Just pull up a chair. It might be helpful if we try to get some agreement, if possible, on different constitutional points. I think, the best framework would be yours, Jan. As I hear you, you are saying you don't find constitutional problems except with respect to some portions of the judicial review, and waiver provisions in the EMB. Any other?

Professor LAITOS. Preemption.

Senator BAUCUS. Even if the need for the legislation is specifically stated in the statute, you still find constitutional preemption questions?

Professor LAITOS. Well, when I say preemption, I mean in terms of federalism issues where you have the problem of this is what I term is the supplantation doctrine where the EMB has the power to take over, take over nine agencies' decisions all together. Not to waive them, but to decide the agencies' permitting question for the State agency. That raises federalism problems because of those lower circuit court of appeal cases which seem to imply that you can't have the Federal Government making those kinds of decisions for the States as opposed to waiving the laws all together.

Senator BAUCUS. OK, so you don't have problems with the Federal Government's attempt to speedup the decisionmaking schedule?

Professor LAITOS. No.

Senator BAUCUS. And what other areas do you not have constitutional problems with?

Professor LAITOS. Constitutional authority to create this thing in the first place.

Senator BAUCUS. Now, do the other three of you generally agree with that analysis? Is there anywhere that you significantly disagree?

Professor BATTLE. You can't ask one law professor if he agrees with another.

Senator BAUCUS. I know you can't, specifically, but can we get some general agreement? That might be helpful.

Professor BATTLE. I could inject a couple various disagreements with that one. It may be a matter of semantics. When I think in terms of preemption, I think in terms of the solidest body of law supporting Federal supremacy. Anytime a Federal agency acts within its authority, then, the State law is preempted. And indeed, classic preemption was not involved in National League of Cities, and the court ex-

pressly denied that it was. What the court said was involved in National League of Cities was direct compulsion of the State—the State acting quasi-state, which is what you had in the National League of Cities. That is, the Federal Government telling the States how it shall pay the minimum wage. The court distinguished from this a situation where we had Federal legislation that merely preempted the State when it was regulating purely private activity. Classic preemption is not called into question in National League of Cities and, therefore, I think some of the most objectionable portions of this legislation are constitutionally sound.

For example, the grandfather provision, the provision that the Board will have the authority to make State decisions if the State fails to act on a timely basis. Now, all precedent at this point, at least for the last 40 years including National League of Cities, supports the constitutionality of that. So, in order to strike that down, the court is going to have to say, this is the straw that broke the camel's back. This has never been done before; his is stretching preemption so far that we will eventually create new law or we will resurrect 19th century law. In my mind, what National League of Cities does draw the line on is the direct coercion of the State decisionmaking—because that's precisely what was involved in the transportation control cases that Mr. Laitos mentioned.

The circuit court decision—and it's expressly involved in section 314 here that authorized the Board to go to a Federal district court and obtain a court order—directed to the State agencies telling them how it shall make this decision. Now, to me that is the closest analogy to what was struck down in National League of Cities—direct coercion of the State agencies—and I would think if anything would fall to the National League of Cities, this would. The problem then is, what does the Board do? It uses its 315 power to say, well, if you don't make the decision, we will make it for you.

Senator BAUCUS. What's the answer to that?

Professor BATTLE. Pardon me?

Senator BAUCUS. What's the answer to that?

Professor BATTLE. That's what I'm saying. I'm saying I think that that's not your National League of Cities problem. Now, National League of Cities is a authority decision which means all things to all people. The court has not elaborated on it. In fact, it's hardly mentioned it since it was decided. It's possible that National League of Cities, more than anything else, stands for a sentiment on the part of the court, and a sentiment that I feel in the country and which means that the court will use the 10th amendment to strike down severe intrusions upon States rights. If thats' what it means, then, I think there is a lot of things in this legislation that are in question, and we really don't have to quibble about semantics.

Senator BAUCUS. Sure. Let me shift gears here. You all made very good statements, raised some excellent points and arguments that we can certainly use in the next Congress when EMB-like bills are introduced. Obviously, it's preferable to be successful in that forum, in Congress, rather than to have to wait until the next forum, the courts. Do you have any other suggestions as to what we can do to enhance our success?

The second question that I have is, from your perspective, what points do you think are the most telling when you talk with energy companies or when you talk with State or Federal officials? I wonder if you could address those two questions. I realize they are broad, but I'm trying to take advantage of the presence of the four of you to tap your minds.

Mr. DANIELSON. I would jump in with one suggestion. One of the things that I thing most upsets local officials I have talked to, and is most helpful in listening to them, is this question, or this problem that local governments can be treated unequally. That you might have a county that had a certain ordinance and an application is filed after it passes that ordinance. The next county doesn't have such an ordinance, so they could waive the provision in the second county while they couldn't waive the provision in the first county, even if the ordinances were identical. As I'm sure you know, a lot of these rural counties in the West, in particular, do not have ordinances or legislation on every single subject under the Sun and, therefore, I think you invite—particularly because the grandfather date is tied not to the date of approval as a priority energy project or anything, but the date the application is filed—you invite a situation where people kind of judiciously shop around in a region where they want to build a project. They find a county that has weak ordinances, pounce on them with the application, and at that point, it's too late for the county to do anything with that danger that can be waived. Even if the county next to them has equally the same ordinances and, I think, as you know, a lot of counties don't bother to go after something until they see it as a problem. Under this Board proposal, it would be too late in that kind of situation.

At any rate, that kind of discussion with local officials gets them, I think, quite perturbed and tends to energize them toward trying to find some other kind of solution to the problem.

Senator BAUCUS. I think that touches on another point. In my experience, most Members of Congress aren't terribly concerned whether the provisions of the bill are constitutional. They just don't care unless we can show that there are so many provisions that have so many constitutional problems that the bill becomes unworkable. Then, they wake up a little bit. Are there so many constitutional problems in this bill that passing it would be just a waste of time?

Mr. DANIELSON. There is one additional problem that I want to mention very briefly because I don't think it has been touched on, is for 200 years the courts have been more or less dodging and, I think, rightfully dodging the question of whether they can, in essence, say we have jurisdiction whether Congress gives it to us or not. Either way they come out on that, the Government would be a loser; we will all be losers. On one hand, if they say, if Congress tells us we can't hear something, we can't hear it. Then you invite every politically unpopular decision the court ever makes to be attacked by Congress passing a law saying the court has no jurisdiction over abortion or busing or school prayer, or you name it. On the other hand, if the court says we have jurisdiction over some kinds of cases whether Congress gives it to us or not, you open up another can of worms which is, who then controls the judiciary? Can they just kind of run rampant? As a result, I think most of the Justices of our Supreme Court

have seen that and while they have been forced into that corner a few times, they have usually found a way out without saying either Congress can tell us that we can't hear it or saying the opposite. And this bill, I think, would force, might very well force, the Court into that corner at long last and make them decide that issue.

Senator BAUCUS. That's the tricky point. Why might it force the court into that corner?

Mr. DANIELSON. Well, it lifts all, the Administrative Procedure Act is essentially the result of a constitutional compromise. On one hand you have people that said the Constitution requires that administrative agencies meet certain standards. On the other side you have people who said that this didn't, this wasn't the case, and that they can do pretty much what they wanted to and Congress solved that or saved the Supreme Court a lot of that problem by passing the Administrative Procedure Act. Well, this essentially suspended the Administrative Procedure Act. In fact, it essentially does. It comes right out and says various portions of the Administrative Procedure Act aren't applicable. How that exactly might work out in practice, I think, you can come up with some examples. But it denies judicial review to the whole classes of people. It says that if the Mobilization Board wants to come in and designate my backyard as an oil well or a coal mine or put that on the fast track, I should say, I don't have recourse to the courts. Only the State can appeal a decision setting a decision schedule or, if I remember right——

Professor BATTLE. No one can appeal that.

Mr. DANIELSON. Yeah, but there are various other things. I don't have my copy of the bill here, but in a couple of these sections it says there shall be no judicial review of certain decisions.

Senator BAUCUS. Is there any precedent for that?

Mr. DANIELSON. There is some precedent for it, and I will defer to somebody who is nodding.

Professor BATTLE. One was ex parte McCartle. The second basically says that Congress can take jurisdiction away from the Federal courts on a piecemeal basis. That's the best example of it. We have also got an example, I can't remember the name of the case, it's under the Taft-Hartley Act. It takes jurisdiction away from Federal courts to grant injunctions in labor disputes. That's been upheld as constitutional. But all precedents thus far indicates that Congress can do that if pushed too far. Though, such as for example, then the busing legislation, I wouldn't count on the Supreme Court staying with those, that precedent.

Senator BAUCUS. Jan, do you have any comments?

Professor LAITOS. Yes, ex parte McCartle is the landmark case which allows the Congress to limit appellant's jurisdiction under the Constitution and remove it basically on a piecemeal basis. But ex parte McCartle was decided in 1870 or 1867, and a number of cases since ex parte McCartle and, I can't remember their names now, have in concurring opinions or in dictum limited ex parte McCartle. In fact, Douglas, in one of his opinions, said I doubt today whether McCartle could get a majority of the Supreme Court, and of course, we don't know because we don't have the case now.

Senator BAUCUS. Nor Douglas either.

Professor LAITOS. And McCartle kind of removed Federal jurisdiction all together. In the EMB case we are taking away State judiciary in the appellant's case and that raises——

Professor BATTLE. The one possible distinction between what proposal we have here and ex parte McCartle is you are also not just taking away any appellant's jurisdiction, we are taking away State court appellant jurisdiction by Federal statute and that may directly go to the National League of Cities which says these four judges said you take away an important State function, you have got a 10th amendment problem. In deciding cases, State cases and giving State courts jurisdiction may be such an essential State function. So, McCartle may be limited in this case.

Senator BAUCUS. Do you agree with the analysis that the bill does not direct States to take certain action but rather sets up Federal entities which make those decisions and therefore the *National League of Cities* case is not very helpful?

Professor LAITOS. The two issues, I think, are intertwined and there is no way to have—one is the authority on the part of the Federal Government to act this way, and the second is what rights do the States have to interfere with that Federal authority. That second issue derives from the 10th amendment, and the only reason we know that there is even a chance of that having the power is because of National League of Cities. So, I think we can exclude that all together, National League of Cities.

Senator BAUCUS. I'm just curious in your States of Colorado and Wyoming how much public reaction was there a few months ago to the EMB bill?

Professor LAITOS. I have here——

Senator BAUCUS. I know Governor Lamm was very involved.

Professor LAITOS. I have here a document from the Western Governors Policy Office dated April 28, 1980 where a number of the Western Governors and their administrative staff got together a number of proposals to try to limit EMB. They thought it was going to go because it was passed by both the Senate and the House, and it just got fouled up in the conference committee. They were very concerned about it and had designated a staff, a task force to do nothing but try to raise the key questions that would practically, not constitutionally, that would practically occur as a result of EMB. Now, that is not public reaction as much as executive branch reaction, but it was a real strong concern. I also happen to know of a number of people who work for private industry. Especially the synthetic fuels industry in Colorado who put together a memo after memo after memo internally trying to convince the Congress and the conferees to be sensitive to their needs as private industry was very much on top of what was going on with a day-to-day basis on EMB proposals, at least in Colorado.

Senator BAUCUS. I found the industry people, I have talked to were split on the final conference version. Did you find that with the industry people you talked to?

Professor LAITOS. Yeah.

Senator BAUCUS. Did you find the same?

Professor LAITOS. I think that's a fair characterization of it. Some of them thought it was very good because it would accelerate the process of synthetic fuel development, and as a matter of fact, contrary to what Luke has said, and Luke and I were discussing this over lunch, even though the reality may be that the regulatory process does not get in the way of fermenting the perception on the part of some companies is that it does get in the way and the perception may be more important than the reality. So, therefore, they are supporting the EMB for that reason, even though Luke, I think, is correct it doesn't really slow it down as a matter of practice. There are economic reasons having to do with obtaining financing and capital investments, and it's not the delays inherent in regulations.

Mr. DANIELSON. I would say that one of the things that we have been looking at in that connection is the fact that most of the companies who need these multiple permits apply for them one at a time. They apply for an air permit. When they get that, they then apply for a water permit.

Senator BAUCUS. Why do they apply for them?

Mr. DANIELSON. Speaking for someone who has worked for industry as well, it often has to do simply with cost. If you have an environmental staff of three people you put them to work on one thing and you put them to work on another. They may also have to do with some thinking that one or two permits are the key ones that are really hard to get and there is no point doing the monitoring, gathering the data and putting together all these other permits until you see whether you are going to get this, that you wonder whether you are going to get it or not.

But I think that's a problem. I have found quite a bit of public reaction to the Mobilization Board in Colorado and, I think, it was largely keyed to oil shale. There is a perception there that, I think, is fairly correct that Colorado, it being in the unique position for having most of the high-grade shale is likely, if we could get into international problems or have a sudden oil shortage, sort of get bulldozed and this was going to be the bulldozer in a lot of peoples' minds.

Senator BAUCUS. How about Wyoming?

Professor BATTLE. Well, to my distress, as you probably know, both of our Senators indeed like the overwhelming majority over the nationwide, many of whom are in the West, voted in favor of the Senate bill which was not far different from the conference report.

Senator BAUCUS. Why?

Professor BATTLE. Well, you know, it was a different mood last fall. Also, I think very few people really understood the complexities. I think very few of your colleagues in the Senate probably really understood the complexities of the legislation when it was brought before them. What they knew is that we have got a 30-percent dependency on Mideast oil. My God, President Carter wants this. He was higher in the polls than he is now, fortunately, and it went through on a great surge of patriotism, I think. I think what's happening now—Representative Cheney also voted for it in the House. I think what's happening now, I don't know how Mr. Cheney voted when he came back up after he came out of conference report, but, of course, I do

know that only seven Republicans, such as himself, did vote in favor of legislation when it came out of the conference room.

Senator BAUCUS. When the conference report came back to the House, most Republicans opposed it.

Professor BATTLE. Yes, that's what I would say, and I would hope that by this time perhaps for the wrong reason, but nevertheless, I would hope that he was one of them. But I think what's happened now, and you probably have a much better sense of this than I do, but what I gather is that people have had the time now to look at this thing, to realize exactly what some of these provisions mean, which we have been talking about today, and for these reasons either as a matter of policy or a matter of fear that it will be struck down and become a Demobilization Board, I think now people are very reluctant to support it. Although, it's correct in principle it's bad actual construction.

Senator BAUCUS. Well, I hope you're right. But I suspect that most Members of the Congress haven't given this any thought since the bill was defeated a few months ago. They are preoccupied with elections and who might be elected President and Iraq and Iran and the World Series. I frankly don't think there are very many Members of the Congress who have given a lot of thought to this. That's why I'm holding these hearings.

I felt there was a need to flush these issues out and to take the arguments back to Washington and begin to help educate some people. But I need some help.

Professor BATTLE. Well, for the record I can assure you that Governor Herschler is very definitely opposed to the legislation, in fact the legislation resembling this in any form Attorney General Troughton, John Troughton, is very much himself opposed to this. I have been in communication with several members of his staff. He has been directed to prepare a memorandum opposing this legislation.

Senator BAUCUS. Both the Governor and attorney general have submitted statements to this committee in opposition to the EMB bill.

Professor LAITOS. Senator Baucus, out of curiosity, do you know if when this proposal went through the Senate, or even in the conference committee, whether as an issue it was raised and by way of parallel, the incredible powers given to the Officer of Price Administration during World War II which, I think, is about as close as I could conjure up as a precedent for the powers here, and there were different kinds of power and it was a different time and they were operating under the War Powers Clause as well. But was that issue as well, the novelty of this proposal of whether there was any precedent in practice?

Senator BAUCUS. No, frankly when the bill came before the Senate, it went through very quickly. As Mr. Battle suggested, there was the perception that we needed to do something, needed to move quickly and I vaguely recall that the Office of Price Administration was used as a helpful precedent for the bill.

Professor LAITOS. There is precedent——

Senator BAUCUS. There is precedent for having a super agency to get things moving. I think very few Members of the Senate have the time or the inclination to focus on any of the problems. The proposal came up and it was rushed through the Senate pretty quickly. If the con-

ference report had come back to the Senate the vote would have been closer. It was fairly lopsided when it first went through the Senate. But the answer to your question is that the Office of Price Administration was not used as example of the problems this bill causes but rather, used as——

Professor LAITOS. Did Kennedy's staff address some of the Constitution issues that we have raised?

Senator BAUCUS. I tried to get the bill referred to the Judiciary Committee because of the constitutional issues, but was unsuccessful in doing so. You might recall that the Judiciary Committee chairman had other interests at that time as well.

Mr. DANIELSON. I would say that one of the other problems that maybe is worth 30 seconds is this question of how much does the State agency get to know about the projects before it has to say when it thinks it can get its decision made. A lot of these initial applications are the real reason for the delay. You get an initial application and it says there is air out there and we don't know what the quality is and the nearest weather station is 60 miles away that says here is what the weather is like. There are some streams there; we haven't sampled them. There may be ground water but we don't know, and then the State, and here is the kind of technology. I would really suggest that anybody worried about this problem ought to look at some of the DOE's environmental impact statements on oil shale. They say we don't know what this technology is going to look like, but it will more or less be like this, and you give something like that to a State and say when do you think you can get your decision made and whatever they say the board then turns around and stays 6 months on this.

Senator BAUCUS. I have another question to ask you, Ted. The Attorney General was not in favor of a one-stop permitting procedure. What was your reaction to his statement?

Mr. DONEY. Well, I think that kind of goes back to what's been discussed here already, and that is the perception is that State governments are slowing down these projects. I agree with Luke that we are not doing that and I said that this morning. But the perception is we are, and I think in order to counteract that perception that the Nation has a one-stop permitting bill will help do that, and I agree with the statement that was made earlier that perception is more important than substance on these political-type matters like this.

Senator BAUCUS. They are both important, but you have to deal with perception as well.

Mr. DONEY. Sure, and I think a one-stop permitting system will help some of the problems that we have. But generally it will change the perception or help change the perception that people have. I would like to add to what Luke just said about the State agencies' decisionmaking. I alluded to that in my testimony this morning. This bill has an ironic, I think, effect in that it will force State agencies to deny projects under the State statutes.

Senator BAUCUS. Because they won't have time to——

Mr. DONEY. To review them and under the State Siting Act our board cannot certify a project unless it finds the thing will represent the minimum adverse environmental impacts. It cannot find that in a year. It's impossible, it's physically impossible, so we are forced to deny

the project which is opposite, I think, of what the intent of the EMB is.

Senator BACKUS. But what's a reasonable period for Montana Department of Natural Resources?

Mr. DONEY. Our statute now provides 33 months maximum on the large projects and 2 years for the smaller projects. The key problem here is that we need a year's worth of field data to analyze the sites and impacts that would be created at those sites. Now, where that data is not yet collected it is going collected now in our States and, I think, in most States. But in some areas it is still to be collected. We need a year's worth of field data and after that then we can draft the EIS and go to the hearings and get a decision in about 2 years maximum.

Senator BAUCUS. Is 2 years or 33 months reasonable or unreasonable?

Mr. DONEY. I think it's very reasonable, very reasonable. It meshes with the schedule they already have adopted themselves. They are going to come in with a preliminary design and preliminary analysis of the sites, and then they are going to go from there. Without State regulation they are going to go from there to more thorough analysis which will be done now under State legislation and the two mesh, as far as I'm concerned. The 2 years the State is taking here or whatever it is, 2½ years, is not going to add to the time at all. It meshes with the time the companies have already been planning for without State regulations. Now, the companies wouldn't agree with my statement that I just made. They think it adds to their timetable, but as far as I'm concerned it does not. I guess my, you know, from sitting here as both an attorney and administrator of these programs and having been around the track a couple times with these political-type issues like the EMB, it seems to me we can discuss all the legal problems and the constitutional questions, but the real problem is going to be change the perception that the country has about our energy situation.

Senator BAUCUS. I think that's exactly right.

Mr. DONEY. And the way you counteract that is educate the public. It's a bad bill from a policy standpoint, it's unworkable and try to explain how the thing cannot work and in the end will be a disaster for our country. Raising the constitutional issues will help some, but I don't think we will change anybody's mind. I have seen the legislature in Montana pass unconstitutional laws right and left, and you stand there and tell them they are unconstitutional. They don't care.

Professor LAITOS. Because you always have the courts to correct it.

Senator BAUCUS. The phenomenon of trying to mobilize public awareness of a real danger reminds me of a story I heard a few days ago.

Dr. Alvin Reich spoke at a conference in Helena on problems of disability. He flew into our State and the weather was bad and Northwest Airlines didn't land in Helena. So, he took a taxi from Bozeman to Helena. Well along the way he was thinking about the time he was driving a car not too long ago. He was driving along on a four-lane highway and some lady was crowding over onto his lane. She turned to him and shouted, "pig." He knew he was driving at a fast rate of speed but didn't think he was bothering anybody or causing any potential danger to anybody. He got perturbed, so he turned to her and shouted, "cow." Whereupon, he ran into a pig.

The obvious moral is sometimes we don't know when people are trying to help us. Sometimes we are trying to mobilize others and it's hard for people to recognize that we are trying to help. But, of course, that's our perception.

Are there any other points anybody wants to make?

Mr. DANIELSON. One quick suggestion, Senator. One of the things that disturbs me is that given how important this bill is, and it really is important, that people haven't done more research on what the problems are. You may find some agencies have no problems at all and all the problems, if there are any, are concentrated in some States or some particular agencies. I just think that for a couple of hundred thousand dollars somebody could do a study of the permitting process for major energy facilities, gathering together things like these forms 12E2 and the various EPA reports on the status of their permitting activities and State reports, and produce a study that might point out where the problem is or what the problem is or if there is a problem and how big the problem is. It would seem to me that that kind of a study could just be immensely valuable either designing legislation that would achieve this end while not using the meat-ax approach or pointing out that maybe there isn't a need for it at all, and maybe somebody in the Federal Government could be found to do so.

Senator BAUCUS. That's a good question. That reminds me of another point. The examples you often hear in support of an EMB are projects like the trans-Alaska pipeline. Could you explain why the problems with such projects don't justify an EMB? What happened in that instance?

Professor BATTLE. Well, I certainly didn't follow it closely, but I know essentially that the trans-Alaska pipeline ran into a lot of obstacles primarily thrown out by environmental groups attacking the EIS on it, and Congress response was to clear the way. Was to on the piecemeal basis to wipe the board clean and say essentially following certain criteria the pipeline will be built. I think Congress always has the power to do that, and to the extent we do have a major energy facility frustrated by Federal agency environmental litigation or by States Congress always has the commerce clause.

Senator BAUCUS. That's another point that we heard made today. I suppose the proponents of the bill would say that we should be clearing the way for all the major projects, not just the ones Congress has the time to deal with. Should Congress every year simply designate the 10 projects that we want speeded up. Maybe this is a better procedure than EMB, I don't know.

Professor BATTLE. I think that's a better procedure than a three-member Board with a standing mission to do precisely this. I think you appoint those three members and give them the mission they are going to promulgate some project decision schedules. They are going to do their jobs.

Senator BAUCUS. So, you are saying that if the country, as a whole, wants 1 or 12 projects expedited that it's better for Congress to address that question and act yearly rather than for the EMB to do it?

Professor BATTLE. I think, of course, Congress will not act unless a bottleneck occurs. I hope it will not. There are a few, I think, mistakes in the past. I think the Teleco exemption was a mistake. Congress

acted hastily. But still in all, I'm more comfortable with that than a Board with a mission to mobilize when I'm not sure that there is any need for it No. 1.

Mr. DONEY. I would sure agree with that, Senator. Both of the pipelines you mentioned I think got into trouble because both of them had some serious questions raised about the need for those projects, and the impacts that they were going to create. Legitimate questions as far as I'm concerned which still exist today. But nevertheless, the Congress finally felt that they had enough of that and passed legislation to at least get the Alaska Pipeline going and they did the same with the Northern Border Pipeline now which is going through Montana. Now, that has some ramifications, too. We just finalized our EIS on the Northern Border Natural Gas Pipeline and our conclusion is that that pipeline is not needed now. That conservation is taking hold in the Midwest and that natural gas will not be needed according to the projections of the Northern Border Pipeline Co. for the Midwest. But Congress says we are going to build this pipeline, here is where it goes, there is nothing the States can do about it. I think it's a proper function for Congress to carry out, not some Board that will be answerable to nobody in making these decisions in a vacuum.

Mr. DANIELSON. It is true that you folks have to come back to the voters every so often and get them to renew your mandate, and I don't think that Board would be as responsive. The other thing is beyond. I mean, those are the examples.

Senator BAUCUS. In addition to that—I apologize for interrupting. The Board is going to be lobbied to death by people who have the means to lobby. Excuse me; I'm sorry; go ahead.

Mr. DANIELSON. I was just going to say the other thing is, I think, the point of the written statement I made is that so far as we have been able to tell with the research we have done, when you go beyond those often-quoted examples you have a hard time coming up with the major project that was going to make a big difference in our energy future that got delayed, and that maybe if there are only three over the last decade or whatever that those are few enough that Congress can grapple with them.

Senator BAUCUS. OK, I want to thank you all very, very much. This has been helpful. It means a lot to me personally. I know it also means a lot to the other people whom I will distribute this record to.

Mr. DONEY. Shall we send additional testimony and material asked for, Senator, to Pat?

Senator BAUCUS. Please, send it to my office here in Missoula.

Professor LAITOS. Will we have an opportunity to see the results of the testimony? Will it ever be compiled in one version?

Senator BAUCUS. Yes; it will be. Each of you will have a copy of the transcript to edit. Thank you again. The hearing is adjourned.

APPENDIX
ADDITIONAL SUBMISSIONS OF JOSEPH A. McELWAIN

Western Regional Council

September 15, 1980

The Honorable Ed Herschler
Chairman
Western Governors' Policy
Office
3333 Quebec Street
Denver, Colorado 80207

Dear Governor Herschler:

The Western Regional Council, a coalition of chief executive officers of corporations doing business within the Mountain States of Arizona, Colorado, Idaho, Montana, Nevada, New Mexico, Utah and Wyoming, joins with you and other WESTPO Governors in opposing Federal legislation to place a ceiling on state coal severance taxes.

WRC feels enactment of such legislation would be a dangerous intrustion into the prerogatives of the several States. Our organization much prefers working with you and each of the individual governors in seeking equitable and reasonable tax treatment which recognizes both the needs of the individual State and the capability of industry to pay. This continues to be a matter of State, not Federal, jurisdiction.

Respectfully yours,

J. D. Geist
Chairman of the Board

James C. Wilson
Chairman
Energy ad hoc Committee

bw

Western Regional Council

ENERGY MOBILIZATION BOARD

The Western Regional Council believes that if federal laws and regulations controlling resource development had been drafted, to reflect a more equitable balance between environmental protection and resource development, there would not now be a need for the Energy Mobilization Board. The Energy Mobilization Board represents an effort to treat symptoms rather than to address causes rooted in ill-advised legislation and regulations. The Council remains committed to rectifying these basic causes. In the meantime, the Council supports the concept of a federal entity empowered to expedite decisionmaking regarding priority energy projects.

The powers of such an entity should include the power to:

- Define federal, state, and local decisionmaking timetables and deadlines.
- Refer to Congress for immediate decision, issues not resolved within established deadlines.
- Receive immediate judicial review of its final decisions.

The Council believes that Energy Mobilization Board legislation should include a grandfather clause, exempting all projects under construction from any construction or production delays due to subsequently enacted or promulgated environmental requirements.

On the other hand, the Council does not feel that the legislation should include the power to override substantive provisions of existing state and local law, such as environmental performance standards or state water law.

We urge that the charter of the Energy Mobilization Board be subject to a statutorily required Sunset Review after four years, and that such review include explicit critera which must be met if the life of the Board is to be extended. If it cannot be shown that the Board has in fact resulted in significant reductions in decisionmaking timetables, or if it cannot be shown that the Board has made a significant contribution to reducing the nation's dependence on imported oil, then it should be terminated. Such a review should also contain a detailed set of recommendations for modification of existing legislation and regulations which necessitated the creation of an Energy Mobilization Board.

The Council wishes to make clear that its support of the EMB concept is predicated upon the assumption that the EMB does not represent a solution to more deep-seated problems in our national energy policy. Solution of these problems will require a broadly based review of the legislative and regulatory provisions which now stand in conflict with the President's energy production goals.

The Billings Gazette
Opinion

A desirable fast track developing for energy

Colorado is setting a pace that Montana could well follow with its Joint Review Process (CJRP) to streamline and thus cut the time needed to get an energy project from the drawing boards to operation.

CJRP is already showing its worthiness. Spokesmen for Amax Inc. say the state agency, organized by the Colorado Department of Natural Resources, has cut 18 months from the time previously required to be licensed. Other energy companies expect the joint review process to save them up to two years.

What CJRP does is coordinate the activities of an estimated 150 different federal, state and local licensing agencies. It's purpose is not to evade the state's environmental laws. It is to ensure they are not slighted in the much-needed speeding up of licensing procedures.

Most industries realize they are going to have to live with laws protecting the environment, that the days of reap, ruin and run are over. Putting the licensing process on a fast track will save the industry time and money, which could mean less cost to the consumer. The system is designed to do it without running roughshod over conservation, reclamation and pollution laws.

CJRP's system sets up monthly meetings involving representatives of the company, licensing agencies and the public. Problems are brought up and solved earlier.

Results to date in Colorado have been favorable. Companies have been able to meet reasonable public objections without long delays. Some call it an early-warning system, one that avoids costly, time-consuming lawsuits which create unusable heat but not much light.

With this area destined to be highly involved in the nation's energy-solving problems, the joint review process is a must.

THE POLITICS OF A NATIONAL SACRIFICE AREA: WESTERN VALUE ISSUES

Daniel H. Henning
Professor, Political Science
Eastern Montana College
Billings, Montana

GENERAL

In the Northern Great Plains Region of Montana, Wyoming, and North Dakota, over 1.3 trillion tons of coal underlie approximately 250,000 square miles of undeveloped prarie lands known as the Fort Union Coal Reserve.[1] If only the strippable coal of Montana and Wyoming were mined, about 67 billion tons or 100 car train units would be available for shipment every two minutes over the next 25 years. The two contain 48.5 percent of all the strippable coal in the United States. If this same coal were converted into oil, it would yield to approximately 7 million barrels of crude oil a day.[2] The Federal Government owns about 60% of the western coal with the remainder held in state, private and corporate (e.g. Burlington Northern Railroad with vast coal land holdings) ownership.

Energy corporations, in conjunction with various governmental agencies involvements, are beginning the irreversible process of developments for this region with massive plans for coal strip mining, power plants, and syntial plants. Currently, coal strip mining operations in Montana and Wyoming are producing approximately 70 million tons a year and energy corporations

have plans to develop vast new acreages through purchase or lease arrangements. A considerable number of power plants are now starting to appear in the Region. There are plans to add large numbers of new power plants in the near future. Energy corridors and coal slurry lines are also being considered to accommodate the increasing volume of coal which is currently being shipped by railroads to power plants outside the region. The Department of Energy (DOE) has identified 36 sites for minemouth synfuel plants in Montana alone and plans to locate numerous others in the Region.[3]

Under the fragmented energy policies of U. S. governmental and energy-related corporate sectors for the energy crisis, a unifying thrust appears to be that the Northern Great Plains Region of Montana, Wyoming and North Dakota should be developed as a National Sacrifice Area to meet the energy needs and demands of the nation. Much of this policy thrust centers around the availability of abundant and strippable coal which is found in undeveloped and sparsely populated public and private lands. The Statistical Abstracts of the United States (1979) states that Montana has a population of 785,000 and 147,130 square miles, while Wyoming contains a population of 424,000 and 97,914 square miles. Consequently, the total populations and land areas of the three states of the National Sacrifice Area would involve approximately 1,861,000 residents on 315,000 square miles

The selected portions of these three states which contain the underlying coal deposits would be primarily impacted by the energy developments, i.e., intensive coal strip mining, power plants, and synfuel plants. However, it must be recognized that the entire states would share in the associated and secondary impacts of being included in a National Sacrifice Area.

including population, pollution, water allocations, transmission lines, energy corridors, etc. As a consequence, the agricultural economies and spacious, quality environments of Montana, Wyoming, and North Dakota would be substantially changed to energy dependent industrial economies and environmentally degraded, developed areas. These changes would also affect the qualities and ways of life of the residents, politics, governmental and social institutions, communities, and a host of other activities of impacted States.

In essence, the combined effects of making Montana, Wyoming, and North Dakota into a National Sacrifice Area by massive energy developments would be to take the "West" out of these western states, i.e., take the Montana out of Montana, the Wyoming out of Wyoming, and the North Dakota out of North Dakota. Until the advent of the energy crisis, these states were generally undeveloped and known for their high quality environments and unique western life styles. However, with the explicit and implicit thrust of fragmented and crisis oriented energy policies to transform them into a National Sacrifice Area, serious political and value issues are posed as intense controversies emerge.

It is generally recognized that energy policies and decisions are highly political and controversial as well as given to a fragmented and crisis orientation. The human values, which underlie the political conflicts, can produce either wise or unwise decisions on energy and environmental matters. In this sense, many energy and environmental problems are beyond the scope of science and technology as many decisions are based upon human values and morals. The authoritative allocation of values in the political process will basically determine energy and environmental policies. In this

sense, the future of Montana, Wyoming, and North Dakota as a National Sacrifice Area will be determined by how political values affect the policy making process. It is the purpose of this paper to explore and analyze some of these western value issues.

VALUE ISSUES

STATE'S RIGHTS: Much older than recent environmental and energy issues, the traditional and historical value of state's rights argues against the involuntary sacrifice or loss of sovereignty of a State for any reason. Given its various political uses and abuses throughout history, this concept is legitimately recognized by the Constitutional concept of Federalism. The Tenth Amendment of the Constitution states, "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." Historically, the state's rights doctrine has been used to resist federal encroachments as well as to argue in favor of political benefits for individual states on the grounds of autonomy and sovereignty.

However, under the threats of becoming a National Sacrifice Area, the involved states are making an unprecedented utilization of this doctrine/value in the name of protecting their very survival as States. They do not wish to become energy colonies of a nation by the inevitable and irreversable transformation of their environments, populations, health, economies, ways of life, and institutions. Further, the utilization of this doctrine is directed at the collusion of the Federal Government and mainly out of state energy corporations; the two have teamed up to produce massive plans for energy development of the area at all costs. This [illegible] involvement transcends normal federal encroachment or the state's [illegible]

[illegible]. However, the use of the State's rights doctrine by the states becomes intertwined with the reality of corporate involvement and collusion.

Basically, the state's rights value hinges on the concept that the involved states want to "call their own shots" on energy developments which will occur within their borders. Montana Congressman Pat Williams has stated:

> Montana has, as an important facet of its heritage, a true willingness to share its wealth with the rest of the nation. The ultimate question has become whether the state of Montana will continue to be a willing provider of its resources or a colony whose desires are overrun in a rough shod manner by special interests who cannot fully appreciate our unique way of life.[4]

In the same vein, Montana Lt. Governor Ted Schwinden has noted:

> We know we have a responsibility to share our resources and be part of the energy solution. What we don't want to do is turn over control to outsiders--and that means OPEC, Washington, and the East Coast.[5]

WESTERN HERITAGE: As contrasted to other energy hungry states, the involved western states have an abundance of energy to meet their own needs. For example, Governor Tom Judge indicates that Montana currently produces two and a half more times the energy than it consumes.[6] Like other western states, the involved States share a common western heritage as well as some different issues that separate them from much of the rest of the nation, e.g., scarce water, large federal ownership of land within their borders, rapid growth, and an agricultural base. This, in turn, provides a basis for growing emphasis on regional or sectional politics with a focus on western issues. However national energy issues increasingly force conflicts with western sectional political issues. For example, demands for scarce water for energy developments are in serious conflict with the present water allocations for agriculture.

As part of their western heritage, the involved states not only share a sense of independence and natural resistance towards the Federal government, and, often, resent forms of governmental intervention Donally and Jonas note several common western political characteristics which are found in the involved states: (a) the emphasis on development of natural resources, particularly water, (b) strong natural resource pressure groups, especially in the areas of water, agriculture, ranching, power, and mining, (c) an acute awareness of the federal government and the strong influence of westerners on natural resource agencies (many westerners tend to view public lands as provincially or community owned), the weight given to an individual's independence and personality, [7, 8]

In this sense, the western heritage creates life styles and a state of mind for western identity and independence of the publics of the involved states. The involved states have a quality of life and an environment which is recognized as one of the best in the world. Values and life styles associated with a healthy and spacious natural environment, agricultural economies, and sparce populations are reflected in concerns about having these features degraded or destroyed by massive energy developments, i.e., the removal of the essential characteristics and qualities of the states and their residents.

Much of this would hinge around the transformation of the states from their traditional agricultural and small communities basis to an industrial and urbanized basis. The northern great plains environment is a social and cultural one besides a physical one. The development of it, with the consequent population impacts, would result in a loss of western heritages and identities for the residents involved as well

as the end of ways of life and of unique environmental qualities for the states.

Further, there is a recognition that much of this transformation would be on a short term basis with boom towns and transient workers as well as a gradual movement away from coal to other more economical, efficient, and environmentally sound forms of energy. Consequently, there are serious concerns that the involved states and their western heritages are being sacrificed because of the emphasis which is being placed on coal as a stopgap answer to the energy crisis.

In noting the concern of western governors to President Carter's call for a crash program of coal exploitation, Newsweek, in, "The Angry West vs. The Rest," observes,

> Their anxieties stem from estimates that 600 square miles of land could be strip mined during the first 30 years of the Carter program; that synfuel development could divert enough water to ruin agriculture; and that coal and oil-shale boom towns much like the old gold and silver camps would spring up, requiring new roads, schools, hospitals and sewers and saddling their states with a lunar landscape and debts reaching far into the future.[9]

Because of the large scale plans for exporting coal and building power plants the very survival of the western heritage has become an important value issue.

FRONTIER EXPLOITATION: According to Fredrick Jackson Turner, a noted historian, the American character was formed through frontier interaction and transformation. He considered this frontier interaction to have profound influences on American values. America has once contained the richest frontier in the history of the world, but Turner documented the disappearance of the American frontier in 1890[10] However, symbolic frontier concepts and values still permeate American life, regardless

of time and value lags. Much of the argument for making Montana, Wyoming, and North Dakota into a National Sacrifice Area hinges around exploiting the seemingly unlimited resources and undeveloped areas of a "New Frontier" without real concerns about the impacts this will have on the environment and life styles of the affected areas. Values associated with frontier exploitation include progress, materialism, utilitarianism, economic development, pragmatism (short term), and other aspects of the American Dream of unlimited growth based upon the use of unlimited resources. Modern technology becomes the major exploitive end and means in this dream and exploitation.

Historically, the involved States have placed high values on the independent economic exploitation of their natural resources. Although the frontier has long since disappeared from the American scene, attitudes associated with unlimied, unrestrained, and irresponsible exploitation still persist in the involved states as elsewhere. This is particularly true where there is a close proximity and heavy utilization of natural resources found on abundant public lands. Economic development is often viewed as good for its own sake without aesthetic, ecological, or future concerns. However, under the prospects of massive energy development as a National Sacrifice Area, mixed reactions and ambiguity surround frontier exploitive and environmental values and conflicts.

Consequently, the publics of the involved states reflect a spectrum of frontier exploitive, compromised, and environmental values and views which makes energy developments highly controversial and political. Observing this, Newsweek notes,

> Most Western states now have high-caliber moderate conservative governors who must mediate disputes between developers, environ-

> mentalists and the Federal government. They must step quickly and delicately to satisfy western voters, who are given to initiatives, referendums, and recalls at the drop of a Stetson.[11]

Montana, for example, has some of the strongest environmental legislation in the nation, particularly in the areas of reclamation, power plant siting, and coal severance tax, as well as several environmental initiatives in circulation. However, recent efforts to weaken this legislation has caused important legislative controversies. These efforts can be correlated with a de-emphasis of the environmental movement and the growing attention which is being paid to energy and economic concerns. Nevertheless, numerous surveys of the publics in the involved states reveal that the majority share strong concerns about protecting the environment.

The frontier exploitive value is reflected in the various outside corporations who have plans for energy developments in the involved states. The investments possibilities for energy corporations are greater in the involved states than elsewhere in the nation, particularly because of the existence of large areas of undeveloped public and private lands and large amounts of strippable coal. Actually, over 90 percent of the western strippable coal could be deep mined,[12] but this is a much more costly process than strip mining. Consequently, cheap land or leases and inexpensive mining methods are strong economic factors which encourage corporate investment under a frontier exploitation orientation. In this sense, corporate investment potential, rather than the resource, appears to determine where the resource will be developed. It is further recognized that eastern, deep mined coal produces higher BTUs per ton than the western strip mined coal. Despite the low sulfur

content of western coal, much more of it would have to be burned, with proportionate increases in pollution, to produce the same BTUs provided by Eastern coal.

Furthermore, sparse populations will provide less opposition to the power and synfuel plants and the developments can be economically located near the source of the coal which would eliminate most transportation costs. However, public resistance to locations of energy plants is increasingly recognized as the severist nationwide problem. In addition, high costs are associated with this opposition, including long delays with inflationary construction costs, court cases, public relation expenses, etc. The sparce populations and small communities found in the involved states would provide less opposition costs than would be found in states with large populations and urban areas. The investment aspects also hinge on the capitalistic attitudes that everything should be used and developed in some manner under economic concerns, i.e., that "worthless" and undeveloped prairie lands can become economically "worthwhile" through strip mining and developments for profits.

TECHONOLOGY: A common value statement made about energy is that it should be made abundant and cheap through the use of technology, be unlimited, and that energy developments will not harm the environment. These assumptions provides a rationale for developing a National Sacrifice Area. Despite the emerging realities which contradict all of these assumptions, technology appears to be viewed as the "magic" which will result in the attainment of all three. Sittler states,

> The role of technology in modern American life is better understood if one sees it not only as an application of scientific knowledge, but also as a way of life joyfully cultivated by a people who retain a frontier mentality long after the physical frontier

> has vanished. . . That simple and uncritical acclaim should surround the advance of technology in America is evidence of the spirit that has never had to come to terms with boundaries, limits, ends. . . A "new frontier" has come into view, and the excitement and challenge of it is similarly greeted. That a triumphant technology can correct the environmental disorders to which it has so largely contributed is an assumption that has the status of secular heresay.[13]

The technology assumption, including its American "way of life," provides the basis and beliefs for making a "Energy New Frontier" or National Sacrifice Area without limitations. It also provides the mythological concept that the various energy developments planned for the involved states will not really harm the environment. Because of the faith placed in technology, it is believed that pollution control and reclamation, will be able to reduce or mitigate the various negative effects of power plants, synfuel plants and coal strip mining. It is also assumed that the impacts of increased populations and boom towns can be mitigated by technological planning and scientific studies. Transmission lines, energy corridors, and coal slurry lines are to be blended into the existing environment by technological consultants inventing innovative programs. Ideally, the rest of the nation, will have its cheap and abundant energy while still protecting the environment of Montana, Wyoming, and North Dakota.

However, a growing body of scientific evidence and environmental realities argue against the technological assumptions made above, i.e., the involved states would definitely become a National Sacrifice Area. In the area of reclamation, for example, serious doubts exist about whether it can be made successful on a long term basis, using the latest technology. The semi-arid conditions of the involved states hamper reclamation efforts considerably, particularly because of their low

rainfall (under 20 inches a year), periodic droughts, short growing seasons, and poor, thin soil. Native plantlife has adapted to these harsh conditions, including serious droughts, of the prairie ecology over centuries. Further questions must be answered about the damaging of aquifers, wildlife dispersal, erosion, and other problems which will result in permanent land and ecological disruption.

Reclamation efforts may involve thousands of dollars for a given acre with irrigation, exotic and natural grass seed mixes, mulches, fertilizing, and other techniques. Some ranchers have argued that they could grow grass in the back of their pickups with reclamation treatment of this nature. However, the key factor to be considered is whether or not the land can be returned to its original status on a long term basis with native vegetation that is self-perpetuating and productive. Given the various disagreements about the success or failure of reclamation, it is significant to note that none of the coal companies have applied to recover bond money in Montana where the bonded land is subject to inspection by the Department of State Lands. This money (over 2 million dollars) was put up by the coal companies years ago to guarantee reclamation under Montana Reclamation legislation.[14]

Technological assumptions about the effectiveness of pollution control for power plants and synfuel plants are also subject to serious questions. Even with questionable pollution control devices for percentage controls of the pollutants, the sheer magnitude of proposed plants as well as their combined numbers would have devasting and massive pollution effects which would saturate the involved States. For example, the North Central Power Study (1971), conducted under the

auspices of the U. S. Department of the Interior and a number of public utilities, proposed 21 power plants for eastern Montana, 15 in Wyoming and four for North Dakota. The plants would range from 700 to 10,000 megawatts and involve a vast network of transmission lines for transporting electricity to other states.[15] Although many have labeled the study proposals as unrealistic, they are still very much present for consideration by such agencies as the Department of Energy.

Given the varying amount of power plants, the addition of large numbers of synfuel plants in the involved states would leave little doubt in pollution and other concerns as to their sacrificial nature. The Department of Energy has identified 36 sites for minemouth synfuel plants in Montana alone under President Carter's energy plan. Newsweek notes,

> . . .But a crash program to subsidize massive production could be an environmentalist's nightmare. Current technology for coal liquefication and gasification, for example, release carcinogens (cancer causing) into nearby air and water, increase air pollution and emit large quantities of carbon dioxide. The Co2 emissions raise the spector of a "greenhouse effect" - a gradual warming of the Earth's atmosphere that could alter the Earth's climate and even melt polar icecaps.[16]

Under the technological assumption of a new energy frontier, various plants are constantly being proposed and considered throughout the involved States. A typical announcement indicates,

> "The need is here," Dave Kaston told the crowd packed into the Circle High School Auditorium. Kasten is a Brokway farmer and Vice President of the Circle Chamber of Commerce (Circle is a small, agricultural town) and a member of the pro-industry People for Economic Progress (PEP). Kasten said the power produced by the plant (1,000 megawatts and coal fired) is needed to help run the proposed Northern Tier Pipeline and other prospective industries, including a fertilizer and synfuel plant being considered for construction in the area by Burlington Northern, Inc.[17]

However, concerns have been expressed by other local citizens about the pollution effects and population impacts which would result if the plant were built. Further, the massive water demands of the power plants and the acid rainfall associated with the burning of coal poses serious threats to the agricultural base of the areas.

CONSERVATION: With the imminent prospect of becoming a National Sacrifice Area in the near future, the involved States question the nature of the demands which are being placed on their resources. A noted energy expert, Amory B. Lovins, for example, observes that all new national energy needs for the next few decades could be met by cutting wastes and using energy more efficiently. He relates the analogy of our using a chain saw to cut butter to much of our energy consumption.[18] Further, Albert Bartlett in, "Forgotten Fundamentals of the Energy Crisis," notes that the energy crisis is basically created by the exponential growth which is characterized by doubling with a few doublings leading quickly to enormous numbers of demand. He indicates that exponential growth will automatically lead to monumental energy demands and consumption of limited energy sources and argues that conservation, including a lowering of the exponential growth rate of energy use, will lessen the energy crisis.[19]

Many experts agree that the United States could get by with approximately half of its energy consumption and point out that much lower rates of energy consumption are found in industrialized, developed nations in Europe. Unfortunately, the United States corporate economy and life styles seem to be dependent on an exponential growth rate in energy consumption and the wasteful and inefficient use of energy.

Consequently, there are powerful political forces and pressures on the government to continue to assure that there are unlimited sources and energy supplies while avoiding adequate attention to conservation and the development of alternative sources of energy. This assumption points toward farther massive energy development and the forced sacrifice of a segment of the United States to meet the demands of the whole. In essence, it involves a short range, irreversible, and symptomatic approach toward the energy crisis while it ignores a long range and source approach, which includes conservation.

In considering conservation, Governor Judge stated,

> Montana should become the nation's leader in conservation of its energy resources and elimination of waste in their usage. . . The number one priority and the basic cornerstone of our energy policy must be reduction of energy demand; any other course is ultimately suicidal. . . . The only permanent solution to the energy problem lies in the development of renewable, alternative energy sources. 20

Many residents of the involved states question and protest why their environments, health, life styles, and agricultural economies must be sacrificed when conservation and other alternatives are available.

As the most materialistic and wasteful country in the World, the United States appears not to pay serious attention to conservation under its technological and economic growth mania with constant exponential rates of energy consumption. A basic question here is what are the real energy needs through conservation as opposed to wants and demands under destructive assumptions. At the same time, growing energy shortages and limitations indicate the need for conservations, but the overriding mandates appear to obtain abundant energy supplies as based on these very assumptions. And this would mean massive energy development of the involved States at all costs.

AUTHORITARIANISM: When Americans have a problem they usually turn to the government with the expectation that government can do something about it. In the energy problems, severe crisis pressures are placed on the government which, in turn, combines with corporations, through various arrangements, for supplying the unlimited energy demanded. However, the desperate nature of this energy "marriage" between government and corporations appears to point toward the adoption of authoritarian policies. There are fears that the Federal Government will become more and more totalitarian in pressing for energy developments while ignoring state's rights, environmental costs, public opposition, and other legitimate constraints. In the case of the involved States, this authoritarianism might result in their being treated as energy colonies rather than as sovereign states with Constitutional rights grounded in Federalism.

A classic example of the growing energy authoritarianism of government is the establishment of a Energy Mobilization Board which is anticipated to be signed into law by Congress. The EMB will have broad and arbitrary powers to accelerate and expedite energy related projects at all costs; it will arbitrarily set standards of air quality, water quality, and use, i.e., "fast track". The EMB would be empowered to arbitrarily waive or overrule Federal and State laws and proceedures, assume the decision-making powers of Federal and State agencies, exempt energy projects from compliance with legislative requirements, and restrict the opportunities for judicial review and public participation. In essence, the EMB poses a dangerous threat to the Federal System of checks and balances. It amounts to an unlimited

executive agency with the power to alter and overrule the Federal Government and States. It could be used to pave the way for developing extensive energy projects in the involved States by overriding legislative and administrative requirements as well as public opposition. For example, requirements pertaining to proposals for power plants and synfuel plants contained in the Montana Major Facility Siting Act could be overriden by the EMB.

Various Congressional legislation is also under consideration which would reduce the powers of the involved States to control energy developments so that the large consuming states will find it easier to meet their energy demands. Through Northwest Power legislation associated with the Bonneville Power Administration, an 11 member regional council for energy policy would be established for Montana, Idaho, Washington, and Oregon. Yet, the majority of the coal fired generating plants for Oregon and Washington would be proposed in Montana, but Montana would only have two votes on the Council. Montana has valid objections to a regional power planning process that does not guarantee its equal state representation on decisions which would profoundly effect its future.[21]

Congressional bills are also under consideration which would limit the rights of the involved States to continue to tax mined coal under their coal severance tax legislation.[22] These coal taxes are utilized to reduce the impacts associated with energy developments, especially population impacts. Montana has the highest coal severance tax (30 percent) of any of the three involved states. Currently, Montana's coal tax is under attack on both judicial and Congressional fronts. The former

front involves 11 mid-western utilities and four coal companies in district court. State officials have defended the tax as "far sighted" and a sacred state right. On the Congressional front, Montana Senator Max Baucus called the proposed (coal tax) ceiling, "unprecedented, unfair, and unreasonable. . .one of the most blatant, disgusting examples of special legislation I have ever seen." He noted that Congress had never restricted internal state taxes and warned, "If you want your state's taxes limited by Congress, then go ahead. It will be the opening shot of the war between the states."[23]

Emerging authoritarianism is particularly noted in the constant, massive patterns of decisions and proposals for various forms of energy development through Federal Government and corporate involvements, arrangements, and collusions.[24] Millions of acres of public lands, and government owned minerals on private lands are subject to leasing arrangements by energy corporations with little public information or participation. Through the Synthetic Fuels Corporation (a governmental/private corporation) and other mechanisms, large numbers of minemouth synfuel plants are being planned for the coal regions of the involved States. However, scarce water availability is recognized as a limiting factor for the plants in this semi-arid area. To accommodate the massive water demands associated with synfuel and power plants, large numbers of dams, reservoirs, and other water projects are under study by the U. S. Bureau of Reclamation and the Corps of Engineers. Yet, water allocations on this scale would cripple the agricultural economy and environmental quality of the States.

Under this governmental and corporate thrust, related actions and proposals permeate the involved States wherever there are any

potentialities for energy development and transportation, e.g., Northern Tier pipeline proposal, coal slurry lines proposals, transmission lines, oil and gas drilling, etc. Recent proposals even call for exploration dynamiting and oil drilling of established wilderness areas in Montana as well as geo-thermal drillings near Yellowstone National Park which will threaten Old Faithful. Collectively, the magnitude and constant new appearances of the energy developments and proposals are staggering and appear "uncontrolled". Real concerns and considerations over the environmental and social impacts are of a questionable nature. Environmental impact statements, valid scientific evidence and concerns, opposition from political and public sources, etc., often become farces under the combined thrust of a Federal Government and corporations committed to development of energy at all costs.

The emerging energy authoritarianism involves a desperate commitment to affluence, exponential growth, technological development, and resource exploitation of a wartime and pre-environmental movement nature. In fact, President Carter's recent statement, under the pressures of an angry public and a wartime-oriented corporate economy, of a "War on Energy" appears to follow this pattern, i.e., a domestic war. Measures like the Energy Mobilization Board, and the arbitrary powers that it would have over Federalism certainly have their counterparts during wartime. Yet much of the authoritarian and warlike emphasis invariably would be directed at the imminent sacrifice of the involved States. Most state residents and their governments, who will be on the receiving end of the energy developments under this authoritarian approach, are becoming increasing aware of the irreversible and negative

social and environmental costs involved. Many residents question why their environments, health, and life styles must be sacrificed to provide energy for a microwave oven in Minneapolis or an aluminum plant in Washington State.

This growing awareness greatly affects the political and governmental life of the involved States and they have passed and proposed various legislation and policies to safeguard their heritage and independence by attempting to control energy developments within their borders, i.e., to decide their own future. Forces and pressures associated with corporations are also prevalent in the political and government life in counter efforts for energy developments with little state controls.

Under growing patterns of authoritarianism for energy developments at all costs, centralization and totalitarian rule would have to prevail. Consequently, the rights, freedom, self-determination, and sovereignty of the involved states and residents would be greatly reduced, ignored, or made powerless. For all practical purposes, the states and their residents would have to be deprived of their rights and humanity to sit in judgment of their own fate. Although they might have the symbolic status of "States," they would, in reality, be relegated to the status of colonies enslaved to feed the massive appetite for energy of the rest of the United States, i.e., an involuntary National Sacrifice Area.

CONCLUSION

Much of the politics of a National Sacrifice Area encompasses Western value issues which are undergoing severe conflict and controversy.

The struggle for power with the authoritative allocation of these and other values by the political processes will determine the energy policy for the future of the involved States. However, policy is a reflection of the culture in which it is formulated and operates. In the American culture, pluralistic and pragmatic (non-ideological) characteristics are dominant in general policy areas and this certainly involves energy policy with its fragmented and pluralistic approach.[25] In this sense, the lack of a powerful and unifying energy policy, based on such unwise value assumptions as exponential growth and technological cure alls, is actually to the advantage of the involved states and may keep them from becoming a National Sacrifice Area, i.e., through unsuccessful, pluralistic, and fragmented policy.

In this regard, the future of the involved states, as well as the rest of the nation, depends on the formulation of wise energy policy which is not based on unwise value assumptions. Alternative values of limiting and controlling growth and technology with conservation and alternative energy can provide a stable state society which would not require the virtual sacrifice of Montana, Wyoming, and North Dakota. But much of current energy policy, given its fragmentation, is based on unlimited and uncontrolled growth. Amory Lovins notes:

> Most thoughtful analysts now see that this (growth) approach is rapidly grinding to a halt. It is looking politically unworkable: most people, for example, who are on the receiving end of offshore and Artic oil operations, coal stripping, and the plutonium economy have greeted these enterprises with a comprehensive lack of enthusiasm, because they directly perceive the prohibitive social and environmental costs. Extrapolative policy seem technically unworkable: there is mounting evidence that even the richest and most sophisticated countries lack the skills, industrial capacity, and managerial ability to sustain

such rapid expansion of untried and unforgiving technologies. And it seems economically unworkable: for excellent reasons, such as free market mechanisms as still operate have persistently shown themselves unwilling to allocate to the extremely capital-intensive, high risk supply technologies the money needed to build them. The inexorable disintegration of current policy thus makes us re-examine its premises (growth and consumption). . . . Energy is but a means to social ends; it is not an end in itself.[26]

References

1. K. Ross Toole, The Rape of the Great Plains (Boston: Little, Brown and Company, 1976) preface.

2. Roger Clawson, "Energy," The Billings Gazette, (September 23, 1979) p. 3-D.

3. Ibid., p. 3-D.

4. Personal Correspondence with Montana Congressman Pat Williams, United States House of Representatives, Washington, DC (October 23, 1979).

5. "The Angry West Vs. The Rest," Newsweek (September 17, 1979) p. 33.

6. Gail Kuntz, Montana Energy Almanac, (Helena: Department of Natural Resources and Conservation, 1978) p. 7.

7. Thomas C. Donnally, Rocky Mountain Politics, (Albuquerque: University of New Mexico Press, 1940) pp. 1-30.

8. Frank Jonas, Western Politics (Salt Lake City: University of Utah Press, 1961) pp. 357-373.

9. "The Angry West Vs. The Rest," Op.Cit., p. 40.

10. Frederic Jackson Turner, The Frontier in American History, (New York: Holt, Rinehart, & Winston, 1917)

11. "The Angry West Vs. The Rest," Op.Cit., p. 34.

12. Personal interview with Mr. Edward Dobson, Northern Great Plains Representative, Friends of the Earth, Billings, Montana (October 20, 1979).

13. Joseph Sittler, "Theology," in Albert E. Utton and Daniel H. Henning, (eds.) Interdisciplinary Environmental Approaches, (Corta Mesa: Educational Media Press, 1974) pp. 68-69.

14. Jeannie Cross, "Reclaimed Land Comes Due This Year," The Billings Gazette (March 9, 1980) p. 1-C.

15. K. Ross Toole, Op.Cit., pp 12-20.

16. "Carter's Energy Plan," Newsweek, (July 30, 1979) p. 56.

17. Jeannie Cross, "Power Plant Proposed for Circle," The Billings Gazette, (March 11, 1980) p. 1-A.

18. Amory B. Lovins, Soft Energy Paths: Toward a Durable Peace, (Cambridge: Ballinger Publishing Company, 1977) pp. 16-41.

19. Albert A. Bartlett, "Forgotten Fundamentals of the Energy Crisis," American Journal of Physics, (September, 1978) pp. 876-887.

20. Gail Fentz, Op.Cit., p.3.

21. "New Oil Taxes Bill A 'Stacked Deck' - Judge," The Billings Gazette (March 6, 1980) p. 2-B

22. Roger Clawson, "Congressmen Uniting to Slash Coal Tax," The Billings Gazette (March 7, 1980) p. 1-A.

23. "Foes Hit State's Coal Tax," The Billings Gazette, (March 22, 1980), p. 1-A.

24. Daniel P. Henning, Environmental Policy and Administration (New York: Elsevier North-Holland, Inc., 1975) pp. 36-46.

25. Ibid., pp. 13-21.

26. Amory B. Lovins, Op.Cit., p. 4.

United States Senate

COMMITTEE ON
ENERGY AND NATURAL RESOURCES
WASHINGTON, D.C. 20510

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MEMORANDUM

July 24, 1979

TO: Chairman and Members, Senate Committee on Energy and Natural Resources

FROM: Jim Pugash, Staff Counsel

RE: Constitutional Issues Associated with Congressional Override of State Procedural and Substantive Law

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In considering "fast track" legislation, Members of the Committee will have to decide whether to support Federal waivers of state substantive or procedural laws. In making this decision, Members should be aware of the constitutional strengths and weaknesses of alternative waiver proposals because some are considerably more likely to withstand constitutional challenge than others. [In particular, it appears that Federal laws imposing binding procedures on the States are substantially less likely to be upheld than Federal enactments exempting priority energy projects from State substantive law.] The remainder of this memorandum explains this conclusion in greater detail.

EXEMPTION FROM SUBSTANTIVE STATE LAW

The Proposals

Section 204(d) of the Stevens amendment to S. 1308 may be viewed as a Federal preemption of state substantive law. It provides

> "No State may adopt any law or regulation or attempt to enforce any State law or regulation that will abrogate...the authority granted to the Board to coordinate and expedite...priority energy projects."

Under one interpretation of this section, priority energy projects could be exempted from any State law, including zoning ordinances and pollution restrictions, which would delay completion of the project.

Constitutionality

Although a broad delegation of authority to the Energy Mobilization Board to preempt State substantive law may be challenged, the constitutionality of such a delegation would probably be sustained. The power of the Federal government to preempt State substantive law under the Supremacy Clause of the Constitution is well established. As Justice Black observed in the leading case on the subject, "where the federal government", in the exercise of its delegated powers "has enacted a complete scheme of regulation..., states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulations." Hines v. Davidowitz, 312 U.S. 52, 66-67 (1941).

A clear Congressional decision to exempt priority energy projects from State laws, in whole or in part, would probably be a valid exercise of Congress' power under both the commerce clause, Art. I, Sec. 8, cl. 3, and the war powers clauses, Art. I, Sec. 8, cl. 11-14. A similar exercise of Congressional power was sustained by the Supreme Court in the famous case of McCulloch v. Maryland, 4 Wheat. (17 U.S.) 316 (1819). In that case, the court concluded that a State tax upon notes issued by the Bank of the United States was void. Justice Marshall wrote for the court:

> "...the States have no power, by taxation or otherwise to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government." 4 Wheat. (17 U.S.) 436.

MANDATING STATE PROCEDURES

The Proposals

The constitutionality of Congressional legislation imposing procedures on State and local officials is considerably more doubtful. Unlike an exemption from State substantive law, which would eliminate the authority of States to act on priority energy projects, an override of State procedural law would require State officials to act in a Federally mandated manner.

Senator Stevens' amendment No. 330 to S. 1308 and the Administration proposal would authorize the National Energy Mobilization Board to impose mandatory deadlines and procedures on State and local agencies. Although these agencies presumably would be consulted before procedures were established, the Board could set schedules which conflicted with State and local law. If the agency failed to comply with the schedule, the Board would be authorized to decide in its place.

Constitutionality

Proposals for imposing Federal procedures and deadlines on State and local agencies could well be invalid under the Tenth Amendment to the United States Constitution. The Tenth Amendment provides, "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." In Fry v. United States, the Court held that the Tenth Amendment "expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or otheir ability to function effectively in a federal system." 421 U.S. 542, 547, n. 7 (1975).

The Tenth Amendment places a limit on the power of Congress to override State and local law, even under the commerce clause. As the Court stated in National League of Cities (NLC) v. Usery, 426 U.S. 833, 842 (1976), "there are limits upon the power of Congress to override State sovereignty, even when exercising its otherwise plenary powers to tax or to regulate commerce which are conferred by Art. I of the Constitution."

In NLC, the Supreme Court struck down a Federal enactment which was arguably less intrusive upon State sovereignty than the proposals for overriding State procedures in fast track legislation. The Court held that Congress, in imposing minimum wage and maximum hour provisions on State and local government employees, had interfered in an unconstitutional manner with integral State and local governmental functions.

The proposals for imposing Federally mandated procedures on State officials may be a greater intrusion on State sovereignty than the minimum wage and hour laws struck down in NLC. It would appear that the freedom of the States to apply and administer their laws in the manner they choose is even more vital to State sovereignty than the freedom to set salaries for State employees.

By confronting the States with the Hobson's choice of complying with Federal procedures or losing their power to enforce State law, Congress might be impairing "the States' integrity" and their ability "to function effectively in a federal system". It is important to note that under the Administration's proposal, Federally mandated procedures could actually conflict with State procedural law. To the extent they do, the Federal government would be requiring the States to enact legislation enabling State agencies to comply with Federal procedures. This type of intrusion into State sovereignty would be particularly vulnerable to constitutional challenge.

Although serious questions may be raised about the constitutionality of a Federal override of State procedural law, the Justice Department has concluded that the Administration's proposal does not violate the Constitution. Congress' power to override state sovereignty under its war powers (which could be the basis for enacting Title ~~II~~ of S. 1308) is arguably greater than its power under the commerce clause (which was the subject of the litigation in NLC). The Administration has indicated that a legal memorandum supporting its position will be forwarded to the Committee shortly.

Whether or not the Administration's conclusion is correct, the important point is that there is a substantial risk that a procedural override is unconstitutional. On the other hand, the risk that the courts will invalidate a law exempting priority energy projects, in whole or in part, from State law is considerably less. Members of the Committee, in deciding which proposal on overriding State law to support, may want to weigh these risks in making their ultimate decision.

Department of Justice
Washington, D.C. 20530

JUL 24 1979

MEMORANDUM FOR HONORABLE STUART E. EIZENSTAT
ASSISTANT TO THE PRESIDENT FOR DOMESTIC AFFAIRS
AND POLICY

Re: Constitutionality of the Energy Mobilization Board Proposal

For the past several weeks this office has been providing your staff with legal advice regarding the Administration's proposal to create an Energy Mobilization Board ("EMB"). The purpose of this memorandum is to expand on and memorialize that advice.

The EMB, which would be established in the Executive Office of the President, would be comprised of three members appointed by the President with the advice and consent of the Senate. The Board's central purpose would be to expedite the completion of designated "critical energy facilities" -- projects that would reduce the nation's reliance on imported oil.

Expedition would be achieved by the Board's establishment of a Project Decision Schedule ("Schedule"), which would set a timetable for all federal, state, and local decisionmaking necessary for the completion and operation of a critical energy facility ("CEF"). If any agency failed to render a decision within the time provided by the Schedule, the EMB would be empowered to make the decision. In doing so, it would apply the federal, state, or local law that the supplanted agency would have applied. In establishing the Schedule, the EMB would be authorized to waive federal, state, and local procedural decisionmaking requirements, such as requirements relating to timing and the methods of decisionmaking. While substantive environmental and other standards could not be changed, the EMB could either: (1) designate a lead agency to prepare a single comprehensive environmental impact statement ("EIS") for a CEF, or (2) waive federal, state, and local EIS requirements, provided that it adopt another method of evaluating the environmental impact of a CEF. The EMB would also be authorized to

waive federal, state, and local laws and regulations enacted or promulgated after the commencement of construction of a facility if the new requirement hindered expeditious completion of the project and so long as grant of a waiver would not unduly endanger public health or safety.

The Administration's proposal also seeks to put CEFs on a "fast track" by limiting and expediting judicial review. Decisions by the EMB designating a CEF and establishing a Schedule would not be subject to review. All other actions of the EMB and relevant agencies would be subject to review only in a federal court of appeals. Parties challenging agency action would have 60 days from the completion of the permitting process to bring suit unless the EMB determines that earlier review is necessary to expedite completion of the process or to assure fairness. In reviewing decisions by agencies, or the EMB acting instead of an agency, the courts of appeals will apply the appropriate federal, state, and local substantive law.

The EMB proposal raises constitutional questions of first impression which it is the purpose of this memorandum to resolve.

I. EMB Decisionmaking Authority

The purpose of the EMB is to expedite completion of energy projects that will reduce national dependence upon foreign sources of oil. Effectuation of the important national interests of reducing oil imports and increasing domestic energy production is within Congress' broad power under the Commerce Clause of the Constitution, Art. I, § 8, cl. 3. But the Supreme Court has recognized limits on the exercise of Congressional power under the Commerce Clause when legislation interferes with the exercise of traditional state functions. See National League of Cities v. Usery, 426 U.S. 833 (1976). The proposal is subject to challenge on this ground because it empowers the EMB to: (1) set decision schedules binding on state and local agencies; (2) waive state and local procedural decisionmaking requirements; and (3) supplant state and local decisionmakers. We will treat these challenges in order.

A. Scheduling

Under the proposal, all state and local agencies that make decisions related to approval of a CEF would be required to forward to the Board a proposed timetable for such actions.

The Board would set a deadline for each decision, which could be shorter than the deadline set by state or local law in cases of "exceptional national need."

It could be argued that Congress would exceed its power under the Commerce Clause by authorizing a federal agency to order a state or local agency to make a decision by a certain time. This argument takes on force when one considers the possibility that such decisions may be made by local units of government -- e.g., town councils.

In National League of Cities v. Usery, supra, the Court invalidated extension of the Fair Labor Standards Act's minimum and maximum hour standards to state and local governments. The Court's opinion, written by Justice Rehnquist, found that the federal requirements had a significant impact upon the functioning of the state and local governments, forcing localities to forego governmental activities and displacing local policies regarding the manner in which governmental services would otherwise be supplied. Id., at 847-48. Thus, the statute was found to "impermissibly interfere with the integral governmental functions" of States and localities. The Court concluded that "insofar as the challenged amendments operate to displace the States' freedom to structure integral operations in areas of traditional governmental functions, they are not within the authority granted Congress by Art. I, § 8, cl. 3." Id., at 852.

The reasoning of the Court's opinion provides the framework for analysis of the constitutionality of the Administration's EMB proposal. It may forcefully be argued that local decisions on land-use, health and safety are traditional state functions and that federal shortening of deadlines is an intrusion into the decisionmaking process -- one that "may substantially restructure traditional ways in which local governments have arranged their affairs." 426 U.S., at 849.

Notwithstanding these arguments, it is our opinion that the scheduling mandate of the EMB is not contrary to the holding in National League of Cities. First, the Court's opinion stresses the financial burden that the FLSA imposed on States and localities. Here, Congress would not be imposing a burden that will alter fiscal policies, curtail traditional state and local activities or regulate provision of traditional services. The federal government would not be directing the local governing

bodies to decide a matter in a particular way; the localities are free to grant or deny the permits and licenses involved pursuant to state and local standards. Nor would the EMB require the localities to perform a new function; it would simply set a deadline for a decision which would otherwise be made at some time. We would emphasize that, analytically, state and local decisionmakers and procedures are not being displaced in fact because there is no power in the EMB to require such agencies to follow the schedule. The EMB cannot, for example, seek injunctive relief in the courts to require a state agency to meet the schedule. Rather, the situation here is analogous to several complex federal regulatory programs, such as the Clean Air Act discussed below, which lay down specific ground rules for state action and provide for preemption by federal agencies of the state role if those rules are not followed. Such programs have been sustained against constitutional challenges similar to those which we may anticipate being brought against a statute enacting the Administration's EMB program. We therefore believe that the EMB may be empowered to set reasonable deadlines for local decisions.

Moreover, Justice Blackmun joined the Court's opinion in National League of Cities on the belief that it "adopts a balancing approach, and does not outlaw federal power in areas such as environmental protection, where the federal interest is demonstrably greater and where state facility compliance with imposed federal standards would be essential." 426 U.S., at 856.

We believe that this balancing approach suggested by Justice Blackmun would sustain the authority of Congress to empower the EMB to shorten state and local deadlines. The seriousness of the energy crisis is apparent, and its impact on foreign policy, national security and international monetary policy will, we assume, be the major focus of congressional deliberations over this proposal. A CEF may be designated only if a project has been determined "to be critical in contributing to the reduction of the nation's dependence upon imported oil or petroleum products;" and state and local deadlines may be shortened only "[i]n circumstances of exceptional national need." We are persuaded that these interests would be sufficient to override a local agency's interest in deciding when to decide. The national interest in expedition seems strong enough to overcome state and local decisionmaking processes which, Congress finds, delay decisions necessary to the expeditious completion of CEFs.

B. Waiver of State Procedures

For the same reasons discussed above, we believe that the authority of the EMB to waive state and local procedural requirements is constitutional. Since substantive standards such as those regarding the environment, land use, health and safety are specifically excluded from the waiver, the authority does not threaten the provision of traditional state and local services. Waivers impose no financial burden on the States or localities; if anything, they are likely to conserve state and local resources. Again, we believe that the critical national interest at stake outweighs state or local interest in any particular decisionmaking procedures. This conclusion, however, is subject to two qualifications. First, the waiver power of the EMB is subject to due process limitations. Since it is likely that private rights will be at stake when property is taken or a particular land-use permitted, wholesale waiver of procedures could deny injured persons due process rights. Second, wholesale waiver may obstruct a local agency's ability to make a rational decision or to carry out a traditional function. For example, total waiver of state and local environmental impact requirements might make it impossible, in particular cases, for a State to evaluate adequately the impact of a facility and thus could hinder its traditional function of protecting public health and safety. 1/ But these are problems of degree, not kind. The possibility that a court might find that a particular instance of waiver denied a party constitutional rights or unconstitutionally interfered with a State's performance of its sovereign functions does not void the waiver provision as a whole. So long as the Board applies a procedural waiver reasonably and "in circumstances of exceptional national need," we believe such action would be constitutional.

1/ This problem is mitigated by the proposal's requirement that "in each case of waiver, the Board shall establish alternative procedures for the assessment of environmental impacts of the facility."

C. Displacement of State and Local Decisionmaking

The proposal provides that if a state or local agency fails to meet a deadline established by the Schedule, the EMB may make the decision in lieu of the agency. Obviously, this provision intrudes on authority presently exercised by state and local officials. Indeed, it could be argued that supplanting decisionmaking strikes at the heart of state and local sovereignty. Nothing is a more integral governmental function than government itself.

However, the constitutional power of Congress to supplant local decisionmakers is well established. Under the Commerce Clause, Congress may preempt local decisionmaking altogether and totally deprive local government from exercising its sovereign powers. Preemption of state and local laws which interfere with federal energy policy is commonplace. See, e.g., § 6(B) of the Emergency Petroleum Allocation Act, 15 U.S.C. § 755(b).

The critical distinction under the case law is between removing decisionmaking from the state and local authorities on the one hand and forcing state and local authorities to implement federal programs on the other. This distinction is made clear by the court of appeals cases that considered constitutional challenges to the Clean Air Act, 42 U.S.C. § 1857, et seq., and the Environmental Protection Agency's implementing regulations. That Act gives States the opportunity to establish plans implementing federal air pollution standards. If a State fails to develop an adequate plan, the EPA is authorized to promulgate a plan for the State. 42 U.S.C. § 1857c-5(c)(1). 2/ EPA adopted regulations which would have subjected States to a injunction or criminal penalties for failure to implement the EPA-promulgated plan. The States challenged the constitutionality of the regulations, claiming that Congress could not authorize the EPA to compel state enfocement of federal programs. Three Courts of Appeals suggested that the EPA regulations exceeded Congress' power under the Commerce Clause by invading state

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2/ The Federal Water Pollution Control Amendments, 33 U.S.C. § 1313(b), contain a similar provision.

sovereignty. Brown v. EPA, 521 F.2d 827, 834-40 (9th Cir. 1975); District of Columbia v. Train, 521 F.2d 971, 992-94 (D.C. Cir. 1975); Maryland v. EPA, 530 F.2d 215, 225-28 (4th Cir. 1975). 3/ The courts of appeals found a constitutional difference between federal regulation of commerce and federal regulation of state regulation of commerce. To the extent the EPA regulations forced state legislatures to enact laws or be subject to penalties, those regulations impermissibly intruded upon state sovereignty. The District of Columbia Court of Appeals found that EPA was "attempting to commandeer the regulatory powers of the states, along with their personnel and resources, for use in administering and enforcing a federal regulatory program . . . ." 521 F.2d, at 992. The court stated that the EPA could seek state cooperation; if it did not receive cooperation, the "recourse contemplated by the Commerce Clause is direct federal regulation of the offending activity and not coerced state policing of the details of an intricate federal plan under threat of federal enforcement proceedings." Id., at 993. Similarly, the Fourth Circuit noted the difference between inviting a State to administer regulations and compelling administration under threat of injunction and criminal sanctions. While questioning the constitutionality of the EPA regulations, it had no problem with the "time honored and constitutionally approved device of threat and promise . . . . The threat is a federally imposed regulation with federal administration; the promise is the invitation for Maryland to enact a suitable implementation plan and administer it with state employees, thus avoiding federal interference." 530 F.2d at 228. None of the courts of appeals suggested that the authority of the Administrator to promulgate complaince plans for States that failed to comply was unconstitutional.

The distinction drawn by these cases strongly supports the constitutionality of the proposed EMB procedures. We believe that Congress on an adequate record could preempt all state and local law that interfered with the construction of a critical energy facility. The Administration's EMB proposal, however, does not go so far; it seeks to achieve state and local cooperation without altering state and local law. The proposal sets

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3/ The judgments of the three courts of appeals were subsequently vacated and remanded by the Supreme Court based on a concession by the EPA that its regulations went beyond the power granted to it by the Clean Air Act. See EPA v. Brown, 431 U.S. 99 (1977).

a deadline for state action, inviting the States to act; if that deadline passes, the EMB is empowered to make the decision for the state or local agency. There is no conscription of state or local personnel or services; there is no compulsion of state or local action. States and localities are given the opportunity to act within a certain time or they lose their ability to act. Such a scheme seems clearly to fit within the "time honored and constitutionally approved device of threat and promise." Maryland v. EPA, supra, 530 F.2d, at 228. In fact, the proposal is less intrusive than a scheme of total preemption because the EMB will apply the substantive law of the States and localities 4/ and its decisions will be subject to judicial review under the relevant state and local standards.

II. Judicial Review of State and Local Decisions

As outlined above, review of EMB actions and decisions by federal, state, and local agencies under the Schedule would be lodged exclusively in the federal courts of appeals. The reviewing court would apply the federal, state or local law governing the challenged decisions. This proposal raises the questions whether Congress may oust state courts of jurisdiction and whether federal courts are capable of receiving such jurisdiction under Article III of the Constitution.

A. Divesting State Court Jurisdiction

Congress has clear authority to vest exclusive jurisdiction of cases within the purview of Art. III of the Constitution in federal courts. Bowles v. Willingham, 321 U.S. 503, 511-512 (1944); The Moses Taylor, 71 U.S. (4 Wall.) 411, 429-30 (1867). And federal courts may entertain state cases, applying controlling state law, if Congress so provides. The Mayor v. Cooper, 73 U.S. (6 Wall.) 247 (1867) (civil removal); Tennessee v. Davis, 100 U.S. 257 (1879) (criminal removal). Nor is it

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4/ We note that the incorporation of state and local laws as the federal standards for decisions made by the EMB in lieu of state and local decisionmakers is not novel. In the area of federal taxation, the Internal Revenue Service routinely interprets and applies state laws establishing property rights in determining the federal liability. See, e.g., Morgan v. Commissioner, 309 U.S. 78 (1940).

unusual for federal courts to apply and intepret state law. Since Erie RR. Co. v. Tompkins, 304 U.S. 64 (1938), federal courts sitting in diversity have applied substantive state law. Federal courts also apply state criminal law under the Assimilative Crimes Act, 18 U.S.C. § 13, and under removal statutes. See Tennessee v. Davis, 100 U.S. at 271-72; Miller v. Kentucky, 40 F.2d 820 (6th Cir. 1930). And cases brought under the Federal Torts Claim Act are governed by state tort liability standards. 28 U.S.C. § 1346(b).

Thus, we see no constitutional impediment to vesting exclusive jurisdiction in federal circuit courts or in having those courts apply the appropriate state or local law. The question that remains, however, is whether the courts of appeals are constitutionally empowered to decide such cases -- that is, whether challenges to state and local permitting decisions come within Art. III.

B. Jurisdiction in the Courts of Appeals

Under the Administration's EMB proposal, decisions made by the EMB in lieu of state and local decisionmakers would be subject to review in the courts of appeals. The basis for federal jurisdiction in such cases is clear because a suit challenging the EMB's decision would be a suit in which the United States is a party.

If, however, a state or local agency renders a decision within the time limit prescribed by the Schedule, the basis for jurisdiction in a federal court of appeals is less certain because the state or local agency's decision will not have necessarily involved decisions on issues of federal law. 5/ In such a situation, the question would be presented whether such cases would "arise under" federal law and thus could be made subject to federal jurisdiction under Art. III.

5/ We note that parties to the state or local agency proceedings may have raised before an agency or might raise before a Court of Appeals federal constitutional issues related to the agency's action which would be adequate to vest jurisdiction in the court of appeals at least over those federal issues. State claims arising out of the same agency decision would be cognizable in the federal courts under the doctrine of "pendent" jurisdiction. See generally United Mine Workers v. Gibbs, 383 U.S. 715 (1966).

Before examining the possible bases for Congress' conferring on federal courts jurisdiction to review state actions governed by state standards as provided in the Administration's proposal, we believe it would be useful to focus on the context in which such litigation may arise.

First, state court jurisdiction is being pre-empted under the Administration's proposal because of the critical need for expeditious judicial review of state and local (as well as federal) decisions which affect the planning, construction and operation of CEFs. This judgment, which was not reached lightly, necessarily reflects a belief that the state courts cannot be relied on to reach decisions as promptly as required in order to meet the national objectives established for CEFs.

Second, the federal government will have substantial interest in virtually all approval decisions rendered by state and local agencies. As proposed by the Administration, the Energy Security Corporation would be a government-sponsored enterprise which would have broad range of powers to shape the overall development of CEFs and to become directly involved in the sponsorship of CEFs through direct grants or loans, or, indeed, through construction of a limited number of CEFs. More importantly, the decision to bring a specific energy project under the federal umbrella provided by the Administration's EMB proposal by designating it as a CEF triggers a range of actions open to the EMB which further illustrates the federal interest present in any approval decision by a state or local agency.

Third, as a practical matter judicial review of most decisions made by state and local agencies may generally be expected to present at least some substantial federal questions. Where, for example, the EMB has granted a waiver to a state agency of state procedural requirements in order that the agency might meet its deadline for decisions prescribed by the Schedule, the federal question of whether that waiver power was exercised arbitrarily by the EMB and whether the state agency's procedure comported with federal constitutional requirements might well be part of the litigation.

The Administration's EMB proposal as presently drafted provides neither for any overriding principle of federal law to control the interpretation of state substantive law nor specifically for incorporation of state law as a federal standard to

be administered by state or local decisionmakers as federal law. Thus, when either the EMB or state and local agencies make approval decisions pursuant to state substantive law, they are applying that law qua state law. If Congress expressly incorporated state law as the federal law of decision by the EMB and state and local agencies, suits challenging those decisions would "arise under" the laws of the United States. See Macomber v. Bose, 401 F.2d 545 (9th Cir. 1968); Stokes v. Adair, 265 F.2d 662 (4th Cir.), cert. denied, 361 U.S. 816 (1959); Quadrini v. Sikorsky Aircraft Division, United Aircraft Corp., 425 F. Supp. 81, 87 (D. Conn. 1977); Textile Workers Union v. American Thread Co., 113 F. Supp. 137, 140 (D. Mass. 1953). Cases establish not only that Congress may incorporate state law as the federal standard but that it may also leave to the States the authority to amend the substance of those state laws that are on the books when the federal statute effecting such incorporation is enacted. See, e.g., United States v. Sharpnacks, 355 U.S. 386 (1958). 6/

Assuming, however, that there is at least some symbolic reason to allow state decisionmakers to continue to apply state law qua state law, we believe that federal court jurisdiction under the so-called "protective jurisdiction" theory would be available.

6/ Incorporation would permit Congress to freeze state law standards as presently in force. The Administration's EMB proposal, however, does not seek to freeze such standards as may evolve, which would appear to us to suggest that there are no significant policy reasons to have state law directly incorporated here, except to the extent incorporation brings actions relating to a CEF within Art. III.

At least in theory, there might be a 10th Amendment objection to federalizing the state law to be applied by state agencies even though federal law is substantively identical to the displaced state law. The objection would be that the state or local agency has, in effect, been instructed with regard to the law to be applied by it and is therefore being required to administer a federal program without having any freedom to decline to do so. See Maryland v. EPA, supra.

In International Brotherhood of Teamsters v. W.L. Mead, Inc., 230 F. 2d 576 (1st Cir. 1956), the Court of Appeals upheld the constitutionality of § 301 of the Taft-Hartley Act on the theory of "protective jurisdiction." Under that theory, Congress is not required to displace totally (or presumably to incorporate) all otherwise applicable state law in its comprehensive regulation of a specific area of activity. Rather, Congress may leave issues to be decided by reference to state law but place litigation over those issues and others in Art. III courts. 230 F.2d, at 580-81.

In reaching its conclusion, the First Circuit relied on Williams v. Austrian, 331 U.S. 642 (1947), a case in which federal jurisdiction was held to exist in a bankruptcy suit, in which only state law would be applied by a federal court. 7/ The First Circuit appeared to suggest that some limits on the "protective jurisdiction" might be derived from Art. III, one such limit being the requirement of a high degree of overall federal regulation of an area before federal "protective" jurisdiction could be established. In this case, we think it clear that the Administration's overall CEF proposal would clearly meet that threshold test. We would add that the First Circuit's analysis received the explict approval of Justices Burton and Harlan in Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957), in which the Court upheld the constitutionality of § 301 of the Taft-Hartley Act on other grounds.

Although we conclude that federal jurisdiction consistent with Art. III's "arising under" requirement may be conferred under either an "incorporation" or "protective jurisdiction" rationale, we would add that such jurisdiction could also be established by empowering the EMB to intervene as a party in any case brought in the Court of Appeals challenging an approval decision made by a state or local agency. In these circumstances, jurisdiction would be established as an Art. III matter by viture of the United States or one of its instrumentalities being a "party" to the suit, see United States v. San Jacinto Tin Co., 125 U.S. 273 (1888), having a judicially cognizable interest in the subject matter of the suit.

7/ See also Shumacher v. Beeler, 293 U.S. 367 (1934). See generally Mishkin, The Federal "Question" in the District Courts, 53 Colum. L. Rev. 157, 195 (1953).

III. Conclusion

It is our opinion that authority may constitutionally be granted the EMB to subject state and local agency decision-making to the Schedule, to waive non-constitutional procedural requirements imposed on those agencies by state law, and to act in the stead of such agencies when they fail to meet the Schedule. If the Schedule is met, then state sovereignty is respected; if the Schedule is not met, then decisionmaking power passes to the EMB. We reach these conclusions acknowledging that these are novel questions of constitutional law for which there is no direct precedent either in judicial decisions or historical experience.

We also believe that jurisdiction may be vested in the federal courts to hear all challenges to approval decisions made by state and local agencies even in cases involving questions of substantive state law and that the EMB may be made a party to any such actions in order to assure that the interests of the United States are adequately represented and that the requirements of Art. III are met.

John M. Harmon
Assistant Attorney General
Office of Legal Counsel

GREAT FALLS TRIBUNE 9-20-79

ARTICLES

Too much energy authority

It's not often that Montana gets a mention in a nationally syndicated column. Lately, though, Montana and other western states have been in the national spotlight — and not for the most encouraging of reasons.

President Carter wants to cut red tape on high priority energy projects to speed them up. This summer, he proposed an Energy Mobilization Board that would do just that.

But the question that Montana and other states have posed repeatedly since the Carter announcement is still unanswered. What happens to other federal and state energy laws when they appear to conflict with the wishes of an Energy Mobilization Board? Will they be overruled or not?

With Carter's proposal now in Congress, the question is crucial. Carter insists he opposes waiving substantial law in an effort to speed energy projects. But White House lobbyists have worked for a bill passed by the House Commerce Committee that would give the mobilization board authority beyond what Carter says he wants it to have. The board could recommend to the president the waiving of substantive and procedural federal, state and local laws that were delaying an energy project.

Anthony Lewis, in his column on this page, outlines the potential disaster stemming from such authority. And he asks, "If a coal liquefaction plant were to be built in Montana, requiring immense quantities of water, would the people of Montana and nearby states be content to have the crucial and complicated issues of Western water law decided by Washington lawyers?"

For Montanans, the answer to that question must be "no." Speeding up energy projects is one issue. But doing it at the expense of health and environmental protection is another — and should not be tolerated.

GREAT FALLS TRIBUNE 9-30-79

9-30-79
Tribune

One voice for western states

It has taken almost a hundred years, but the political heyday of the western states may have arrived. It's about time.

Thanks to the energy crisis, the rest of the nation has begun to realize the West has something everyone needs. It has massive amounts of coal and substantial amounts of other energy resources. To the eastern eye, the West also has plenty of space — room for people and for development.

And so President Carter, in his July energy message, placed a great deal of emphasis on the West and its resources. Western governors responded in the best political way possible. They are going to play their resource-rich hand for all it is worth.

Yes, the West is willing to play its part in reducing dependence on foreign oil. But there are limits. One is maintaining values the West is noted for: Agriculture needs the scarce water before energy projects do. Clean air and water — and that precious space — are as important as energy independence.

Shortly after Carter's energy speech, governors of 10 energy-rich western states warned that the government must go slow in synthetic fuel development.

Recently, the same governors met and continued their policy of speaking with a unified voice. The Western Governors' Policy Office adopted a resolution asking Congress to make sure an Energy Mobilization Board will not be able to override state law. Another resolution will put the western states on the path toward establishing a trade organization to further western products in the U.S. and elsewhere.

The theme of the governors' weekend Energy Summit was unity, a regional approach to energy independence and growth management, as Utah Gov. Scott Matheson put it.

That theme is a wise one. If the West holds a key to energy independence and is slated for energy development, western states must have a say in that development. The only way the states will be heard is if they speak with a unified voice.

GREAT FALLS TRIBUNE 10-17-79
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Energy cooperation from the top down

President Carter claimed a major victory the other week when the Senate passed a bill creating his proposed Energy Mobilization Board. It was a victory for the federal level of government. But for Montana and other states, the measure proves to be something less.

The purpose of the bill is to provide a coordinated "fast track" approval process for non-nuclear energy projects found to be in the national interest. But the way the bill is written assures that coordination and cooperation among the involved agencies actually means the federal energy board will call the shots, and state and local governments will have only to react.

Under the bill, the Energy Mobilization Board would have tremendous powers. It could give priority to certain energy projects. It could set deadlines for all agencies' decisions on such projects. Two years would be the longest time allowed unless the board determined otherwise. If a federal, state or local agency failed to meet deadlines, the board could step in and make a decision. The board also would be allowed to intervene in any agency proceeding.

In one sense, the Senate followed a middle road with passage of this measure. It rejected efforts to give the board more sweeping authority as well as those reducing the board's powers.

But the question for Montana, and other western states — those that will be most affected by any energy mobilization law — is just how much say state and local agencies indeed will have over development within their jurisdictions. The answer to the question is not spelled out in the bill.

Ambiguities over whether substantive as well as procedural laws will be altered are one reason Sen. Max Baucus voted against the bill. Sen. John Melcher, after certain amendments were added, was satisfied state laws would not be overridden.

Melcher points out states would have the right of veto on projects. That's correct. The energy mobilization board could not overrule an agency decision not to allow a project.

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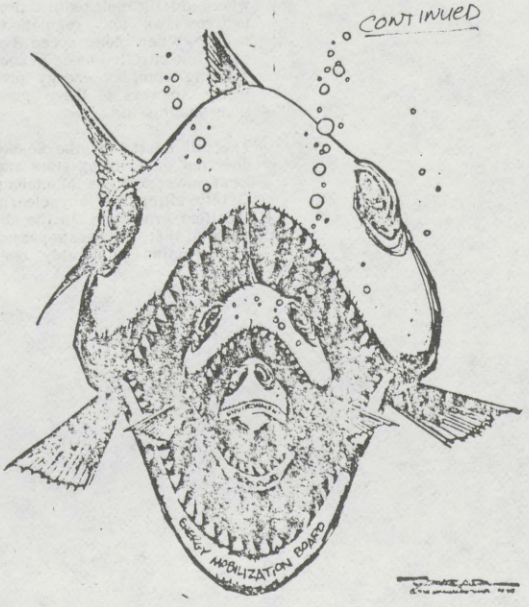

That gives the state some leeway. The state also can find some comfort in the fact the board could not approve a project until federal, state and local agencies do so first.

But that's about as far as state and local powers go. And even with those powers, the board controls the strings to make all agencies dance. Any agency action must be taken within deadlines the board sets. Deadlines, specifies the bill, should be set by cooperative agreement with the affected state and local governments. But (and here the bill adds a qualifier), this shall be done when it is possible.

Who's to decide when cooperation is possible and when it is not? You can bet it would not be the states or local communities.

Almost everyone will agree that red tape tying up energy projects can be cut. But where does the red tape stop and where do the substantive protective laws and regulations begin? When does speed become uncontrolled haste in considering complex energy projects? Answers to these questions are missing.

The bill passed by the Senate does not give strong state and local laws such as Montana's facility siting law any clearly specified protection. In the absence of that, the Senate-passed bill remains intolerably one-sided.

GREAT FALLS TRIBUNE 11-11-79

P14 - 11/11/79 Trib. * ↓ 11/11/79

EMB: not just a bad dream

Montana's energy mobilization nightmare didn't quite come true. Neither the House nor the Senate passed bills giving an Energy Mobilization Board outright powers to override state and local laws.

Ever since President Carter declared the nation needs a board to speed work on priority energy projects, Montana's concern has been that the board not be allowed to override the state's strong facility siting and environmental protection laws.

Oct. 4, the Senate passed a bill that gives the board sweeping authority but does not allow an outright waiver of substantial federal, state or local law. Procedural matters, such as time requirements, could be waived. One of the bill's major flaws is it does not clearly draw a line between what is substantial and what is procedural law.

The bill needs revision.

So does the measure the House passed, although it avoided the ambiguity of the Senate bill. During the last week of October, the House had a handful of energy mobilization bills from which to choose. It came up with a strange compromise indeed.

The House decided that an Energy Mobilization Board should not be able to waive state and local laws. But it made an exception for federal laws. Under the measure finally passed, a federal law that was determined to be a "substantial impediment" to a priority project could be waived. The board would have to recommend the waiver; and the president and both houses of Congress would have to agree.

The House ended up saying the integrity of state and local law at the expense of federal law. That is no kind of victory for Montanans to celebrate. The provision in the House bill is aimed specifically at federal environmental laws. Some laws (those covering labor, water rights and civil rights, for example) could not be waived.

The waiver section poses disturbing questions for Montana. Much of the state's coal is on federal land. If an Energy Mobilization Board decided to override the federal strip mining act, what effect would that have on mining in the state and on Montana strip mining law?

There are other questions. Why should state and local laws but not federal laws be protected? What is the difference between them? Obviously, it is politics. States like Montana have screamed loudly and repeatedly about not overriding their laws. They got their wish.

But even they got only part of it. A so-called grandfather waiver in the bill actually allows suspension of any law — provided the law is passed after an energy project has begun.

The impact of a grandfather waiver might be felt the most when applied to synthetic fuels plants. Synfuel technology is untried, but if Carter gets his way, widespread building of synfuel plants will begin. Then, if problems later crop up, state, local or federal laws could be written to correct them. And those very laws could be waived.

The grandfather waiver and the outright waiver of federal law are matters a conference committee will have to face. Montana isn't out of the energy mobilization nightmare yet.

Trib. 4/19/80

State siting authority still in danger

President Carter is pushing the Energy Mobilization Board conference committee to get its work done. But he's doing more than that. When the House conferees came up with a compromise proposal in late March on a key issue, Carter met with them, and in the words of Sen. John Melcher, "he gave them a pat on the back and a rather vigorous shove."

The key issue, as a Tribune editorial pointed out last Sunday, was whether or not a mobilization board should have the authority to waive federal law. The House says yes. The Senate says no.

The Senate conferees are right.

But there is another key issue that is unresolved, an especially crucial one for Montana: protection of individual states' siting authority.

Melcher serves on the conference committee, and he's worried about the push to wrap up conference committee work. He's worried for the sake of state siting processes.

Melcher fears that in the stampede to agree on the matter of waiver powers, other issues like siting authority may be trampled.

His fears are justified. All states have an interest in deciding whether federal laws can be waived by an EMB. But not all states have facility siting laws, nor do they necessarily care about protecting states like Montana that do.

Melcher wants to make sure an EMB could not interfere with a state siting process and force a decision on a priority project before the project's final deadline has passed.

Preserving state siting authority has been a key concern for Montana ever since Carter proposed an EMB to speed consideration of energy projects. It still should be a concern because the conference committee, under a House proposal, could effectively gut Montana's Major Facility Siting Act.

The EMB conference committee needs to be reminded, and vigorously, of the need to protect states' siting authority. In the committee's efforts to find agreement on a waiver provision, the question of state siting authority runs the risk of being overshadowed.

That shouldn't be allowed to happen.

GREAT FALLS TRIBUNE 4-19-80

GREAT FALLS TRIBUNE 4-27-80

Trib. 4/27/80 File: EMB

Sidetracking Carter's fast-track EMB

There's some speculation in the state that Sen. John Melcher may have voted against the interests of Montana in a Tuesday meeting of senators serving on the Energy Mobilization Board conference committee. The question is whether he voted for a compromise package that would allow the EMB to waive federal law.

Forget the speculation. Melcher says that is not the case at all; but more important, he voted against accepting waivers when the crucial showdown came Wednesday.

Even so, his opposition did little good. Senate members of the conference committee voted 9-8 to accept the waiver provision proposed by House conferees.

Instead of wondering about Melcher, Montanans might spend a little time wondering about Sen. Mark Hatfield, R-Ore. He had opposed the waiver, but was absent for the crucial Senate conferees' vote. With a 9-8 decision, his vote would have made a difference. Where was Hatfield?

Then, Montanans ought to spend a lot of time wondering about President Carter. He has misled Congress and the public on the issue of giving a mobilization board the authority to waive laws.

Last summer, Carter proposed a mobilization board to speed consideration of priority energy projects, but he has insisted all along he does not support giving the board waiver authority. His administration's actions speak louder than his insistences.

During Senate consideration of the EMB bill, White House lobbyists supported giving the board power to waive environmental laws. But Carter took pains to assure the Senate Energy Committee he did not favor the waivers.

The Senate passed a bill without waiver authority.

The House, on the other hand, voted to give the EMB the power to waive federal law. Again, White House lobbyists did little, if anything, to work against the waiver provision. After House passage, the administration said it would ask House-Senate conferees to strike the federal waiver.

Maybe Carter did ask that of the conferees. If he did, it was in a whisper. In the last month, he's been more concerned about getting the EMB measure out of conference committee, where it has languished since before Christmas, than about anything in the proposal itself.

After Wednesday's 9-8 vote, a White House statement read: "It now appears that a sound and workable bill will soon be on the president's desk. The tentative conference committee agreement meets the criteria the president set forth."

So much for Carter's concern about waivers.

MELCHER HAS DECLARED the fight isn't over in the conference committee — that 10 senators must sign the conference report for it to be final. He won't sign it, and, he says, there is no guarantee 10 senators will at a meeting next Tuesday.

We hope they won't sign.

But if the report is approved, the only hope left lies with the full Senate. The House has approved waiver authority once; the Senate hasn't. It should refuse the waiver provision again.

A five-member board should not have the power to undo what it takes Congress months and years to agree upon. Federal laws deserve more protection than that. The public, represented by Congress but not by an EMB, deserves more than that. The state of Montana and other western states, with enormous amounts of federal land and environments worth protecting, deserve more than that.

EMB proposals have been filled with dangers for Montana and its state siting authority. The waiver issue has overshadowed those dangers. Carter has waffled on waivers and come down on the wrong side. His fast-track mobilization proposal should die.

GREAT FALLS TRIBUNE 6-27-80

Trib. 6/27/80 File: EMB

Last chance to defeat EMB

President Carter has a publicity deadline coming up that he doesn't want to miss — the Fourth of July. If he has his way, and Energy Mobilization Board legislation passes Congress, he'll be able to declare the nation's energy independence on Independence Day.

Carter already has the windfall profits tax and synthetic fuels legislation in the bag, but he wants to have approval of EMB as well. Congress should do its best to foil his plans.

It's not that energy independence isn't a worthwhile goal, or that tying energy independence to July 4 isn't a fitting touch. The problem lies with the compromise bill that creates a fast track energy board. It shouldn't pass.

The measure is at the final approval stage. The Senate-House conference committee has issued its report. The House is scheduled to vote on the compromise bill today; the Senate is expected to take up the matter next week.

There is a chance — some people say it's just an outside chance — that the legislation will not go through. Opposition to the bill apparently is growing.

The opposition is understandable. The bill can be legitimately fought for a number of reasons, reasons that cover all sides of the political spectrum. They include:

— The bill allows an unnecessary and undue amount of federal interference in state affairs.

— The fast track board may do nothing more than add another layer of federal bureaucracy to the energy project approval process, ironically, all in an attempt to cut through the red tape.

— The EMB will have the power to waive crucial state and federal environmental protection laws.

— The bill does not clarify that states will have control over water rights and water appropriations.

— The bill may be so heavily contested in the courts that it becomes simply a lawyers' bonanza.

The Montana congressional delegation shouldn't hesitate to oppose the measure. But, at this writing, both representatives' attitudes on the EMB are unclear. Sens. Max Baucus and John Melcher strongly oppose the bill. Melcher was on the conference committee and was one of three senators who refused to sign the conference report. Melcher feared the conference committee measure could gut Montana's Major Facility Siting Act.

Reports of rising opposition to the bill and questions about its effectiveness are encouraging. But they may come too late. Here's hoping they don't. The measure is a disaster.

GREAT FALLS TRIBUNE 7-3-80

Trib. 7/3/80

Finally, a defeat for the EMB

President Carter wanted the whole energy cake this week and he only got two-thirds. But don't feel sorry for him. The last piece — with Energy Mobilization Board filling — was much too rich. It wouldn't have been good for anyone.

Two-thirds of Carter's energy program announced last summer has made it through Congress. Carter signed synthetic fuels legislation Monday, and a windfall profits tax measure earlier this spring.

According to Carter, the defeat of a conference committee report setting up a fast track energy board was "a serious disappointment and a major setback." For him politically, that is true. Carter insists energy independence should not be a partisan issue; and undoubtedly many of the representatives voting against the EMB did so to jab at Carter.

But more than partisan issues were at stake. Montana's congressional delegation — particularly the state's two senators — did a good job pointing that out.

Both Reps. Ron Marlenee and Pat Williams voted to send the conference report back to conference committee. Sen. John Melcher served on the conference committee that came up with the measure the House rejected. He was one of three senators on the committee who refused to sign the conference report.

One of Melcher's primary concerns during committee wrangling was that the furor over allowing waivers of laws would overshadow concerns about preserving the integrity of state siting authority. He voiced that concern over and over. It was one of the reasons for the House vote against the EMB.

Sen. Max Baucus lobbied against the EMB proposal on the House floor the day of the vote. His big argument was that the fast track board would create an unnecessary layer of bureaucracy. EMB, he insisted, stood for Even More Bureaucracy.

Technically, the EMB is not a dead proposal. But it suffered a bad defeat, and there may not be time to paste a proposal together again this year.

Let's hope not. The EMB defeat was well-deserved.

BILLINGS GAZETTE 10-9-80

Gazette Thurs
Oct. 9 p. 3-B

Federal/state energy policy sn

Gazette State Bureau

HELENA — The increasingly strained relationship between the states and federal government over energy policy will be the subject of three hearings scheduled by Sen. Max Baucus, D-Mont.

The first hearing will be in Billings Tuesday from 9 a.m. to 4 p.m. in Room 3043 of the Federal Building. The second hearing will be in Missoula Oct. 20 from 9 a.m. to 4 p.m. in the Federal Building. And the third meeting will be held sometime in December in Washington, D.C.

Spokesmen for Baucus said the hearings are designed to get the Senate Judiciary Committee, of which Baucus is a member, more involved in the question of federal preemption of states' rights on energy policy.

They also said they hope the hearings will help build a coalition of western senators who want to protect state's rights. Members of Congress are expected to testify at Baucus' hearing in Washington, D.C., in December.

The states' rights issue has grown in importance because Congress considered legislation this year to do such things as limit coal severance taxes of states and pre-empt state policies on siting of energy-generating facilities.

"The U.S. drive for energy independence may be changing the relationship between the states and United States government, and it's probably not changing it for the better," said one Baucus aide.

prls to be aired

The witnesses scheduled to testify at Tuesday's hearing in Billings are: Byron Dorgan, North Dakota tax commissioner; Joe McElwain, Montana Power Co. officer and representative of the Western Regional Council; Bob Hall, representative of the Western Governor's Policy Board; Nancy Wood, specical assistant to the governor and attorney general of Wyoming.

Witnesses for the Missoula hearing are: Attorney General Mike Greely; Ted Doney, director of the state Department of Natural Resources and Conservation; Roger Tippy, Helena attorney; Jackson Battle, University of Wyoming Law School professor; and Jan Laitos and Luke Danielson, both professors at the University of Denver College of Law.

MAX BAUCUS
states' rights at issue

GREAT FALLS TRIBUNE 10-15-80

8-C Great Falls Tribune Wednesday, October 15, 1980

Speakers denounce energy proposals

BILLINGS (AP) — Spokesmen from three states converged at a congressional hearing Tuesday to denounce federal efforts to limit state coal taxes and state review of energy projects.

North Dakota Tax Commissioner Byron Dorgan rapped what he called "the Texas hog rule," as Sen. Max Baucus, D-Mont., brought his Senate Judiciary subcommittee on energy legislation to Montana.

Baucus is opposed to both the effort to create an Energy Mobilization Board, proposed by President Carter to cut red tape on selected energy projects; and to a bill by Sen. Dale Bumpers, D-Ark., that would place a 12.5-percent ceiling on state coal taxes.

Montana charges 30 percent and Wyoming levies 17 percent, and the limitation is opposed by other coal states — such as North Dakota — that would not automatically be affected.

Dorgan said the attempt to limit coal taxes "seeks to exploit, at cut-rate prices, the coal resources of states like Montana, Wyoming and North Dakota for the benefit of major utility companies and their customers in Michigan, Illinois, Texas and other states."

Dorgan called it "the height of hypocrisy" for a state like Texas to complain that Montana's coal tax is too high. In 1979, he said, severance taxes on oil and gas in Texas raised revenues for that state of $1.2 billion. By contrast, Montana raised $59 million from its coal severance tax last year, and North Dakota collected only $15 million from its coal tax.

"I call that the Texas hog rule — take as much as you like, then complain loudly when someone else takes even a little," Dorgan said.

Baucus said both bills raise serious constitutional questions about the separation of federal and state powers.

"These proposals have been made and considered in the name of national energy independence," he said. "They have been reviewed by the U.S. Senate and House committees that handle energy policy. However, these proposals do not address energy issues alone. Rather, they would profoundly undermine the way the federal government and the states of this country have done business for almost 200 years."

Baucus said both the tax-limiting bill and the mobilization-board bill, which he said would allow some state restrictions to be overridden, may violate state powers guaranteed under the 10th Amendment to the U.S. Constitution.

There was little argument with that position.

Wyo. Gov. Ed Herschler and Attorney General John Troughton called for improvements in the mobilization board measure.

"More attention should be given to state and local participation in the decision to designate a priority energy project," Herschler said. "This early input would not only avoid potential clashes, but would ensure that no project is put on a fast track which might later beecome a technological, economic or envirionmental disaster."

GREAT FALLS TRIBUNE 10-15-80

Gazette P.I-D. 10/15/80

Beware the 'Texas Hog Rule'

By PATRICK DAWSON
Of The Gazette Staff

If the federal "fast track" steam roller is turned loose and the "Texas Hog Rule" takes over, then Montana and other coal-producing states in the Rocky Mountain region better watch out.

The "Texas Hog Rule" theory was put forth by Byron Dorgan, North Dakota's tax commissioner, who testified before Sen. Max Baucus' Judiciary Committee hearing in Billings Tuesday on the issue of federal preemption of state energy policies.

Baucus was in town gathering testimony to help fight two bills pending in Congress which threaten to override traditional state powers over their own affairs.

One is the Carter administration's plan to create the Energy Mobilization Board, a centralized federal agency that would have the power to preempt state and local regulations thought to be delaying proposed energy-related projects, like power plants, synthetic fuel and coal gasification plants.

The other bill would limit state severance taxes on coal to 12 percent of the selling price at the mine.

Montana's coal severance tax is 30 percent, Wyoming's total 17 percent and North Dakota's is 94 cents-per-ton.

Montana's tax was passed by the 1973 Legislature to help pay for the damages inflicted on the state by coal development.

A parade of selected witnesses appeared before Baucus to furnish him with ammunition in his battle against the EMB and coal severance tax bills back in Washington.

To nearly every witness, Baucus expressed concern that residents of Montana and other Western states — "even editorial writers" — seem to be silent on the issue, and he asked for suggestions on how to get the people fired up.

"There is interest at the grass roots, but people back home feel overwhelmed, powerless. They don't think they stand a chance against Big Government and Big Industry," said Helen Waller, Circle, president of the agriculturally-based Northern Plains Resource Council.

She termed the proposed EMB "a monstrous Frakenstein" that "represents tyranny intolerable to American Constitutional democracy."

North Dakota's Dorgan said the attempt to limit coal severance taxes "seeks to exploit, at cut rate prices, the coal resources of states like Montana, Wyoming and North Dakota, for the benefit of major utility companies and their customers in Michigan, Illinois, Texas and other states."

Dorgan called it "the height of hypocrisy for a state like Texas to complain that our coal severance taxes are too high. In 1979, severance taxes on oil and gas in Texas raised in revenues for that state $1.2 billion. By contrast, Montana raised only $59 million from its coal severance tax last year, and North Dakota collected only $15 million from its coal severance tax. I call that the 'Texas Hog Rule:' Take as much as you like, then complain loudly when somebody else takes even a little."

Dorgan defended plans like Montana's coal severance tax trust fund which will start retaining one-half of the coal taxes to help finance future needs. Coal mining of the plains, he said, "is a one-time harvest," and the trust fund would help "replace that resource with something the future generations can use."

Baucus said both the EMB bill and the limit on state severance taxes raises serious Constitutional questions about the separation of federal and state powers.

"These proposals have been made and considered in the name of national energy independence," Baucus said. "They have been reviewed by the the U.S. Senate and House committees that handle energy policy. However, these proposals do not address energy issues alone. Rather, they would profoundly undermine the way the federal government and the states of this country have done business for almost 200 years."

Other comments included:

"Improve the front end of the EMB designation process," suggested a statement from Wyoming Governor Ed Herschler and Attorney General John Troughton. "More attention should be given to state and local participation in the decision to designate a priority energy project. This early input would not only avoid potential clashes, but would ensure that no project is put on the fast track which might later become a technological, economic or environmental disaster."

Montana Power's Joseph McElwain, representing the industrial-based Western Regional Council, said "The marketplace will determine what is a reasonable severance tax on coal or any other resource far more efficiently than can the U.S. Congress. Coal consuming interests will go elsewhere if a severance tax is too high and in turn, a state may reconsider its tax rate."

McElwain, speaking for his group of oil, mining and utility interests, said creation of the EMB could prompt states to file "legal actions...which would only further impede project construction and operation."

McElwain took the opportunity Tuesday to protest all federal control, including federal clean air, land use and environmental regulations, and advocated the allowance of "regional variations" instead of applying "one inflexible and rigid federal standard."

Bull Mountain rancher Bob Tully, president of the Western Organization of Resource Councils, called the EMB proposal "a bad idea, an unworkable idea, and, most probably, an unconstitutional idea. We are not prepared to jeopardize the long-term production of our agricultural land, the value of our timber or our precious water resources to meet short-term energy production goals calculated to meet insatiable foreign and domestic energy appetites."

"We are not colonies to be ruled," Tully told Baucus. "The EMB legislation is an insult accusing state governments and citizens alike o aggravating our energy problems. This is no true. We work within the legal system and ad only that others do likewise. How can anyone b expected to remain a law-abiding citizen if th federal government won't abide by the law it self? The EMB would be a bully, changing th rules in the middle of the game."

GREAT FALLS TRIBUNE 10-24-80

Federal intervention in states' rights criticized

By PEGGY KUHR
Tribune Staff Writer

In meetings around the state, Sen. Max Baucus, D-Mont., has been encouraging efforts to reopen history and law books to take a look at the concept of balancing federal powers with the rights of individual states.

In Baucus' view, the balance is being tipped, and in the wrong direction.

His concern is national energy policy, in particular recent efforts in Congress to place a limit on a state's coal severance tax and to create a federal board that would speed up decision-making processes for priority energy projects.

Bills putting a cap on coal taxes and creating an Energy Mobilization Board (EMB) have been reviewed by the Senate Energy Committee. But Baucus, who is a member of the Judiciary Committee, thinks the bills concern more than energy policy. The two bills would, he says, "profoundly undermine the way the federal government and the states of this country have done business for almost 200 years."

To gather support — and ammunition — for future battles in Congress on federal pre-emption of state policies, Baucus has toured the state in the last two weeks, speaking repeatedly against a coal severance cap and an EMB and discussing the concept of federalism. He has held two Senate Judiciary Committee hearings, one last week in Billings and one Monday in Missoula. Tuesday he led a symposium at the University of Montana Law School.

As a result of these meetings, Baucus told the Tribune, he sees a "grand opportunity" facing individual states to assert their decision-making powers in the face of federal pressures to pre-empt them.

"The success of states to prevent federal intrusions," he said, "depends on states' efforts to take care of problems themselves and in a reasonable way." The more Congress and the U.S. Supreme Court see that states are trying to resolve energy problems fairly, he said, the better the chance they will not interfere.

"If Dale Bumpers were convinced that Montana was being fair," Baucus said, "he wouldn't have introduced his bill to limit severance taxes." Bumpers is the Arkansas Democrat whose bill places a 12.5 percent cap on any state's coal severance tax.

But, in Baucus' view, more than fairness is at stake. The matter of federal pre-emption endangers the 10th amendment to the U.S. Constitution. That amendment leaves powers not specifically delegated to the federal government and not specifically prohibited to the states in the hands of the states themselves or with the people.

According to Baucus, increasing federal and congressional power translates into less and less meaning for the 10th amendment and, consequently, into an erosion of states' powers. Information gathered at the Judiciary hearings and the symposium will be taken back to Washington, D.C., to stem that erosion.

Baucus said the hearings and the symposium have been valuable in providing a western point of view that often isn't heard in Washington. His Judiciary Committee sessions focused on the coal severance and EMB controversies. The symposium added a third area of contention — water rights.

Following are some highlights of Judiciary Committee testimony:

- Roger Tippy, a Helena attorney who helped research and draft the Montana coal tax legislation, likened the state's experience to the 30 percent tax to a political experiment.

"Within the American political system," he said, "the states are the social laboratories where political experiments are tried ... Now, every laboratory in which scientists are experimenting shares some common features. The experimenters will be tinkering with, fiddling and adjusting the object of the experiment ... However, when the experiment is attacked from outside, the scientists are apt to leave off tinkering and keep the experiment just as it is. A siege mentality sets in, which dictates that the experiment be defended in detail exactly as it is constituted then."

- Ted Doney, director of the Montana Department of Natural Resources and Conservation, said the principle victim of EMB legislation would be the state's Major Facility Siting Act. Admitting that the state has had a role in past delays of the permitting process, Doney said that was because the state was new at working out the process. He added that permit applicants also caused delay because they didn't know what was required of them under the 1973 act. However, Doney said, most delays are from the federal level.

Doney said states traditionally have had the role of making resource decisions. To ward off federal government pre-emptive powers, he concluded, states must show that they are improving their siting processes.

• Luke Danielson, attorney for the National Wildlife Federation, decried the energy mobilization legislation as bad precedent for resolving critical national energy issues. Constitutional questions aside, he said, he questioned whether the EMB was a workable proposal and called for local control and decision-making.

"If we truly believe that decisions made after open participation by a variety of interests ... are the best decisions," he noted, "we cannot afford to create a highly centralized decision-making process, responsive only to a few interests, at the highest and most remote level of government."

• Bob Hall, from Colorado Gov. Richard Lamm's office, cited a need for cooperation instead of federal pre-emption in state's affairs. The public policies of energy development are decided, Hall said, on several forums — by all three levels of government and with the private sector.

"Federal policy," Hall said, "is but one component of national policy — and in the end, it may not even be the most important."

Hall, who testifed on behalf of the Western Governors Policy Office, pointed out that the states have gone ahead and are streamlining their own siting and permitting processes.

• Allen Olson, attorney general of North Dakota, called legislation that would limit coal severance taxes "the ultimate in legislation that is discriminatory against western states," and claimed its passage would turn western states into a regional colony to serve the economic needs of the rest of the nation.

GREAT FALLS TRIBUNE 10-27-80

Intervention in states' rights said still alive with EMB plan

By PEGGY KUHR
Tribune Staff Writer

If Sen. Max Baucus and other participants in an eight-hour seminar in Missoula last week needed concrete justification for their examination of federal vs. state decison-making powers, they got it early in the day.

Jonathan Lash, attorney for the Natural Resources Defense Council, led off a morning discussion on Energy Mobilization Board legislation with a warning that the EMB proposal is not dead.

While the House rejected a conference committee report on the legislation last June, Lash said, there is a chance of a new conference report session after the November elections.

The proposed legislation set up a powerful three-member federal board that would have had authority to designate priority energy projects and shepherd them through a speeded-up permitting process that it — not state, local or other federal agencies — would set. The board could waive existing federal laws. Its actions would have been subject to sharply limited judicial review.

The EMB, a windfall profits tax and synthetic fuels legislation formed President Carter's three-pronged energy independence program. The energy mobilization proposal was the only part of his program that Congress rejected in its entirety.

Lash said that even if a lame duck effort fails, the same pressures will exist for a future Congress to develop legislation allowing some sort of expedited process for certain energy projects.

Lash led the first of a three-part symposium on "Federal Pre-emption of State Energy Policies," sponsored by Baucus, the Western Governors Policy Office and the University of Montana Law School. In addition to energy mobilization, the 30-odd participants discussed Montana's coal severance tax in a session led by Mike McGrath, Montana assistant attorney general, and water rights controversies in a session led by Henry Loble, Helena attorney and chairman of the state's Reserved Water Rights Compact Commission.

Lash commented that almost no one outside of Washington, D.C., seemed to support or oppose the EMB proposal. Yet, he said, there was enormous political discussion in the capital about it. Baucus has made similar comments around the state in recent weeks, repeating his worry that there has been relatively little public concern, in Montana about EMB.

Lash said all kinds of mythology surrounded the energy mobilization proposal: concepts that the states are the cause of most delay in permitting processes, that every energy project has been tied up in endless litigation, that federal agencies simply delay permit decisions without excuses, and that the central problem holding up energy projects is red tape, something that can be swept away.

Such mythology still exists, Lash warned, and he said states will have to answer it if they don't want to see a similar bill before Congress again.

Little consensus was reached on how states should respond to future energy mobilization proposals. Some participants said they felt more comfortable with a project-by-project federal process, granting special consideration to individual energy development proposals as the need arose. Lash, on the other hand, said relying on a project-by-project approach is dangerous.

MONTANA'S LEGAL STRATEGY

to defend the coal severance tax came under some fire during the symposium. McGrath explained that a crucial part of the state's legal defense of the 30 percent tax is to question how the courts can decide whether the tax rate is too high. Montana's argument in court has been that the 'costs of coal mining cannot be measured. How can anyone measure, McGrath asked, the cost of losing an aquifer — or the psychological effects a boom and bust economy has upon people.

Jackson Battle, University of Wyoming law professor, and Owen Anderson, of the North Dakota attorney general's office, replied that the state had better be prepared to itemize those costs anyway.

Baucus added that, as a political matter, the more Montana can identify and document the costs of mining, the better it will be able to fend off efforts to place a cap on its severance tax. While the severance tax is in the middle of a court battle, it also is being challenged in Congress. Bills have been introduced to limit states' coal severance taxes.

One strategy western congressmen and senators should pursue, Baucus said, is to introduce a series of bills limiting other states' taxes. One tax he cited was Washington state's tax on Boeing Corp. Such an effort would dramatize the foolishness of any bill limiting Montana's tax, Baucus said.

A STRONG AGREEMENT

emerged from the symposium discussion on water rights that the way to resolve those controversies is through negotiation, rather than litigation or legislation. Wyoming officials emphasized the high costs of their current effort to adjudicate the Big Horn basin and advised that any state look at alternatives to taking water rights determinations to court.

Loble called Montana's Reserved Water Rights Compact Commission a "noble experiment . . . unique in western states." The commission, set up by the last Legislature, is negotiating now with the Flathead and Cheyenne Indians and with the federal government to arrive at water rights compacts.

Loble asserted that if the commission's work fails, it will be a failure of the negotiation process. But if it succeeds, he said, it may provide an answer to the state-federal-Indian problem of determining who owns what water and, at the same time, allow states to maintain their traditional role of governing water decisions.

GREAT FALLS TRIBUNE 1-4-81 Trib. 1/4/81 file State Pltc.

The watchword is federalism...

If talk about federalism and the declining influence of the 10th Amendment doesn't grab you, look at it from another angle: that of the federal government overriding state powers.

Montanans have been hollering about federal government interference for years, most recently in reference to energy issues. It's a matter they're likely to keep hollering about, and they'll be helped along the way by the state's two U.S. senators.

Both John Melcher and Max Baucus have been paying close attention to the balance of state powers vs. federal government powers, and in slightly different ways, a result of the Senate committees on which they serve.

From his seat on the Senate Judiciary Committee, Baucus has approached the matter from a more philosophical stand, that of the endangered 10th Amendment to the U.S. Constitution. The amendment states, "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."

In October, Baucus held two Judiciary Committee hearings and led a day-long symposium on federal pre-emption of state energy policies. The focus of those sessions lay in three areas: attempts by Congress to place a cap on the level of coal severance tax a state can levy; attempts to pass a bill creating an Energy Mobilization Board (EMB) to speed decision-making on certain priority energy projects; and water rights controversies that involve states, the federal government and Indian tribes.

The coal severance tax limit and the EMB, in particular, represented distinct threats to Montana laws.

Melcher, who sits on the Senate Energy Committee, has had a direct shot at the matter of federal pre-emption. EMB and coal severance legislation has been fought in the committee. Melcher also served on the EMB conference committee, and refused to sign the conference report.

Rather than talking from a focus of federalism and the 10th Amendment, Melcher hammers on Montana's right to say "no." In a letter to constituents last month, Melcher said "the agenda for energy development in our state must be controlled by Montana law and by Montanans." He specifically mentions the state's coal severance, facility siting and strip mining laws.

...One battlefront is Montana

Montana made it through this last congressional session safely. Several coal severance tax limitation efforts were beaten back. The House rejected the conference committee report on the Energy Mobilization Board.

Still, the controversy over federal vs. state control is far from over. Both Melcher and Baucus expect it to continue and both say they will continue to fight the matters from their various committees. Baucus adds that his assignment to the Senate Environment and Public Works Committee for the new Congress will help, particularly on water resources issues.

But the game will be different with the Republicans in control of the Senate. Montana's Democratic senators have to focus on getting bipartisan backing for their stands on states' powers.

It still is too early to tell what President-elect Ronald Reagan's stand on these energy/federalism matters will be. While he opposed the EMB, his action was political. Passage of EMB legislation was one of President Carter's energy priorities.

But Reagan's views on federalism received ample attention during the campaign. He favors shifting government services to the state level.

Representatives of the nation's governors and legislatures also have focused on federalism recently. The executive committee of the National Governors Association and the steering committee of the National Conference of State Legislatures held their first joint meeting in November. The subject was federalism and the need to give state governments a stronger role in problem-solving. Among specific recommendations was that Congress and the next administration make sure federal laws and rules do not pre-empt state laws and policies.

Federalism is a banner word that Montanans will hear repeatedly over the next four years — both from their congressional delegation and elsewhere. It's a word deserving of attention. This state, with huge energy resources and strict energy laws, has a tremendous stake in battles over who will make decisions about them.

STATEMENT OF MAX BAUCUS BEFORE THE MONTANA STATE LEGISLATURE - FRIDAY, JANUARY 16, 1981.

Mr. President, (Mr. Speaker,) distinguished members of the Senate (House), Ladies and Gentlemen, I want to thank the Senate (House) bi-partisan leadership for this opportunity to address you this afternoon.

INTRODUCTION

I am here today because we Montanans face an old problem that demands our renewed attention: the relationship between Montana and the federal government. Over the next few years, the decisions made here in Helena -- and those made in Washington, D.C. -- will dictate whether the federal government will serve as a constructive or a destructive force in this state for decades to come. These decisions will determine the quality of life in Montana far into the twenty-first century.

In the wake of the 1980 election, we are tempted to adopt a "wait and see" attitude. Some suggest the new Administration will respond to an angered electorate and revolutinize the federal government; & unwarranted federal interference will be eliminated.

No one doubts that the strong winds of political change have once again swept this land. Indeed, voters have expressed old frustrations with a new urgency.

But, the voters do not always obtain what they seek. We would be well served to heed the maxim: "the more things change, the more they remain the same." We should remember that, as the 96th Congress of the United States came to an end, Montana's ability to control its own destiny lay threatened by a rash of ill-advised proposals... proposals that will live on and, if adopted, cripple our ability to shape our own economic and political future.

So far, the Montana Congressional delegation -- with the help of Montana officials and concerned citizens -- has succeeded in preventing unwarranted federal intrusions. But, the proposals that Montanans rightly fear were not defeated on November 7. They live on -- and will face us for the rest of this decade.

Our past has prepared us to meet the test of the present and the challenges of the future.

THE MONTANA RECORD

As the decade of the 1970's opened, Montanans faced its new challenges squarely. We did not waste the years that followed.

The State reorganized its executive branch to enhance its responsibility and to make it more accountable and accessible to the public.

The State adopted a strong, innovative constitution to replace the 80-year old document written by the copper barons of another age.

The State Legislature drafted, debated, passed and revised a responsible facility siting law to ensure that energy plants are built only as needed and where environmentally compatible.

The Legislature adopted and refined a tough strip mine reclamation law that has served as a model for other states and for the federal government.

We enacted a water law designed to ensure an organized, even-handed determination of water rights and beneficial uses.

And, we adopted a reasonable coal severance tax to pay the coal development costs we will bear during and long after that one-time harvest of an irreplaceable resource.

In sum, Montana's record on energy matters is unparalleled. We have indicated clearly that we will contribute to national energy needs in a responsible and timely fashion. We seek no escape from that obligation.

We will not hamstrong needed energy development with delays, cumbersome procedures, or unrealistic requirements. Nor do we propose to profiteer from the nation's disturbing energy predicament.

But, we also intend to make clear that Montana is no longer and will not again become a resource colony. In doing so, we intend to demand and help structure a new partnership with the federal government.

Unfortunately, Montana's record on these matters has not ended the federal attempts to undermine our right to shape our own future. Our willingness to cooperate has gone largely unheeded.

Montana's history is littered with the wreckage of a short-sightedness that destroys communities, neighborhoods, and families. All too recently, despite our best efforts, we have felt again the tragedy of commerce uprooted -- of economic activity halted by forces beyond our control and held to no account.

It is against this background that the federal attacks on our energy program appear so disheartening. For we have labored long and tirelessly to convince the federal government that our approach to the energy crisis is reasonable and deserves support.

We have heeded the words of Thomas Jefferson that the only way states can avoid the abuse of national power is to strengthen state governments... and this must be done by the states themselves....

The recent past makes it clear that the task of strengthening state government is one without end.

CURRENT CHALLENGES

In the term of Congress just ended, some members decided they did not approve of Montana's severance tax on coal. They suggested that Montana and other Western states were like a little OPEC-- exacting exorbitant tribute at the expense of energy consumers. A number of bills were drafted, introduced and considered on the subject. The measures proposed a federal cap that would have slashed our coal tax and ruined our balanced budget.

In a hail storm of bad numbers and faulty arguments, the advocates of this serious federal intrusion forced the pace -- slowed only by the well-made arguments of Montanans at the end of the legislative session.

Of course, they were not pleased to learn that our severance tax generates a scant one-twentieth the revenue produced by a Texas severance tax; that our tax adds on the average only about one percent to the utility bill of a typical Midwest consumer; and that the oil severance taxes in Louisiana, Oklahoma, and New Mexico are much higher per unit of heat than our coal tax. They were not pleased to hear; but we made our point. And, for the time, we have prevailed.

A second major challenge to Montana's future was the proposal to create the Energy Mobilization Board. The idea seemed straightforward enough.

The EMB, we were told, would cut red tape, sweep away the bureaucratic cobwebs, and expedite agency decisions on energy projects. Why? Because the United States must end its dependence on foreign sources of oil.

Unfortunately, like the deceptive vigor of a dying tree, it was all too easy to believe and all too good to be true.

The EMB as proposed would accomplish its worthy objective in a wholly unacceptable fashion. It would not foster federal/state cooperation, because it would treat the State of Montana as if we were merely a nuisance, or an obstacle. This new super bureaucracy would have the power to ignore and override state laws and local ordinances.

The EMB could blackmail states with federally established deadlines. And, if the deadlines were not met -- for whatever reasons -- the EMB could simply substitute its decision for that of the state. Nor would Montana courts be available to challenge these awesome powers of the EMB.

In short, the states would be the victims, not the partners of American energy policy. State and local authorities would be swept from the path as the federal juggernaut rushed to its belated rendevous with the nation's energy crisis.

MONTANA'S RESPONSE

Montana's response to these federal intrusions must be both measured and direct. This is no time to stop the flow of innovative legislation and programs that have highlighted Montana's past. We must build on that foundation and not weaken our resolve to exercise those powers reserved to our State by the U.S. Constitution.

If we are successful, Montana can lead the way to a new, progressive states' rights. Montanans -- along with our friends from other states -- can help chart a new partnership with the federal government that respects our state's constitutional rights and allows us to determine our destiny.

But we will not be successful if we get swept up in posturing and rhetoric that only makes us appear parochial, narrow and selfish. We must act responsibly and with good sense, or risk losing the hard-fought victories of the past.

SAGEBRUSH REBELLION

The Legislature soon will face this dilemma when it considers what's been called the Sagebrush Rebellion. This protest, fed by the frustrations many of us feel because of federal interference in state affairs, makes a legitimate point.

If by the Sagebrush Rebellion, we mean making federal agencies responsive to state concerns, then I endorse it.

But, if the Sagebrush Rebellion means transfering millions of acres of land from federal to state ownership, then I oppose it.

Such land transfers are politically unrealistic and unworkable.

However, even if they were attainable, they pose a severe threat to our state's financial future.

In Fiscal Year 1980 Montana, for example, received over $8 million in payments in lieu of taxes. This would be lost to the state. Whether Montana could ever replace this source of revenue is at best uncertain, in view of the fact that state lands are tax exempt.

In addition, the state would be forced to employ hundreds of land managers -- costing millions of dollars -- to oversee the 20 million acres in this state alone.

And, increased revenues we would receive from timber sales, mineral leasing and grazing permits most likely would not offset these losses.

Such a massive loss of revenue -- at a time when the state is trying to cut its budget -- would result in a fiscal nightmare.

As I attended the confirmation hearing of Interior Secretary nominee James Watt earlier this month, I was impressed by his measured restraint on this issue. A staunch advocate of an increased state role in resource decisions, he made it clear that he would not favor a massive transfer of federal land at this time.

Instead, he advocated a "good neighbor" policy -- characterized by much closer cooperation and consultation with the people most directly affected by public land management decisions.

We should welcome this approach. We must not be diverted by the sabre rattling of an ill-conceived rebellion.

We must focus on the real points of federal attack on states' rights and mount a forceful, effective defense. What we started in the 1970's, we must continue throughout the 1980's.

CONSTRUCTIVE RESPONSES

We in Congress must work closely and in a bipartisan fashion with you in state government as we continue this critical task. It is impossible for those of us in Congress to stop the EMB and save the coal tax on our own. We must have your help in demonstrating again and again that Montana intends to behave responsibly in determining our future while contributing to the resolution of serious national difficulties.

If the rest of the country is convinced that Montana's Facility Siting Act is reasonable and is being implemented reasonably, then the enactment of an EMB becomes less likely.

If we wish to improve our chances of stopping the EMB, we should ensure that our review of proposed energy facilities is conducted in a timely, consistent manner. We may be able to streamline our review procedures so that they operate on a one-stop basis -- with joint hearings, joint studies, and a unified decision timetable agreed upon and binding upon all state and federal agencies involved.

If we want to improve our chances of defeating coal tax cap proposals, we must renew our effort to establish that the tax is carefully structured so as to cover the legitimate costs of coal development. We will need to expand our attempt to educate federal officials in this regard.

In short, if it becomes clear to the rest of the country that Montanans are interested in doing their share to increase our nation's energy production, then it is less likely that Montana's right to make those decisions will be challenged.

Only in this way, can Montana continue to serve as a model and a conscience for the nation.

CONCLUSION

These are tough challenges. They will test our abilities and our fortitude.

Montana's Congressional delegation will do its best to fend off challenges to our state's coal severance tax. But, we cannot do the job alone. We need your help and assistance.

Montana's State Legislature needs to improve our state's government. And, we must find ways to work constructively with its sister states to broaden our strength.

In return, when we are in Washington,we will do our best to aid your efforts wherever possible.

Working together, we will hasten the day when states can once again serve in the role Jefferson foresaw, as the true barriers protecting our liberties.

CONGRESSIONAL RECORD STATEMENT

SENATOR MAX BAUCUS
JANUARY 27, 1981

MONTANA COAL SEVERANCE TAX

Mr. President, I rise to speak in support of a state's right to impose severance taxes. And, I urge the Senate not to open a Pandora's box by meddling in a state's taxing actions.

My state -- Montana -- is a natural resource state. Our economy prospers or suffers in direct correlation to the demand for our agricultural, timber and mining products.

That economic fact of life has resulted in a roller coaster of economic promise and collapse throughout much of Montana's past. During the 19th and 20th centuries, many of the critical decisions about our state's future were made in corporate boardrooms far from Montana's borders.

Their decisions were made based on what they think is appropriate -- not on any particular sense of corporate responsibility. The bottom line -- not the future of Montana's towns and communities -- all too often has been the order of the day.

When a smelter closes down -- as recently happened in Anaconda, Montana -- there is no economic activity to replace it. When the mill stops producing, families' savings are wiped out, their homes lose their value, and whole communities simply shut down.

Anaconda, Montana, has not shut down yet, but its road to economic health is rocky and steep.

But the human suffering far outweighs the willingness of Anaconda's parent company and the Federal government to offer help.

This scenario has happened time and time again in Montana's past. It is not a pretty sight; and it is not an acceptable condition for the future. Montanans want the right to determine their future -- just like all Americans.

Montanans remember this history quite well. That is why the Montana Legislature acted quickly, and responsibly, in the face of the rumored coal boom in the early 1970's.

We knew that coal had promise -- that it was being sought as America's energy "ace in the hole". But, we also remembered that too often others took the entire deck of cards and left Montana with only the hole.

We knew we would be called upon to contribute, so that a beleaguered nation could reduce its dependence on unreliable sources of oil from the Middle East.

We did not shrink from that obligation; nor did we seek an escape. But, we did see the potential costs, and we acted legitimately to protect ourselves from them.

The State did not simply enact a severance tax and drop the matter. We enacted strong reclamation laws to promote the restoration of our fragile land. The rains are not plentiful in Montana and the ground water flows are easily interrupted. Massive disruption of the vegetation, soils and waters of eastern Montana's ranching economy is a risky experiment. No one is sure if the fertility of the land can be restored.

Nor can we be certain that the area's social fabric, its relaxed rural character, will not be irreparably torn.

The Legislature was keenly aware that the costs of coal development are both immediate and long term. In fact, the greatest costs, the biggest problems, will occur at the conclusion of this one-time harvest.

Our severance tax was designed to protect both our present and our future -- to ensure that some day we would not become wards of the government, living on depleted land in a busted economy.

In this session of the Congress -- as in the last -- Montana's Coal Severance Tax is being unfairly attacked. We hear golden oratory about the need to "protect consumers" and increase coal production. I am no stranger to these concerns. But, I recognize misplaced intentions when I see them.

The advocates of slashing Montana's coal tax may be long on hope, but they are short on evidence. Simply put, there is no convincing evidence of any kind that a 12½ percent cap on coal taxes would reduce a consumer's utility bill by more than a few cents a month.

Nor is there any convincing evidence of any kind that the Montana tax is hindering needed coal production. In the decade of the 1970's, Montana coal production increased 1,000 percent. It is projected to increase again and again in the years ahead.

Those who wish to help electricity consumers in the Midwest should look not at the Montana coal tax, but at the costs of coal transportation. The Montana tax is only about 10 percent of the delivered price of coal.

The railroad that hauls the coal collects a whopping 60 percent of the delivered price. Over half the cost of coal is collected by a railroad that monopolizes coal transportation.

Over the last several years, Montanans have fought hard to restore competition to the railroads of the Northern Tier. We have been trying to save the Milwaukee Railroad so it could compete with the Burlington Northern and provide some incentive for lower rates.

I am not pleased to have to say it, but it is in fact the case, that we had very little help from those who are now taking pot shots at Montana's coal tax. They passed up a golden opportunity to strike a blow for their state's electricity consumers.

Mr. President, I do not deny that the Federal government has an interest in reducing our dependence on foreign oil. But that does not mean the federal bull should be loosed in the china shop of state resource taxation. The Montana tax simply does not slow the production of Western coal.

I do not deny that the Federal government has a legitimate concern about the skyrocketing electricity bills of American consumers. But that does not mean the Federal government should victimize states that are trying to stabilize their economic present and establish an economic future.

The question is not whether this Congress has constitutional authority to slash Montana's tax. We all know that issue would ultimately have to be decided by the courts. The real question is whether the Congress wishes to continue badgering Western states by pressing this unfortunate proposal.

In the months ahead, I will be writing my colleagues to warn in greater detail about the grave dangers of the federal intrusion in the traditional domain of state taxation. Virtually no state will be immune.

Many states have taxes whose impacts far exceed those of the Montana coal severance tax. For example, the sales and utility taxes paid by Illinois and Michigan electricity consumers are many times the Montana coal tax. In 1979, a typical Michigan electricity consumer paid 12¢ per month for Montana production taxes and over 2 dollars in Michigan sales tax.

In addition, many states are very successful in exporting their tax burden -- far more aggressive in doing so than Montana. Illinois and Michigan are among them.

The principles behind this tax cap -- that we in Congress are free to tell states how much they can tax -- is a principle alien to our system of federalism.

Ultimately, no region of the country will benefit from the anger that will persist if this tax cap is adopted.

It will not aid consumers. It will not encourage energy conservation. It will not increase coal production. It will not improve coal transportation. It will not speed the day when this nation stands tall with a clear, consistent national energy policy.

But, it will divide the country. It will intrude in areas traditionally handled by states. And it will further aggravate the tensions that already exist in the West as a result of Washington's lengthening reach.

It is, in short, not an answer. It diverts attentions from the real problem. And, it is simply one more proposed solution that will only make our difficulties worse.

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