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SURFACE COAL MINING LAW IN THE WESTERN UNITED STATES: HOW DOES IT PROVIDE FOR WILDLIFE?

ROBERT E. BECK**

I. INTRODUCTION

The increased coal production in the western United States has raised many environmental concerns and has caused much discussion of potential impacts.¹ One environmental concern that has received relatively little attention in the legal journals is the extent to which wildlife and wildlife habitat will be protected during the surface mining process. This article considers the laws of six western states, Colorado, Montana, North Dakota, South Dakota, Utah, and Wyoming, in that context. Five of these states have the potential for immediate substantial expansion of coal development through surface mining methods. South Dakota is included not so much because of a large potential for expansion, but to have a complete picture of the Northern Great Plains area.

All six states contain environments that could be changed dramatically even into the unforeseeable future as a result of surface mining.² The climatic and soil conditions of these states suggest severe reclamation problems and render reclamation experiences in the min-

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1. See, e.g., Hagen, *North Dakota's Surface Mining and Reclamation Law: Will Our Wealth Make Us Poor?*, 50 N.D.L. REV. 437 (1974); Imes & Wall, *An Ecological-Legal Assessment of Mined Land Reclamation Laws*, 53 N.D.L. REV. 359 (1977); White & Barry, *Energy Development in the West: Conflict and Coordination of Governmental Decision-Making*, 52 N.D.L. REV. 451 (1976).

2. Two recent documents are available that between them present a substantial amount of background data on the subject states and which it would be impossible to even begin to summarize herein. These two documents are DEPARTMENT OF THE INTERIOR, FINAL ENVIRONMENTAL IMPACT STATEMENT, PROPOSED FEDERAL COAL LEASING PROGRAM (1975) (all six states); NORTHERN GREAT PLAINS RESOURCE PROGRAM MANAGEMENT TEAM, EFFECTS OF COAL DEVELOPMENT IN THE NORTHERN GREAT PLAINS (1975) (Montana, North Dakota, South Dakota, and Wyoming).

ing regions of the eastern United States of little value.³ Within these states, however, there is a myriad of wildlife whose habitat and migration patterns could be affected.⁴ This wildlife includes several endangered species, such as the peregrine falcon, black-footed ferret,

3. See *supra* note 2; NATIONAL ACADEMY OF SCIENCES, REHABILITATION POTENTIAL OF WESTERN COAL LANDS (1974); NORTH DAKOTA GEOLOGICAL SURVEY, SOME ENVIRONMENTAL ASPECTS OF STRIP MINING IN NORTH DAKOTA (1973).

4. There could be both direct and indirect impact. The North Dakota Commissioner of Game and Fish has identified three general potential impacts. The first impact is total temporary loss of habitat due to vegetation removal in the actual area being mined; some species may not be able to return after the land is reclaimed, particularly if wooded areas destroyed are not replaced. The second is increased poaching and hunting activities. The increase comes both from mining crews and from area hunters who are able to use the improved access ways into the surrounding areas. The third is dissolved solids flowing into nearby water courses and eventually into reservoirs creating fish management problems. Newly exposed and packed sodic soils do not allow for water penetration such as was possible prior to reclamation when the land captured most of the scant rainfall. Stuart, *Surface Mining and Wildlife*, NORTH DAKOTA OUTDOORS, Nov. 1974, at 2.

The following table indicating potential habitat loss from three different development scenarios is taken from NORTHERN GREAT PLAINS RESOURCE PROGRAM MANAGEMENT TEAM, EFFECTS OF COAL DEVELOPMENT IN THE NORTHERN GREAT PLAINS 57 (1975).

TABLE IV-3.—Cumulative acres of projected habitat losses to coal development in the study area.¹

Species	1980	1985	2 2000
CDP I			
Deer, mule, and white-tail	6,370	17,961	51,359
Antelope	5,478	14,914	44,227
Other big game ³	167	257	527
Sage grouse	3,602	8,647	23,896
Sharp-tailed grouse	5,538	14,329	42,808
Hungarian partridge	5,116	13,287	39,270
Ring-necked pheasant	3,811	10,702	31,883
Turkey	826	1,976	5,939
CDP II			
Deer, mule, and white-tail	6,141	24,346	91,523
Antelope	5,259	20,548	73,662
Other big game ³	167	257	527
Sage grouse	3,802	16,127	50,111
Sharp-tailed grouse	6,309	20,018	75,813
Hungarian partridge	4,887	18,974	69,784
Ring-necked pheasant	3,381	12,771	52,833
Turkey	826	1,976	10,599
CDP III			
Deer, mule, and white-tail	18,507	67,732	277,255
Antelope	15,007	58,594	210,842
Other big game ³	167	257	2,216
Sage grouse	6,325	24,716	142,669
Sharp-tailed grouse	17,675	59,958	213,970
Hungarian partridge	15,967	54,836	177,795
Ring-necked pheasant	13,016	43,177	122,638
Turkey	5,309	17,103	83,208

¹ Includes only good-and medium-quality habitat lost, except other big game and turkey also include low-quality habitat lost to mine facilities and urban development. Various species ranges overlap, thus some acreages are listed more than once; therefore, acreages cannot be totaled.

² Based on the assumption that it takes 25 years to restore wildlife habitat, acreages strip mined between 1972-1975 are considered restored and have been subtracted from year 2000 totals.

³ Includes in different ecosystems elk, black bear, moose, mountain goats, and bighorn sheep.

In analyzing a reclamation attempt of a test plot in the Bull Mountain area of Montana, Gary L. Dusek, Planning Ecologist, had this to say:

Although the revegetated area may have met some of the forage needs of mule deer during the three years following seeding, it is my opinion that the disturbed area by itself never did provide the diversity of forage necessary to meet year-long forage requirements. The intent expressed in the

whooping crane and bald eagle in all six states, and the northern rocky mountain wolf in Montana and Wyoming.⁵

With the enactment of the federal Surface Mining Control and Reclamation Act of 1977,⁶ it will be necessary for states to re-examine their consideration of wildlife in the surface mining process since the Act provides for express consideration of wildlife in developing general performance standards for mining and reclamation operations.⁷ In addition, the Act provides that states must establish procedures for excluding certain types of areas from surface mining. In this "fragile" lands exclusion, wildlife could play a significant role.⁸

reclamation plan was to restore the area to grassland for the purpose of grazing. The revegetated test pit did not compare favorably with natural grasslands, either in diversity or relative abundance of plant species, when forage requirements of mule deer in the Bull Mountains are considered. For example, the test pit provided an abundant quality of yellow sweetclover during the summer of 1973, but little else. Shrubs used by mule deer during winter, primarily silver sagebrush and skunkbush, were virtually nonexistent on the test pit area. Winter is normally considered the most critical time of the year for wildlife.

. . . [I]t is difficult to assess the actual impact that disturbance of the 12 acre plot would have on a population of mule deer, or even the deer that occur in the immediate vicinity. However, if the size of the area was magnified, we have a pretty good idea that the result could be detrimental.

G. DUSEK, *Vegetational Responses by Substrata, Gradient, and Aspect on a Twelve Acre Test Plot in the Bull Mountains*, in FORT UNION COAL FIELD SYMPOSIUM 233, 244-45 (1975).

5. A recent North Dakota study places three mammals, the eastern timber wolf, the black-footed ferret, the California bighorn, and four birds, the prairie falcon, the American peregrine falcon, the greater prairie chicken, and the whooping crane, on the "threatened" list. In addition, four mammals, the northern swift fox, the fisher, the pine marten, and the Canada lynx, and five birds, the ferruginous hawk, the American osprey, the pigeon hawk, the northern long-billed curlew, and the western burrowing owl were listed as "status undetermined." One fish, the pallid sturgeon, was listed as status undetermined. MCKENNA & SEABLOOM, *THREATENED AND UNIQUE WILDLIFE OF NORTH DAKOTA: AN INITIAL STATUS REPORT passim* (Mar. 1976).

For a discussion of threatened species for a portion of Colorado, Montana, Utah, and Wyoming, see DEPARTMENT OF THE INTERIOR, FINAL ENVIRONMENTAL IMPACT STATEMENT, PROPOSED FEDERAL COAL LEASING PROGRAM 2-38 to 2-39 (1975). For a discussion of the balance of these four states and North Dakota and South Dakota, see *Id.* at 2-60 to 2-61.

Current information has been provided by the Endangered Species Coordinator of Region 6, headquartered in Denver, Colorado.

6. Pub. L. No. 95-87, 91 Stat. 445 (codified at 30 U.S.C.A. §§ 1201-1328 (Supp. 1977)).

7. 30 U.S.C.A. § 1265(b) (Supp. 1977) states in part as follows:

General performance standards shall be applicable to all surface coal mining and reclamation operations and shall require the operation as a minimum to—

.
(17) insure the the construction, maintenance, and postmining conditions of access roads into and across the site of operations will control or prevent . . . damage to fish or wildlife or their habitat . . . ;

.
(24) to the extent possible using the best technology currently available, minimize disturbances and adverse impacts of the operation on fish, wildlife, and related environmental values, and achieve enhancement of such resources where practicable. . . .

8. 30 U.S.C.A. § 1272(a)(3) (Supp. 1977) states in part as follows:

Upon petition pursuant to subsection (c) of this section, a surface area may be designated unsuitable for certain types of surface coal mining operations if such operations will—

.
(B) affect fragile or historic lands in which such operations could result in significant damage to important historic, cultural, scientific, and esthetic values and natural systems. . . .

II. STATUTORY AUTHORIZATION FOR WILDLIFE AND WILDLIFE HABITAT PROTECTION

All six of the states have enacted statutes specifically dealing with surface mining for coal.⁹ This section explores the extent to which these statutes provide for protection of wildlife and wildlife habitat during the process of surface mining for coal. In addition, this section explores to what extent statutes other than those directly related to surface mining for coal may allow for protection of wildlife and wildlife habitat from the impacts of surface mining for coal.

A. SURFACE MINING STATUTES

While some of the six state statutes specifically *require* consideration of wildlife, others merely *authorize* the supervising agency to undertake such consideration. This discussion will consider each category separately.

1. Requirement that Wildlife Be Considered

Montana¹⁰ and South Dakota¹¹ have provisions in their surface mining statutes that prohibit the granting of mining permits for land areas where there would be a specified impact on wildlife or wildlife habitat. The Montana statute bans the granting of mining permits in "unique" areas, a term defined to include those areas that have special value for their "biological productivity, the loss of which would jeopardize certain species of wildlife."¹² The South Dakota statute bans the granting of mining permits where the land is unsuitable for reclamation. One of the specific criteria for determining such unsuitability is whether "the biological productivity of the land is such that the loss would jeopardize certain rare species of wildlife indigenous to the area."¹³ In both states it is necessary to have a mining permit before surface mining for coal begins.¹⁴

9. Colorado Mined Land Reclamation Act, COLO. REV. STAT. §§ 34-32-101 through 34-32-124 (Supp. 1976); Montana Strip Mining Reclamation Act, MONT. REV. CODES ANN. §§ 50-1034 through 50-1057 (Supp. 1977); North Dakota Reclamation of Surface-Mined Lands Act, N.D. CENT. CODE §§ 38-14-01 through 38-14-13 (Supp. 1977); South Dakota Surface Mining Reclamation Act, S.D. COMPILED LAWS ANN. §§ 45-6A-1 through 45-6A-33 (Supp. 1977); Utah Mined Land Reclamation Act, UTAH CODE ANN. 1953 §§ 40-8-1 through 40-8-23 (Supp. 1977); Wyoming Environmental Quality Act, WYO. STAT. §§ 35-502.1 through 35-502.74 (Supp. 1975).

Several of these statutes or earlier versions thereof have received law journal treatment. See Hagen, *North Dakota's Surface Mining and Reclamation Law—Will Our Wealth Make Us Poor?*, 50 N.D.L. REV. 437 (1974); Comment, *South Dakota's Coal and the 1971 Surface Mining Reclamation Act*, 21 S.D.L. REV. 351 (1976); Comment, *Strip-Mining Reclamation Requirements in Montana—A Critique*, 32 MONT. L. REV. 65 (1971); Comment, *Wyoming Environmental Quality Act of 1973, Section III Land Quality: The Regulation of Surface Mining Reclamation in Wyoming*, 9 LAND & WATER L. REV. 65, 97 (1974).

10. MONT. REV. CODES ANN. § 50-1042(2) (Supp. 1977).

11. S.D. COMPILED LAWS ANN. § 45-6A-9.1 (Supp. 1977).

12. MONT. REV. CODES ANN. § 50-1042(2)(a) (Supp. 1977).

13. S.D. COMPILED LAWS ANN. § 45-6A-9.1(4) (Supp. 1977).

14. MONT. REV. CODES ANN. § 50-1039(1) (Supp. 1977). The permit applies only to

Montana and Wyoming have provisions in their surface mining statutes that require consideration of wildlife or wildlife habitat in the reclamation process. The Montana statute requires land to be reclaimed so that vegetative cover will sustain "grazing pressure from a quantity and mixture of wildlife and livestock at least comparable to that which the land could have sustained prior to the operation."¹⁵ The Wyoming statute sets a standard requiring reclamation to the "highest previous use of the affected lands, the surrounding terrain and natural vegetation, surface and subsurface flowing or stationary water bodies, wildlife and aquatic habitat and resources."¹⁶ However, whereas the Montana statute prohibits the granting of a mining permit for land on which reclamation cannot be accomplished,¹⁷ the Wyoming statute only provides that nonreclaimability of the land *may* be used as a basis for denying a mining permit.¹⁸ In addition, although the Wyoming standard clearly recognizes "wildlife," that recognition may be offset by the general preference for "the *highest* previous use," depending upon how "highest" is defined.

Wyoming also requires the applicant for a mining permit to include in his proposed reclamation plan, which accompanies the permit application, procedures "to avoid . . . endangering . . . animal life . . . wildlife and plant life in or adjacent to the permit area."¹⁹ Furthermore, in the application itself, the applicant is required to include a description of the land, noting "its vegetative cover . . . [and] indigenous wildlife," among other things.²⁰

The other three states, Colorado, North Dakota and Utah, do not provide in their surface mining statutes that wildlife or wildlife habitat must be considered or protected at any given point in the surface mining process. Of the three that do require some consideration, only two, Montana and South Dakota, expressly prohibit surface mining for the purpose of protecting wildlife and wildlife habitat and then only under limited circumstances relating to "rare" or "jeopardized" species.

2. Authority to Consider Wildlife

While only three of the state statutes require consideration of wildlife in some aspect, the surface mining statutes in all six states contain language that can be construed as authority for considering

"operators" and one is an operator only if he "removes or intends to remove more than ten thousand (10,000) cubic yards of mineral or overburden," MONT. REV. CODES ANN. § 50-1036(7) (Supp. 1977); S.D. COMPILED LAWS ANN. §§ 45-6A-7, -10 (Supp. 1977).

15. MONT. REV. CODES ANN. § 50-1045(a) (Supp. 1977).

16. WYO. STAT. § 35-502.21(a)(i) (Supp. 1975).

17. MONT. REV. CODES ANN. § 50-1042(1) (Supp. 1977).

18. WYO. STAT. § 35-502.24(g) (Supp. 1975).

19. WYO. STAT. § 35-502.24(b)(xiii) (Supp. 1975).

20. WYO. STAT. § 35-502.24(a)(vii) (Supp. 1975).

or protecting wildlife and wildlife habitat at various stages of the surface mining process. In some of the statutes the authority is express through specific references to wildlife; in the other statutes it can only be implied from general language.

The Colorado,²¹ Montana,²² and Wyoming²³ surface mining statutes specifically state that at least one purpose for their enactment is to "protect" wildlife. The North Dakota statute refers to the "enhancement" of wildlife.²⁴ The South Dakota and Utah statutes do not refer to wildlife protection or enhancement as a purpose for their enactment, but since South Dakota has the protective requirements discussed above,²⁵ wildlife protection is an obvious purpose of its statute.

The statutes in Colorado²⁶ and North Dakota²⁷ require that applicants for a mining permit indicate in a proposed reclamation plan the area that is going to be reclaimed for wildlife purposes, although these statutes do not require that any portion be so reclaimed. The Colorado statute goes one step further and requires the applicant to describe in the reclamation plan how the plan will rehabilitate the "natural vegetation, wildlife, water, air, and soil."²⁸ Furthermore, in Colorado, once a portion of the area has been designated for reclamation for wildlife purposes, the minimum requirements are those agreed upon by the operator and the supervising board.²⁹

Although the statutes in Colorado,³⁰ North Dakota³¹ and South Dakota³² either give authority to deny or require denial of a mining permit if the land is not reclaimable, they do so without express mention of wildlife in the statutory reclamation standards. However, the general statutory language is broad enough to include wildlife, particularly when related to the purposes for which the statutes were enacted. Furthermore, wildlife may benefit from the mere fact

21. COLO. REV. STAT. § 34-32-101 (Supp. 1976) ("to . . . aid in the protection of wildlife and aquatic resources").

22. MONT. REV. CODES ANN. § 50-1035(1) (Supp. 1977) ("protect . . . wildlife").

23. WYO. STAT. § 35-502.2 (Supp. 1975) ("will . . . be harmful to wildlife, fish and aquatic life").

24. N.D. CENT. CODE § 38-14-01 (Supp. 1977) ("the enhancement of wildlife and aquatic resources").

25. *Supra* notes 11-14.

26. COLO. REV. STAT. § 34-32-116(1)(k) (Supp. 1976) provides as follows: On all affected land, the [mine] operator in consultation with the landowner where possible, subject to the approval of the board [Colorado Mined Land Reclamation Board], shall determine which parts of the affected land shall be reclaimed for . . . other uses, including food, shelter, and ground cover for wildlife.

27. N.D. CENT. CODE § 38-14-05(8) (Supp. 1977) ("which parts of the affected land shall be reclaimed for . . . food, shelter, and ground cover for wildlife. . .").

28. COLO. REV. STAT. § 34-32-112(3) (Supp. 1976).

29. COLO. REV. STAT. § 34-32-116(1)(q) (Supp. 1976) provides as follows: If the [mine] operator's choice of reclamation is for the development of the affected land for . . . food, shelter, and ground cover for wildlife, the basic minimum requirements necessary for such reclamation shall be agreed upon by the operator and the board.

30. COLO. REV. STAT. § 34-32-115 (Supp. 1976).

31. N.D. CENT. CODE § 38-14-04 (Supp. 1977). This statute seems to prefer agricultural use, however.

32. S.D. COMPILED LAWS ANN. § 45-6A-9.1(1) (Supp. 1977).

that reclamation is required in all six states to be completed with "reasonable diligence."³³ Although these provisions relate to reclamation, an event that occurs as the last stage of the mining process, they authorize taking into account wildlife before mining begins since reclamation plans must be submitted with a mining permit application³⁴ and mining cannot commence until a permit has been issued.³⁵ Utah, however, does not require a permit. It requires that only a reclamation plan be approved in advance of mining, and it is the only one of the six states not to mention wildlife or wildlife habitat anywhere in its surface mining statute.³⁶ Wildlife can be included within the stated general objectives of the Utah statute, however.³⁷

In addition to the purpose and reclamation provisions already discussed, several other relevant provisions exist in several of the statutes. Montana, South Dakota and Wyoming specifically protect land of "ecological" importance. Such areas could have an important relationship to wildlife. Thus, in Montana if an area has "special, exceptional, critical, or unique ecological fragility" so that once disturbed it could not return to its "ecological role in the reasonable foreseeable future," or if it has "special, exceptional, critical or unique" ecological importance" in that impact on it could precipitate a systemwide reaction of unpredictable scope or dimensions," it qualifies.³⁸ South Dakota requires protection where "[t]he ecological importance of the land surrounding the area to be mined is such that the proposed operation's effects could cause an adverse reaction of unpredictable scope to be suffered by the total ecosystem of which the surrounding land is a part."³⁹ Finally, Wyoming will deny a mining permit if "the proposed mining operation would irreparably

33. COLO. REV. STAT. § 34-32-116 (Supp. 1976) (exceptions are recognized); MONT. REV. CODES ANN. §§ 50-1043 through 50-1046 (Supp. 1977); N.D. CENT. CODE § 38-14-05 (Supp. 1977); S.D. COMPILED LAWS ANN. § 45-6A-17.2 (Supp. 1977); UTAH CODE ANN. § 40-8-3 (Supp. 1977); WYO. STAT. § 35-502.24(g) (Supp. 1975).

34. COLO. REV. STAT. § 34-32-112(1)(b) (Supp. 1976); MONT. REV. CODES ANN. § 50-1039(5) (Supp. 1977); N.D. CENT. CODE § 38-14-04(1)(c) (Supp. 1977); S.D. COMPILED LAWS ANN. § 45-6A-17 (Supp. 1977) (code does not require plan to accompany permit application but does require plan approval before mining commences); WYO. STAT. § 35-502.24(b) (Supp. 1975).

35. COLO. REV. STAT. § 34-32-109 (Supp. 1976); MONT. REV. CODES ANN. § 50-1039(1) (Supp. 1977); N.D. CENT. CODE § 38-14-03 (Supp. 1977); S.D. COMPILED LAWS ANN. § 45-6A-10 (Supp. 1977); (except where less than 10,000 tons are produced in a year); WYO. STAT. § 35-502.23 (Supp. 1975).

36. UTAH CODE ANN. § 40-8-7(g) (Supp. 1977).

37. UTAH CODE ANN. § 40-8-12(1) (Supp. 1977) provides as follows:

The objectives of mined land reclamation shall be:

(a) To return the land, concurrently with mining or within a reasonable amount of time thereafter to a stable ecological condition compatible with past, present and probable future local land uses;

(b) To minimize or prevent present and future on-site or off-site environmental degradation caused by mining operations to the ecologic and hydrologic regimes and to meet other pertinent state and federal regulations regarding air and water quality standards and health and safety criteria;

(c) To minimize or prevent future hazards to public safety and welfare.

38. MONT. REV. CODES ANN. § 50-1042(2)(b) & (c) (Supp. 1977).

39. S.D. COMPILED LAWS ANN. § 45-6A-9.1(5) (Supp. 1977).

harm, destroy, or materially impair any area that has been designated to be of a unique irreplaceable, historical, archeological, scenic, or natural value."⁴⁰

The Colorado statute contains an important unique provision whereby a mining permit may be denied if the mining would be in violation of any city, town, or county or subdivision regulations.⁴¹ Under the Colorado Local Government Land Use Control Enabling Act,⁴² municipalities and counties are given authority to protect lands within their jurisdictions "from activities which would cause immediate or foreseeable material danger to significant wildlife habitat and would endanger a wildlife species."⁴³ Although the Colorado Land Use Act⁴⁴ is designed to leave primary land use control at the local level, the legislature has designated certain "areas of state interest," and local governments are encouraged to designate further areas and activities of state interest and to regulate land use accordingly.⁴⁵ Generally, local guidelines are permitted to be more stringent than the criteria set forth by the legislature.⁴⁶

Among areas of state interest are both "mineral resource areas"⁴⁷ and "natural resources of statewide importance." Extraction of minerals is to be permitted in mineral resource areas unless it would cause significant danger to public health or safety, or unless the local government finds that the economic value of the minerals is less than the value of another existing or requested use with which mining will interfere.⁴⁸ "Natural resources of statewide importance" are defined to include "significant wildlife habitats in which the wildlife species . . . in a proposed area could be endangered."⁴⁹ These resources are to be "administered by the appropriate state agency [Division of Wildlife] in conjunction with the appropriate local government in a manner that will allow man to live in harmony with, rather than be destructive to, these resources. Consideration is to be given to the protection of those areas essential for wildlife

40. WYO. STAT. § 35-502.24(g)(iv) (Supp. 1975).

41. COLO. REV. STAT. § 34-32-115 (Supp. 1976).

42. Colorado Local Government Land Use Control Enabling Act, COLO. REV. STAT. §§ 29-20-101 through 29-20-107 (Supp. 1976).

43. COLO. REV. STAT. § 29-20-104(1)(b) (Supp. 1976).

44. Colorado Land Use Act, COLO. REV. STAT. §§ 24-65-101 through 25-65-106 (1974 & Supp. 1976).

45. COLO. REV. STAT. § 34-65.1-101 (Supp. 1976).

46. COLO. REV. STAT. § 34-65.1-402(3) (Supp. 1976).

47. COLO. REV. STAT. § 24-65.1-104(11) (Supp. 1976) provides as follows:

[A]reas in which minerals are located in sufficient concentration in veins, deposits, bodies, beds, seams, fields, pools, or otherwise as to be capable of economic recovery. The term includes but is not limited to any area in which there has been significant mining activity in the past, there is significant mining activity in the present, mining development is planned or in progress, or mineral rights are held by mineral patent or valid mining claim with the intention of mining.

48. COLO. REV. STAT. § 24-65.1-202(1)(a) (Supp. 1976).

49. COLO. REV. STAT. § 24-65.1-104(12) (Supp. 1976).

habitat.”⁵⁰ Development in natural resource areas of statewide importance is to be “conducted in a manner which will minimize damage to those resources for future use.”⁵¹

Montana, in addition to a surface mining reclamation statute, also has a statute regulating the location of new surface mines.⁵² One aspect to be considered in determining whether a mining proposal involves a “new” mine or merely an expansion of an existing mine is “important differences in . . . wildlife . . . from an existing . . . mine.”⁵³ Although no other specific mention of wildlife exists in this statute, wildlife should play a role in the administration of the statute since its purpose is to protect “the environment life support system from degradation.”⁵⁴

B. STATUTES OTHER THAN SURFACE MINING STATUTES

Wildlife and wildlife habitat can be protected from the effects of surface mining for coal through statutes other than the surface mining statutes. Therefore, in order to give a more complete picture of the possible scope of protection and in keeping with the general purpose of this article, it is necessary to point out some of these “indirect” statutory sources of protection that may exist in the six states. The first discussion will be general in nature and will discuss statutory sources other than those specifically categorized as wildlife statutes. The second discussion will consider the wildlife statutes.

1. General Statutory Sources of Protection

All six states have air quality and water pollution control statutes which either follow federal mandates or set forth more stringent requirements than the federal laws mandate.⁵⁵ All of these air quality and water pollution control laws contain specific references to the protection and preservation of wildlife. Therefore, to the extent that surface mining for coal would either affect air quality or introduce

50. COLO. REV. STAT. § 34-65.1-202(3) (Supp. 1976).

51. *Id.*

52. Montana Strip and Underground Mine Siting Act, MONT. REV. CODES ANN. §§ 50-1601 through 50-1617 (Supp. 1977).

53. MONT. REV. CODES ANN. § 50-1603(4) (Supp. 1977).

54. MONT. REV. CODES ANN. § 50-1602(1) (Supp. 1977). The rules and regulations promulgated pursuant to the Act, however, contain only two references to wildlife, both in the context of the applicant providing information about wildlife on the proposed mine site. MONT. ADM. CODE, R. 26-2.10(18)-S10390(A)(2)(b) (1975); *Id.* R. 26-2.10(18)-S10400(C)(4) (1975).

55. COLO. REV. STAT. §§ 25-7-101 through 25-7-129 (1974 & Supp. 1976) (air); *Id.* (1974) (water); MONT. REV. CODES ANN. §§ 69-3906 through 69-3921-1 (Supp. 1977) (air); *Id.* §§ 69-4801 through 69-4827 (Supp. 1977) (water); N.D. CENT. CODE ch. 23-25 (Supp. 1977) (air); *Id.* ch. 61-28 (Supp. 1977) (water); S.D. COMPILED LAWS ANN. ch. 34A-1 (1977) (air); *Id.* ch. 34A-2 (1977) (water); UTAH CODE ANN. ch. 26-24 (1976) (air); *Id.* ch. 73-14 (1968) (water); WYO. STAT. §§ 35-502.1 through 35-502.74 (Supp. 1975) (air & water).

pollutants into the waters of the state, the development could be controlled for the benefit of wildlife.⁵⁶

All six states have land use planning statutes which establish varying degrees of control exercisable at the state and local levels.⁵⁷ Traditional land use planning tools such as zoning and government ownership are used. These laws are not designed for specific application to coal development but might be used to protect wildlife and wildlife habitat from impacts of surface mining for coal. In only one of the six states, Colorado, is wildlife and wildlife habitat specifically dealt with under state land use planning statutes and made referable to the surface mining statute.⁵⁸

In addition to air quality, water pollution control, and land use planning statutes, all six states have statutes pertaining to water resource allocation.⁵⁹ To the extent that surface mining for coal involves a consumptive use of water,⁶⁰ or the necessity to protect a valuable supply of water,⁶¹ a regulatory focal point exists. Most water resource allocation statutes recognize wildlife as a legitimate water use, although in any balancing of uses it might often come out as the least preferred.⁶²

56. See DEPARTMENT OF THE INTERIOR, FINAL ENVIRONMENTAL IMPACT STATEMENT, PROPOSED FEDERAL COAL LEASING PROGRAM 3-8 to 3-9 (1975), where air and water pollution aspects of surface mining are noted.

57. Colorado Local Government Land Use Control Enabling Act, COLO. REV. STAT. §§ 29-20-101 through 29-20-107 (Supp. 1976); Colorado Land Use Act, *Id.* §§ 24-65-101 through 24-65-106 (1974 & Supp. 1976); MONT. REV. CODES ANN. §§ 11-3801 through 11-3876 (1968 & Supp. 1977) (city or city-county planning boards); *Id.* §§ 16-4101 through 16-4107 (1967 & Supp. 1977) (county planning and zoning districts); *Id.* §§ 16-4701 through 16-4711 (1967 & Supp. 1977) (county zoning districts); N.D. CENT. CODE ch. 11-33 (1960) (county zoning); *Id.* ch. 40-47 (1968) (city zoning); N.D. CENT. CODE ch. 40-48 (1968) (municipal master planning); *Id.* §§ 58-03-11 to -15 (1972) (township zoning); S.D. COMPILED LAWS ANN. tit. 11 (1969) (planning and zoning); UTAH CODE ANN. ch. 10-9 (1973) (city zoning, building & planning, *Id.* ch. 17-27 (1973) (county zoning, building & planning); Wyoming State Land Use Planning Act, WYO. STAT. §§ 9-849 through 9-862 (Supp. 1975).

However, the Montana county zoning districts statute expressly provides as follows: "No . . . regulation adopted pursuant to . . . this act shall prevent the complete use, development or recovery of any mineral . . . resources by the owner thereof." MONT. REV. CODES ANN. § 16-4710 (1967).

In addition to these general planning and zoning statutes, there are some more specialized ones such as Montana Natural Areas Act of 1974, MONT. REV. CODES ANN. §§ 81-2701 through 81-2713 (Supp. 1977); Montana Natural Streambed and Land Preservation Act of 1975, *Id.* §§ 26-1510 through 26-1523 (Supp. 1977); North Dakota Nature Preserves Act, N.D. CENT. CODE, ch. 55-11 (Supp. 1977); North Dakota Little Missouri State Scenic River Act, *Id.* ch. 61-29 (Supp. 1977).

58. See *supra* notes 41-51, and text accompanying.

59. COLO. REV. STAT. tit. 37 (1974); Montana Water Resources Act, MONT. REV. CODES ANN. §§ 89-101 through 89-142 (1964 & Supp. 1977); Montana Water Use Act, *Id.* §§ 89-865 through 89-8111 (Supp. 1977); N.D. CENT. CODE tit. 61 (Supp. 1977); S.D. COMPILED LAWS ANN. tit. 46 (1969); UTAH CODE ANN. tit. 73 (1968); WYO. STAT. tit. 41 (1959 & Supp. 1975).

60. This is more likely to occur from the use of coal such as for power generation than from surface mining itself.

61. Five of the six states take special note in their surface mining statutes of the necessity to protect state water resources. COLO. REV. STAT. § 34-32-116(1)(h) (Supp. 1976); MONT. REV. CODES ANN. § 50-1055(3) (Supp. 1977); N.D. CENT. CODE § 38-14-05(14) (Supp. 1977); S.D. COMPILED LAWS ANN. § 45-6A-9.1(8) (Supp. 1977); WYO. STAT. § 35-502.33(b) (Supp. 1975).

62. See 5 WATERS AND WATER RIGHTS §§ 408.1, 408.4, 424 & 425 (R. Clark ed. 1972).

Four of the states, Montana, North Dakota, South Dakota and Wyoming, have enacted comprehensive statutes dealing with solid waste disposal,⁶³ a type of waste that can result from surface mining for coal.⁶⁴

Finally, two of the states, Montana and South Dakota, have Environmental Policy Acts, the central thrust of which is the preparation of an environmental impact statement.⁶⁵ To the extent that surface mining for coal falls within the purview of these statutes,⁶⁶ another indirect regulatory device for controlling the impact of surface mining on wildlife and wildlife habitat may exist.

2. Wildlife Statutes

All six states have wildlife statutes that deal with protecting wildlife and wildlife habitat within the state, but which do not have any specified relationship to the laws relating to surface mining.⁶⁷ Traditionally, state wildlife statutes have dealt with game animals or fish. In recent years, however, there has been considerable movement to encompass non-game species. This has occurred in Colorado and Montana. Thus, the 1973 Colorado Nongame and Endangered Species Conservation Act states that it is the policy of Colorado to "manage nongame wildlife for human enjoyment and welfare, for scientific purposes, and to insure to their perpetuation as member of ecosystems. . ."⁶⁸ Similarly, the 1973 Montana Nongame and Endangered Species Conservation Act provides for the conservation and management of "nongame wildlife and endangered species."⁶⁹

Although the relationship between all of these wildlife statutes and the statutes specifically directed toward surface mining for coal is not clear, all of the wildlife statutes provide for setting aside

63. Montana Solid Waste Management Act, MONT. REV. CODES ANN. §§ 69-4001 through 69-4020 (1970 & Supp. 1977); North Dakota Solid Waste Management and Land Protection Act, N.D. CENT. CODE ch. 23-29 (Supp. 1977); South Dakota Solid Waste Disposal Act, S.D. COMPILED LAWS ANN. ch. 34A-6 (1977); Wyoming Environmental Quality Act, WYO. STAT. §§ 35-502.1 through 35-502.74 (Supp. 1975).

64. Five of the state surface mining statutes take special note of this type of waste. COLO. REV. STAT. § 34-32-116(e) (Supp. 1976); MONT. REV. CODES ANN. § 50-1043(3)(a), (d), (g) & (4) (Supp. 1977); N.D. CENT. CODE § 38-14-05(5) (Supp. 1977); S.D. COMPILED LAWS ANN. § 45-6A-17.1 (Supp. 1977); WYO. STAT. § 35-502.24(b)(ix) (Supp. 1975).

65. Montana Environmental Policy Act, MONT. REV. CODES ANN. §§ 69-6501 through 69-6518 (Supp. 1977); South Dakota Environmental Impact of Governmental Actions, S.D. COMPILED LAWS ANN. ch. 34A-9 (1977).

66. The required application information in most of the six states seems to fulfill the same purpose that an environmental impact statement would fulfill, however; thus the policy acts may be considered inapplicable.

67. COLO. REV. STAT. tit. 33 (1974); MONT. REV. CODES ANN. tit. 26 (Supp. 1977); N.D. CENT. CODE tit. 20.1 (Supp. 1977); S.D. COMPILED LAWS ANN. tit. 41 (1977); UTAH CODE ANN. tit. 23 (1976); WYO. STAT. tit. 23.1 (Supp. 1975).

68. COLO. REV. STAT. § 33-S-102 (1974).

69. MONT. REV. CODES ANN. §§ 26-1801 through 26-1809 (Supp. 1977). Nongame wildlife is defined to mean "any wild mammal, bird, amphibian, reptile, fish, mollusk, crustacean or other wild animal not otherwise legally classified by statute or regulation of this state. Animals designated by statute or regulation of this state as predatory in nature are not classified as 'nongame wildlife' for purposes of this act."

Id. § 26-1802(7) (Supp. 1977).

various types of game management areas.⁷⁰ It seems probable that surface mining will not be permitted in these areas. It would clarify the issue substantially, however, if the legislatures stated that surface mining will not be permitted in game management areas set aside pursuant to state law. Whatever the relationship between wildlife statutes and surface mining statutes is, it appears clear that the general trend is toward broader, not narrower, protection for wildlife and wildlife habitat.

III. IMPLEMENTATION

Having reviewed the basic statutory authority that exists for protecting wildlife from the impacts of surface mining, it is now appropriate to consider how that authority is or has been implemented. While the state is principally responsible for implementing the surface mining statutes in all six of the states, varying roles exist for citizen and federal input into the implementation process.

A. THE STATE GOVERNMENT'S ROLE

In all six states the statutes designate a state agency or agencies principally responsible for implementation of the surface mining statutes.⁷¹ Generally it is only one agency that is responsible, but in Wyoming both the Department of Environmental Quality and the independent Environmental Quality Council have lead roles to play.⁷²

70. COLO. REV. STAT. § 33-1-112 (1974); MONT. REV. CODES ANN. § 26-104.6 (Supp. 1977); N.D. CENT. CODE ch. 20.1-11 (Supp. 1977); S.D. COMPILED LAWS ANN. ch. 41-4 (1977); UTAH CODE ANN. § 23-21-1 (1976); WYO. STAT. § 23.1-10(c) (Supp. 1977).

To use Colorado for illustrative purposes, there numerous tracts have been acquired and set aside for wildlife purposes including 35 wildfowl areas (ranging in size from 5 to 10,527 acres), 31 big game areas (ranging in size from 3 to 30,163 acres), 3 areas of combined big and small game (ranging in size from 733 to 7,935 acres), and 20 areas of combined game and fish (ranging in size from 44 to 3,600 acres), in addition to many fishing areas and leased lakes. Many of these wildlife areas coincide with coal regions. Map of Colorado Division of Wildlife and Colorado Division of Parks and Outdoor Recreation Properties, Key II.

71. COLO. REV. STAT. § 34-32-105 (Supp. 1976) (Mined Land Reclamation Board, Department of Natural Resources) (three of the seven members are to have expertise in either agriculture or conservation, but no more than two of those in one of the fields); MONT. REV. CODES ANN. §§ 50-1037, -1038 (Supp. 1977) (Board of Land Commissioners, Department of State Lands); N.D. CENT. CODE § 38-14-03.1 (Supp. 1977) (Public Service Commission); S.D. COMPILED LAWS ANN. ch. 45-6A *passim* (Supp. 1977) (State Conservation Commission, Division of Conservation, Department of Agriculture); UTAH CODE ANN. § 40-8-5 (Supp. 1977) (Board and Division of Oil, Gas, and Mining); WYO. STAT. §§ 35-502.21, -502.22 (Supp. 1975) (Land Quality Division, Department of Environmental Quality; Environmental Quality Council).

72. WYO. STAT. §§ 35-502.21, -502.22 (Supp. 1975). The Wyoming Department of Environmental Quality consists of three divisions: Air Quality; Water Quality; and Land Quality. The department is headed by a director responsible for supervising each of the three administrative divisions and for appointing an administrator for each of them. In addition a five member advisory board for each division is appointed by the governor. Each advisory board consists of one member to represent industry, one member to represent political subdivisions, one member to represent agriculture, and two members to represent the public interest. No more than three members of each board may belong to the same political party. The advisory boards recommend the adoption of rules, regulations, and standards, and counsel with each other and the director to coordinate the activities of the department as a whole.

On the other hand, in each of the six states a different agency is principally responsible for management and protection of wildlife,⁷³ although in Colorado and Utah the two agencies are part of the same department.⁷⁴ In the other four states, the agencies are not so connected. Throughout the discussion in this section, reference will be made whenever information is available on how the agencies responsible for regulating the two different resources interact, although the focus will be on the coal mining regulatory agency.⁷⁵

It will facilitate the consideration of state implementation of wildlife and wildlife habitat protection to divide the presentation into four parts: (1) promulgation of rules and regulations; (2) advance approval of reclamation plans and/or mining permits; (3) monitoring once mining begins; and (4) sanctions for violations.

1. Rules and Regulations

In each of the six states the implementing agency has authority to promulgate rules and regulations in furtherance of the statutory purposes.⁷⁶ In four states, Colorado, Montana, South Dakota, and Wyoming, the rules and regulations expand the consideration that wildlife and wildlife habitat protection is to receive in the implementation process.⁷⁷ On the other hand, in two states, North Dakota and Utah, the rules and regulations do not refer to either wildlife or wildlife habitat. Three of the states that expand the consideration of wildlife and wildlife habitat also specify a role for their state wildlife manage-

An independent seven member Environmental Quality Council is appointed by the governor, with no more than four members of the same political party. Employees of the state or any of its political subdivisions are disqualified from serving as members. The Council is responsible for adopting administrative rules and regulations upon recommendation by the director, the division administrators, and the advisory boards. The Council also conducts hearings for changes in regulations and decides issues arising under departmental regulations or orders. Thus it has both quasi-legislative and quasi-judicial authority. WYO. STAT. § 35-502.1 through § 35-502.15 (Supp. 1975). In Utah both the Board and Division of Oil, Gas and Mining are involved also. UTAH CODE ANN. § 40-8-6 (Supp. 1977).

73. MONT. REV. CODES ANN. §§ 26-103.1, -104 (Supp. 1977) (Fish and Game Commission; Department of Fish and Game); N.D. CENT. CODE. ch. 20.1-02 (Supp. 1977) (Game and Fish Department); S.D. COMPILED LAWS ANN. ch. 41-2 (1977) (Division of Game and Fish, Department of Game, Fish and Parks; Game, Fish and Parks Commission); WYO. STAT. § 23.1-10 (Supp. 1977) (Game and Fish Commission, Game and Fish Department).

74. COLO. REV. STAT. § 33-1-106 (1974) (Wildlife Commission, Division of Wildlife, Department of Natural Resources); UTAH CODE ANN. § 23-14-1 (1976) (Division of Wildlife Resources, Department of Natural Resources; Wildlife Board; Board of Big Game Control).

75. Interviews were conducted with both surface mining regulatory agency employees and wildlife management agency employees in Helena, Montana, Bismarck, North Dakota, Pierre, South Dakota, and Cheyenne, Wyoming, by researchers Gregory Hennessey and Daniel Kohn during the period September 6-15, 1976. Some of the conclusions presented in this discussion will be drawn from their interview report.

76. COLO. REV. STAT. § 34-32-108 (Supp. 1976); MONT. REV. CODES ANN. §§ 50-1037(3), -1038(7) (Supp. 1977); N.D. CENT. CODE § 38-14-03.1(3) (Supp. 1977); S.D. COMPILED LAWS ANN. § 45-6A-26 (Supp. 1977); UTAH CODE ANN. § 40-8-6 (Supp. 1977); WYO. STAT. § 35-502.21 (Supp. 1975).

77. See *infra* notes 78-96, and text accompanying.

ment agency to play, but in none of the states is this specified role the full role that the wildlife management agency plays.

In Colorado, the rules and regulations require the submission of numerous exhibits with the mining permit application form. One of these exhibits must provide "wildlife information."

In developing the Wildlife information, the operator may wish to contact the local wildlife conservation officer. A description of the game and non-game resources on and in the vicinity of the application area, including:

a. A description of the significant wildlife resources on the affected land.

b. Seasonal use of the area.

c. The presence and estimated population of threatened or endangered species from either federal or state lists.

d. A description of the general effect during and after the proposed operation on the existing wildlife in the area, including but not limited to temporary and permanent loss of food and habitat, interference with migratory routes, and the general effect on the wildlife from increased human activity, including noise.

The application shall be reviewed and commented upon by the State Division of Wildlife in a timely manner prior to the Board's consideration of the application.⁷⁸

With reference to "limited impact" operations, the Colorado rules and regulations require only a description of the present occurrence on the land and seasonal use of it by game and nongame species.⁷⁹

In addition to the wildlife information required in the application process, the Colorado rules and regulations require as follows:

a. All aspects of the mining and reclamation plan shall take into account the safety and protection of wildlife on the mine site, at processing sites and along all access roads to the mine site with special attention given to critical periods in the life cycle of those species which require special consideration (e.g., elk calving, migration routes, peregrine falcon nesting, grouse strutting grounds).

b. If compatible with the subsequent beneficial use of the land, the proposed reclamation plan shall provide for protection, rehabilitation, or improvement of wildlife habitat.

c. Habitat management and creation, if part of the reclamation plan, shall be directed toward encouraging the diversity of both game and non-game species. Operators are encouraged to contact the Colorado Division of Wildlife and/or

78. COLORADO MINED LAND RECLAMATION BOARD, RULES AND REGULATIONS 17-18 (1977).

79. *Id.* at 23.

federal agencies with wildlife responsibilities to see if any unique opportunities are available to enhance habitat and/or benefit wildlife which could be accomplished within the framework of the reclamation plan and costs.⁸⁰

Although the Colorado surface mining statute does not impose any duty on its supervising agency to consult the wildlife management agency, it does impose a duty on the wildlife agency to assist if requested to do so. "It is the duty of . . . the division of wildlife . . . to furnish the board [Mined Land Reclamation Board] and its designees, as far as practicable, whatever data and technical assistance the board may request and deem necessary for the performance of total reclamation and enforcement duties."⁸¹ The Colorado surface mining rules and regulations have provided a more definitive role for the wildlife management agency.

The Montana rules and regulations also contain specific requirements regarding wildlife in the permit application process. To obtain a surface mining permit, an operator must submit a mining and reclamation plan which reflects the required advance investigation and study of the affected area.⁸² This includes "adequate mine site resource inventories" and a "Wildlife Survey."⁸³ The survey must contain the following:

(i) A listing of the fish and wildlife species utilizing the permit area, including any species on the rare and endangered list⁸⁴ prepared by the U.S. Bureau of Sports Fisheries and Wildlife⁸⁵ (Threatened Wildlife of the United States).

(ii) Population density estimates of each species insofar as practicable. Wildlife includes, but is not limited to, birds, mammals, reptiles, amphibians.

(iii) Season or seasons of use by each species must be noted along with a discussion of winter concentration areas, fawning or calving areas, nesting or brooding areas in the area affected.⁸⁶

The Montana rules and regulations are supplemented by a five page set of "wildlife survey guidelines."⁸⁷ One of the guidelines under "methods" lists as a standard technique "communications with local residents, Fish and Game personnel, or any knowledgeable parties."⁸⁸

80. *Id.* at 34-35.

81. COLO. REV. STAT. § 34-32-106(2) (Supp. 1976).

82. MONT. ADM. CODE, Reclamation, sub-chapter 10 (1973).

83. MONT. ADM. CODE, Rule 26-2.10(10)-S10300(2)(c) (1973).

84. Now called the "endangered and threatened wildlife and plants" list.

85. Now called "Fish and Wildlife Service."

86. MONT. ADM. CODE, Rule 26-2.10(10)-S10300(2)(c) (1973).

87. MONTANA DEPARTMENT OF STATE LANDS, RECLAMATION DIVISION, WILDLIFE SURVEY GUIDELINES (undated).

88. *Id.* at 3.

The South Dakota rules and regulations⁸⁹ require that the reclamation plan include a "wildlife survey" which is defined as "a statement describing the dominant species of wildlife inhabiting the area of the affected land."⁹⁰ "Dominant species" is defined to mean "the species in a plant or animal community exerting the greatest degree of control upon other species. Dominance may be determined by relative size, numbers and permanence of the species."⁹¹

The Wyoming rules and regulations deal specifically with wildlife in the permit application process.

a. The operator shall submit a list of the indigenous vertebrate wildlife species by common and scientific names observed within one (1) mile of the proposed permit area.

b. Special attention shall be paid to the possible presence of wildlife on or adjacent to the proposed permit area which are listed on the "Endangered Species List," of the Wyoming Game and Fish Department.

c. If significant habitat or migration route disruption is possible or likely, the Wyoming Game and Fish Department shall be contacted in order to determine the types and numbers of wildlife likely to be disturbed or displaced.⁹²

Thus, the rules and regulations specify a role for the Wyoming wildlife management agency in the permit application preparation process.

Furthermore, the Wyoming rules and regulations restate the statutory policy that all affected lands "must be reclaimed to a use equal to or greater than the highest previous use,"⁹³ and continue as follows: "Previous uses of affected lands must be ranked on an individual basis according to the overall economic or social value to the community or area in which these lands are found."⁹⁴ As to wildlife habitat they state as follows: "[O]perators are required to restore wildlife habitat, whenever possible, on affected land in a manner commensurate with or superior to habitat conditions which existed before the land became affected, unless the land is used for a recreational or agricultural purpose which precludes its use as "wildlife habitat."⁹⁵ Thus, current Wyoming rules and regulations appear to interpret "highest" use to mean that use which brings the greatest economic return, since recreation and agriculture are given higher preference than wildlife habitat.

89. S.D. CONSERVATION COMM'N, SURFACE MINING LAND RECLAMATION, art. 12:04.

90. *Id.* at art. 12:04:02:05.

91. *Id.* at art. 12:04:01:02(2).

92. LAND QUALITY DIVISION, WYOMING DEPARTMENT OF ENVIRONMENTAL QUALITY, LAND QUALITY RULES & REGULATIONS, ch. II, § 1 (1975).

93. *Id.* at ch. II, § 1(b).

94. *Id.* at ch. II, § 1(b)(3).

95. *Id.* at ch. VI, § 4.

Thus, all four of the states that expand upon the consideration to be given wildlife do so in relation to the surface mining permit application process, primarily through requiring specific types of detail in information about wildlife. Although it appears that the information will be used in considering the adequacy of a proposed reclamation plan as well as for purposes of deciding whether or not to grant a mining permit, only two of the states specifically expand upon the consideration that wildlife is to get in the reclamation process.

2. Advance Approval

In all six states a reclamation plan must receive the approval of the surface mining regulatory agency before surface mining can begin⁹⁶ and in five of the six states, the operator must obtain a mining permit as well.⁹⁷ Only in Utah is no permit required. In all six states the wildlife management agency has a role to play in the advance approval process, whether it consists of assisting the person who is applying for a permit, providing data to the surface mining regulatory agency, or evaluating the proposed reclamation plan and making comments thereon. This role differs from state to state.⁹⁸

Further discussion of advance approval will be confined to three of the six states. In Montana the surface mining regulatory agency uses the application information to decide whether to grant a permit in the first instance. If the agency decides to grant the permit, the information is used to determine what conditions to impose within the permit in order to assure satisfactory reclamation. Even though the agency has its own staff wildlife specialist, the agency asks the wildlife management agency for a recommendation regarding a mining permit application and provides it with a copy of the mining permit application. After receiving this information the wildlife agency may engage in independent research and make its recommendations to the surface mining regulatory agency. There is no Montana statutory provision that requires this cooperation between the two agencies. However, the Administrator of the Environment and Information Division of the Montana Department of Game and

96. COLO. REV. STAT. § 34-32-115 (Supp. 1976); MONT. REV. CODES ANN. §§ 50-1039, -1042 (Supp. 1977); N.D. CENT. CODE § 38-14-05 (Supp. 1977); S.D. COMPILED LAWS ANN. § 45-6A-17 (Supp. 1977); UTAH CODE ANN. § 40-8-7(1)(g) (Supp. 1977); WYO. STAT. § 35-502.24 (Supp. 1975).

97. COLO. REV. STAT. § 34-32-109 (Supp. 1976); MONT. REV. CODES ANN. § 50-1039 (Supp. 1977); N.D. CENT. CODE § 38-14-03 (Supp. 1977); S.D. COMPILED LAWS ANN. § 45-6A-7 (Supp. 1977). No permit is required for small-scale operations. *Id.* § 45-6A-10 (Supp. 1977); WYO. STAT. § 35-502.23 (Supp. 1975).

In Wyoming, in addition to the permit, the operator must obtain a license which can be revoked or suspended for violations of the law. WYO. STAT. § 35-502.27 (Supp. 1975).

98. See the discussion in the section on rules and regulations, in addition to what follows in this section.

Fish noted this cooperation in a recent paper where he summarized his view of Montana's attitude toward wildlife as follows:

In all this legislation, the importance of the fish and game resource is acknowledged—if you would, legitimized—as a legal contender for the land and water that now sustains it. This recognition is gained through constant emphasis on its right to exist and its ability to indicate the quality of our own existence.⁹⁹

In addition, the wildlife management agency in pursuance of management duties under the Nongame and Endangered Species Conservation Act,¹⁰⁰ whether requested to do so or not has given advice during the decision-making process on whether or not a surface mining permit should be issued.

In North Dakota, the surface mining regulatory agency is given sixty days in which to reject a permit application or the permit is deemed approved.¹⁰¹ However, before the agency gives its approval, it is required to consider the advice and technical assistance of, among others, the State Game and Fish Department.¹⁰² The agency has implemented this requirement, at least in part, through the concept of an advisory committee.¹⁰³ The agency sends copies of the reclamation plan and supporting materials to the committee members for their comments. They have twenty days in which to reply. Although the committee members' comments are advisory only, apparently the wildlife regulatory agency believes that the committee's recommendations are followed closely. The committee recommendations regarding precautions that the mine operator should take, areas where mining should be excluded, and also suggests appropriate reclamation steps, such as possible types of revegetation. Sometimes the surface mining regulatory agency turns these recommendations into conditions to be attached to the mining permit.

In Wyoming, once the completed permit application is submitted by the prospective operator; the surface mining regulatory agency relays the material to the wildlife management agency for its comments.¹⁰⁴ The wildlife agency provides information concerning iden-

99. POSEWITZ, *LEGITIMATIZING OF FISH AND WILDLIFE* 4 (1975).

100. MONT. REV. CODES ANN. §§ 26-1801 through 26-1809 (Supp. 1977). See *supra* note 69, and text accompanying.

101. N.D. CENT. CODE § 38-14-05(8) (Supp. 1977).

102. N.D. CENT. CODE § 38-14-05(8) (Supp. 1977). While the North Dakota rules and regulations make special mention of the North Dakota State Health Department, NORTH DAKOTA PUBLIC SERVICE COMM'N, RULES AND REGULATIONS FOR THE RECLAMATION OF STRIP MINED LANDS, R38-14-05.4 & R-38-14-05.7, and the North Dakota State Water Commission, *Id.* Rule 38-14-05.8, they make no special mention of the North Dakota State Game & Fish Department.

103. NORTH DAKOTA PUBLIC SERVICE COMM'N, RULES AND REGULATIONS FOR RECLAMATION OF STRIP MINED LANDS, R38-14-05.3.

104. In addition to the specific references to the Wyoming wildlife management agency set forth at *supra* note 92, the Wyoming rules and regulations provide as follows: "The

tification of important game species occurring in the project area, the importance of habitat to be lost due to the project, including description of the type of habitat, and the impact of the project on affected wildlife populations. The agency also makes recommendations concerning the granting of a permit. It will either oppose granting of the permit, not oppose granting of the permit at all, or not oppose granting of the permit if the permit includes conditions which minimize the impact on wildlife. There are time strictures, however, that limit how much the agency can do.

In addition to using the Wyoming wildlife management agency, the Wyoming surface mining regulatory agency has the authority to "utilize qualified experts in the field of hydrology, soil science, plant or wildlife ecology, and other related fields to advise on mining reclamation practices."¹⁰⁵

3. Monitoring

All six states provide for supervision by the surface mining regulatory agency once mining begins.¹⁰⁶ Such supervision includes both inspections by the agency and submission of annual reports by the mine operators.¹⁰⁷ However, even though protection of wildlife is at least a partial purpose of the statutes in most of the states and is otherwise recognized in most of the statutes and rules and regulations, it appears to get little if any consideration in the monitoring process. Generally, the wildlife management agencies have no role in this process even though the surface mining statutes appear broad enough to allow a role if such was desired by the surface mining regulatory agency. Certainly none of the statutes and rules and regulations give the wildlife management agency any specific role to play. Only in Montana does the surface mining regulatory agency have a staff wildlife specialist.

4. Sanctions

In all six states a variety of sanctions are available to the sur-

Wyoming Game and Fish Department shall be consulted prior to diversion [of streams] or affecting more than 100 feet of bank or channel of a flowing stream." LAND QUALITY DIVISION, WYOMING DEPARTMENT OF ENVIRONMENTAL QUALITY, LAND QUALITY RULES AND REGULATIONS, ch. III, § 2(c) (1975).

105. WYO. STAT. § 35-502.62(a)(i) (Supp. 1975).

106. COLO. REV. STAT. § 34-32-121 (Supp. 1976); MONT. REV. CODES ANN. §§ 50-1038(5), -1039(2), (3), (4) (Supp. 1977); N.D. CENT. CODE § 38-14-03.1 (Supp. 1977); S.D. COMPILED LAWS ANN. §§ 45-6A-23.1, -18 (Supp. 1977); UTAH CODE ANN. §§ 40-3-17.2, -7(f), -15 (Supp. 1977); WYO. STAT. § 35-502.28 (Supp. 1975).

107. See *supra* note 106; COLORADO MINED LAND RECLAMATION BOARD, RULES AND REGULATIONS 41 (1977) (Inspection and Monitoring); N.D. CENT. CODE ch. 38-16 (Supp. 1977) (requires an annual report to the state soil conservation commission); S.D. CONSERVATION COMM'N, SURFACE MINING LAND RECLAMATION, R. 12:04:03:04 (annual permit renewal report); UTAH BOARD OF OIL, GAS, AND MINING, MINED LAND RECLAMATION GENERAL RULES AND REGULATIONS AND RULES OF PRACTICE AND PROCEDURE, R. M-8 (1975) (Reports).

face mining regulatory agency for dealing with violations of the surface mining statutes or the rules and regulations promulgated pursuant thereto. All of the states require posting of a performance bond as a part of the mining permit application process.¹⁰⁸ Thus bond forfeiture is a sanction that is available in all of the states.¹⁰⁹ Suspension of mining operations¹¹⁰ is also an available sanction in all six states. In all the states except South Dakota civil penalties¹¹¹ are available, and in all the states except Colorado, criminal penalties¹¹² are available. In Colorado, Montana, North Dakota, and Utah, injunctive relief is made available specifically by statute.¹¹³ The statutes in Colorado, Montana, North Dakota, and South Dakota authorize denial of unrelated or future mining permits.¹¹⁴ In Colorado, Montana, and Utah cease and desist or compliance orders can be issued by the agency.¹¹⁵

In all six states if the state agency obtains bond forfeiture, the state is empowered to complete the reclamation.¹¹⁶ The Wyoming statute adds that the attorney general may sue to recover the reclamation costs if the bond was insufficient.¹¹⁷

Wyoming is the only state to specifically provide for wildlife in its sanctions. It provides that the state may recover the reasonable value of "fish, aquatic life or game or bird life" destroyed by a violator of the statute or any rules or regulations promulgated thereunder.¹¹⁸

Wyoming is also the only state to provide that if the agency di-

108. COLO. REV. STAT. §§ 34-32-111(2)(d), -117 (Supp. 1976); MONT. REV. CODES ANN. § 50-1039(8) (Supp. 1977); N.D. CENT. CODE § 38-14-04(1)(b) (Supp. 1977); S.D. COMPILED LAWS ANN. §§ 45-6A-6.2, -8 -12 (Supp. 1977); UTAH CODE ANN. §§ 40-8-7(e), -14 (Supp. 1977); WYO. STAT. §§ 35-502.31(c), -502.34 (Supp. 1975).

109. COLO. REV. STAT. § 34-32-118 (Supp. 1976); MONT. REV. CODES ANN. § 50-1050(1) (Supp. 1977); N.D. CENT. CODE § 38-14-06.1(3) (Supp. 1977); S.D. COMPILED LAWS ANN. § 45-6A-20 (Supp. 1977); UTAH CODE ANN. § 40-8-14 (Supp. 1977); WYO. STAT. § 35-502.38 (Supp. 1975).

110. COLO. REV. STAT. § 34-32-124(6) (Supp. 1976); MONT. REV. CODES ANN. §§ 50-1037, -1038, -1050 (Supp. 1977); N.D. CENT. CODE §§ 38-14-03.1(6), -06.1(2) (Supp. 1977); S.D. COMPILED LAWS ANN. § 45-6A-23 (Supp. 1977); UTAH CODE ANN. § 40-8-16 (Supp. 1977); WYO. STAT. § 35-502.29 (Supp. 1975).

111. COLO. REV. STAT. § 34-32-124(7) (Supp. 1976); MONT. REV. CODES ANN. § 50-1056(1) (Supp. 1977); N.D. CENT. CODE § 38-14-12(3) (Supp. 1977); UTAH CODE ANN. § 40-8-8(4) (Supp. 1977); WYO. STAT. § 35-502.49(a) (Supp. 1975).

112. MONT. REV. CODES ANN. § 50-1056(3) (Supp. 1977); N.D. CENT. CODE § 38-14-12(1) & (2) (Supp. 1977); S.D. COMPILED LAWS ANN. § 45-6A-31 (Supp. 1977); UTAH CODE ANN. § 40-8-9(3) (Supp. 1977); WYO. STAT. § 35-502.49(c) (Supp. 1975).

113. COLO. REV. STAT. § 34-32-124(3) (Supp. 1976); MONT. REV. CODES ANN. § 50-1056(2) (Supp. 1977); N.D. CENT. CODE § 38-14-12 (Supp. 1977); UTAH CODE ANN. § 40-8-8(4) (Supp. 1977).

114. COLO. REV. STAT. § 34-32-120 (Supp. 1976); MONT. REV. CODES ANN. § 50-1050(2) (Supp. 1977); N.D. CENT. CODE § 38-14-06.1(3) (Supp. 1977); S.D. COMPILED LAWS ANN. § 45-6A-9.2 (Supp. 1977).

115. COLO. REV. STAT. § 34-32-124(2) (Supp. 1976); MONT. REV. CODES ANN. § 50-1037 (Supp. 1977); and UTAH CODE ANN. § 40-8-8(4) (Supp. 1977).

116. COLO. REV. STAT. § 34-32-117(5) (Supp. 1976); MONT. REV. CODES ANN. §§ 50-1052, -1053, -1054 (Supp. 1977); N.D. CENT. CODE § 38-14-07(5) (Supp. 1977); S.D. COMPILED LAWS ANN. § 45-6A-29 (Supp. 1977); UTAH CODE ANN. § 40-8-14(6) (Supp. 1977); WYO. STAT. § 35-502.22(a) (iii) (Supp. 1975).

117. WYO. STAT. § 35-502.29 (Supp. 1975).

118. WYO. STAT. § 35-502.49(b) (Supp. 1975).

rector finds that land pollution has created "an emergency requiring immediate action to protect human or animal health or safety . . .", he may order cessation of the cause of the emergency¹¹⁹ or may proceed for an injunction.¹²⁰

B. THE CITIZEN'S ROLE

At six state surface mining statutes seem to recognize at least some role for citizens to play in the surface mining regulatory process. Five of the states specifically provide for publication of notice about the mining permit application process. In Colorado, Montana, North Dakota, and Wyoming, the statutes require that notice of a mining permit application be published in newspapers in circulation in the area of the proposed mine.¹²¹ In Utah, which does not use the permit concept, the statute requires the publication of the tentative decision of the surface mining regulatory agency.¹²² In South Dakota, the rules and regulations provide for publication of notice "that the . . . [regulatory agency] intends to give final consideration to a permit application."¹²³

In Colorado, North Dakota, and Wyoming the statutes also provide that "any person" may submit written objections, petitions, or the equivalent concerning the mining permit application.¹²⁴ If objections are made in Wyoming, a public hearing will be necessary. In Colorado and North Dakota, the regulatory agency will hold a public hearing if "good cause" exists. In Montana and Utah, the statutes specifically allow "aggrieved persons" to object to the decisions of the regulatory agency in allowing mining permits.¹²⁵ Neither statute, however, defines "aggrieved." The South Dakota statute makes no special provision for citizen input into the application process.¹²⁶

In addition to the provisions regarding citizen input into the mining permit application process, the statutes in Montana, North Dakota, and Utah specifically provide for citizen input into the enforcement process. The Montana statute allows any resident of the state who has reason to believe a responsible officer has failed to enforce the statutory requirements to so notify that officer and, if the matter is not corrected, to bring a mandamus action in court for the pur-

119. WYO. STAT. § 35-502.15(a) (Supp. 1975).

120. WYO. STAT. § 35-502.15(b) (Supp. 1975).

121. COLO. REV. STAT. § 34-32-112(10)(b) & (c), (Supp. 1976); MONT. REV. CODES ANN. § 1039(5)(k) (Supp. 1977); N.D. CENT. CODE § 38-14-04.1 (Supp. 1977); WYO. STAT. § 35-502.24(e) (Supp. 1975).

122. UTAH CODE ANN. § 40-8-13 (Supp. 1977).

123. S.D. CONSERVATION COMM'N, SURFACE MINING LAND RECLAMATION, R. 12:04:03:02.
124. COLO. REV. STAT. § 34-32-114 (Supp. 1976); N.D. CENT. CODE § 38-14-04.1 (Supp. 1977); WYO. STAT. § 35-502.24(f) (Supp. 1975) (Interested person).

125. MONT. REV. CODES ANN. § 50-1043(2) (Supp. 1977); UTAH CODE ANN. § 40-8-13(4) (Supp. 1977). See also UTAH CODE ANN. §§ 40-8-8, -9(1) (Supp. 1977).

126. Nor do the regulations, although they do appear to anticipate input. See S.D. CONSERVATION COMM'N, SURFACE MINING LAND RECLAMATION, ch. 12:04:06 (contested cases).

pose of ordering the officer to carry out his duties.¹²⁷ The North Dakota statute provides that any person "aggrieved or adversely affected" has a right to a hearing to seek enforcement of the law.¹²⁸ Finally, in Utah, any persons "adversely affected" by a violation of the law can so notify the regulatory agency and if the agency takes no corrective action can bring suit for injunctive relief.¹²⁹ The Wyoming statutes seem to contemplate that citizens will notify the regulatory agency of violations.¹³⁰ The South Dakota rules and regulations provide for such citizen notice of violations to the agency by way of a signed affidavit.¹³¹

Limited classes of citizens are given special causes for involvement under some of the statutes. For example, the Montana statute specifically gives owners of real property the right to sue for damages resulting from a mine operator's interference with their water supply.¹³² North Dakota has enacted a separate Surface Owner Protection Act which makes reclamation the obligation of the mineral owner or mineral developer.¹³³ If the mineral developer fails to complete reclamation as required in the reclamation plan, the surface owner may either require the surface mining regulatory agency to take appropriate action or he may maintain an action at law for damages which resulted from the failure to reclaim.

Finally, North Dakota and South Dakota have separate Environmental Law Enforcement Acts which appear broad enough in scope to allow enforcement of the surface mining statutes.¹³⁴

C. THE FEDERAL ROLE

None of the six state statutes provide for any specific input by the federal government into the implementation process. The references these statutes do contain to the federal government are usually to authorize the state agency to receive assistance from the federal government, to comply with federal laws, or to cooperate with the federal government.¹³⁵ The strongest federal role appears to be in Wyoming, where a duty is imposed on the director of the supervis-

127. MONT. REV. CODES ANN. § 50-1055 (Supp. 1977).

128. N.D. CENT. CODE § 38-14-07.1 (Supp. 1977).

129. UTAH CODE ANN. § 40-8-8(5) (Supp. 1977).

130. WYO. STAT. § 35-502.46 (Supp. 1975).

131. S.D. CONSERVATION COMM'N, SURFACE MINING LAND RECLAMATION, R. 12:04:05:01.

132. MONT. REV. CODES ANN. § 50-1055(3) (Supp. 1977).

133. N.D. CENT. CODE ch. 38-18 (Supp. 1977).

134. N.D. CENT. CODE ch. 32-40 (Supp. 1977); S.D. COMPILED LAWS ANN. ch. 34A-10 (1977).

135. COLO. REV. STAT. § 34-32-115 (Supp. 1976) (denial of mining permit if it would violate applicable federal law or regulation); MONT. REV. CODES ANN. § 50-1053 (Supp. 1977) (accept federal reclamation funds); N.D. CENT. CODE § 38-14-33 (Supp. 1977) ("to cooperate with and receive technical and financial assistance from" and to comply with federal laws); S.D. COMPILED LAWS ANN. § 45-6A-25 (Supp. 1977) (to cooperate with, to accept federal funds, and to deny mining permits where incompatible with federal land development plans); UTAH CODE ANN. §§ 40-8-5.2, -11, -22 (Supp. 1977) (to cooperate with and to enter into agreements with).

ing agency to "advise, consult and cooperate with . . . agencies of the . . . federal government . . . in furtherance of the purposes of this act."¹³⁶ Of course where state statutes provide for citizen input by "persons," federal officials as well as other citizens are included.¹³⁷

IV. FACILITY SITING

While the basic purpose of this article is to determine to what extent the surface mining statutes in the six states protect wildlife and wildlife habitat from the impacts of surface mining, it is also relevant to consider to what extent wildlife and wildlife habitat is protected from the impacts of facilities that utilize the coal. Such a review gives a more complete picture of the impact of coal development as a whole on wildlife and wildlife habitat. Montana, North Dakota, and Wyoming have enacted comprehensive statutes dealing with such facilities.¹³⁸ Although the terminology differs among the states, the basic thrust is that a regulated energy conversion facility¹³⁹ cannot be constructed or operated until the appropriate regulatory agency¹⁴⁰ has issued a certificate or permit¹⁴¹ authorizing the same. To what extent do these statutes or the rules and regulations promulgated pursuant to the statutes provide for wildlife or wildlife habitat protection? That question will form the basis for the balance of the discussion in this section.

136. WYO. STAT. § 35-502.9(a)(ii) (Supp. 1975).

137. See *supra* notes 124-131, and text accompanying.

138. Montana Major Facility Siting Act, MONT. REV. CODES ANN. §§ 70-801 through 70-829 (Supp. 1977); North Dakota Energy Conversion and Transmission Facility Siting Act, N.D. CENT. CODE ch. 49-22 (Supp. 1977); Wyoming Industrial Development Information and Siting Act, WYO. STAT. §§ 35-502.75 through 35-502.94 (Supp. 1977).

139. In Montana a "facility" is a plant or unit, other than oil or gas refineries, designed for, or capable of, generating 50 megawatts of electricity or more, producing 25,000,000 cubic feet of gas per day or more, producing 25,000 barrels of liquid hydrocarbon products per day or more, enriching uranium minerals, refining or converting 500,000 tons of coal per year or more, or any addition to any of the above plants which costs over \$250,000. "Facility" also includes electric transmission lines of certain voltages, pipeline facilities, any use of geothermal resources to create, use, or convert energy, and any underground in situ gasification of coal. MONT. REV. CODES ANN. § 70-803 (Supp. 1977).

The North Dakota statute defines an energy conversion facility as a plant that can generate fifty thousand kilowatts or more of electricity, or manufacture or refine one hundred million cubic feet or more of gas per day, or manufacture or refine fifty thousand barrels or more of liquid hydrocarbon products per day, or enrich uranium minerals. N.D. CENT. CODE § 49-22-03(5) (Supp. 1977). It defines transmission facility to mean an electric transmission line and associated facilities of one hundred fifteen kilovolts or more, or a gas or liquid transmission line and associated facilities that can transport coal, gas, or liquid hydrocarbon products except oil or gas pipeline gathering systems, or a liquid transmission line and associated facilities that can transport water to or from an energy conversion facility. N.D. CENT. CODE § 49-22-03(11) (Supp. 1977).

The Wyoming statute defines the "facilities" that are subject to the provisions of the Act so that all major energy generating and conversion plants are included. WYO. STAT. § 35-502.76(c) (Supp. 1977).

140. MONT. REV. CODES ANN. § 70-803(2) (Supp. 1977) (Board of Natural Resources and Conservation); N.D. CENT. CODE § 49-22-03(2) (Supp. 1977) (Public Service Commission); WYO. STAT. § 35-502.76(b) (Supp. 1977) (Industrial Siting Council).

141. MONT. REV. CODES ANN. § 70-804(1) (Supp. 1977) ("certificate of environmental compatibility and public need"); N.D. CENT. CODE § 49-22-07 (Supp. 1977) ("certificate of site compatibility"); WYO. STAT. § 35-502.80 (Supp. 1977) ("permit").

In Montana the certificate will not be issued until the Department of Natural Resources and Conservation has undertaken an "intensive study and evaluation of the proposed facility."¹⁴² "The departments of . . . fish and game . . . shall report to the department information relating to the impact of the proposed site on . . . [its] area of expertise."¹⁴³ The Board may not issue the certificate before it makes a finding on a long list of possible impacts, including "land use impacts" such as "effects on natural systems, wildlife, [and] plant life."¹⁴⁴ In furtherance of these statutory requirements, the Board has provided in its regulations that applications for certificates are to include a discussion of "natural environmental factors," including wildlife.¹⁴⁵

In North Dakota, before the Commission grants an application it must consider a number of listed items including an evaluation of research on the effects of such facilities on vegetation and animals¹⁴⁶ and "evaluation of the effect on areas unique because of biological wealth or because they are habitats for rare and endangered species at or in the vicinity of the proposed site, corridor, or route."¹⁴⁷ However, some areas will already have been excluded as potential sites pursuant to a comprehensive inventory provision.¹⁴⁸ Among the areas excluded for energy conversion facility sites are the following:

(a) Designated or registered national: . . . wilderness areas; wildlife areas; wild, scenic, or recreational rivers; and wildlife refuges,

(b) Designated or registered state: . . . wild, scenic, or recreational rivers; game refuges; game management areas; management areas; and nature preserves,

(c) . . . hardwood draws; and enrolled woodlands,

. . .

(f) Areas critical to the lifestages of threatened or endangered animal or plant species, [and]

(g) Areas where animal or plant species that are unique or rare to this state would be irreversibly damaged.¹⁴⁹

For transmission facilities, however, only national wilderness area, state nature preserves, and items (f) and (g) of the above are ex-

142. MONT. REV. CODES ANN. § 70-807(1) (Supp. 1977).

143. *Id.* § 70-807(2) (Supp. 1977).

144. *Id.* § 70-816(2)(1) (Supp. 1977).

145. MONT. ADM. CODE §§ 36-2.8(2)-S820(1)(f)(iii), -S830(1)(e)(iii) (1975).

146. N.D. CENT. CODE § 49-22-09(1) (Supp. 1977).

147. *Id.* § 49-22-09(11) (Supp. 1977).

148. *Id.* § 49-22-05.1 (Supp. 1977).

149. NORTH DAKOTA PUBLIC SERVICE COMM'N, RULES AND REGULATIONS, R65-06-08-01(1).

cluded.¹⁵⁰ In addition to exclusion areas, certain avoidance areas have been designated, including for energy conversion facilities "woodlands and wetlands,"¹⁵¹ and for transmission facilities those areas listed as exclusion areas for energy conversion facilities but not listed as exclusions areas for transmission facilities.¹⁵²

According to the Wyoming statute, the permit application must contain a statement of the procedures proposed to avoid "endangering . . . wildlife or plant life . . . by emissions or discharges."¹⁵³ In addition, the Council regulations provide that an application should include a preliminary evaluation regarding "species, population, available habitat, migration routes, and summer and winter ranges of fauna within the area of site influence. Particular reference should be made to any species that appear on the list of endangered or threatened species."¹⁵⁴ A permit will be granted if the council finds, among other things, that the "nature of the probable environmental impact is acceptable, including a specification of the predictable adverse effect on fish . . . [and] wildlife."¹⁵⁵

The Wyoming statute provides for publishing a summary of the application,¹⁵⁶ scheduling and holding a public hearing and publishing notice thereof.¹⁵⁷ Parties to a permit proceeding are defined broadly to include "any nonprofit organization with a Wyoming chapter, concerned in whole or in part to promote conservation or natural beauty, to protect the environment, personal health or other biological values. . . ."¹⁵⁸ In addition "any person" may make a "limited appearance" by filing a written statement.¹⁵⁹ If the Council determines that further study is necessary before a decision on the permit can be made, it may designate such study on a number of topics, including effects on "land use impacts" such as "effects on natural systems, wildlife, [and] plant life,"¹⁶⁰ and on "water resource impacts" such as "effects on plant and animal life. . . ."¹⁶¹ Whenever relevant or necessary to the permit decision, the Office of Industrial Siting Administration must seek information and recommendations from other state agencies, including the State Game and Fish Department and the Department of Environmental Quality.¹⁶² Parties may obtain judicial review of either grant or denial of a permit.¹⁶³

150. *Id.* R. 65-06-08-02(1).

151. *Id.* R. 65-06-08-01(2)(e).

152. *Id.* R. 65-06-08-02(2).

153. WYO. STAT. § 35-502.81(a)(xi) (Supp. 1977).

154. WYOMING OFFICE OF INDUSTRIAL SITING ADMINISTRATION, INDUSTRIAL DEVELOPMENT INFORMATION AND SITING RULES AND REGULATIONS R. 5(m)(15) (1977).

155. WYO. STAT. § 35-502.87(a)(i) (Supp. 1977).

156. *Id.* § 35-502.82(a)(ii) (Supp. 1977).

157. *Id.* § 35-502.82(b)(i) & (iii) (Supp. 1977).

158. *Id.* § 35-502.85(a)(iii) (Supp. 1977).

159. *Id.* § 35-502.85(c) (Supp. 1977).

160. *Id.* § 35-502.84(a)(ii)(M) (Supp. 1977).

161. *Id.* § 35-502.84(a)(iii)(H) (Supp. 1977).

162. *Id.* § 35-502.84(b)(iv) & (xi) (Supp. 1977).

163. *Id.* § 35-502.88 (Supp. 1977).

The Montana and North Dakota statutes also contain provisions for public hearings¹⁶⁴ and broad citizen participation.¹⁶⁵ In addition, the North Dakota statute provides the commission with authority to "cooperate with and receive and exchange technical assistance from and with the United States . . . for any purpose relating to the siting of energy conversion and transmission facilities."¹⁶⁶

All three of the states provide for monitoring of development after the certificates or permits are issued. In Montana the statute provides that a certificate must include "a plan for monitoring environmental effects of the proposed facility."¹⁶⁷ The statute also places a specific duty on both the board and the department to "monitor the operations of all certified facilities for assuring continuing compliance . . ."¹⁶⁸ Any Montana resident with knowledge of nonenforcement is allowed to bring this to the attention of the public officer by a statement under oath, and if the public officer "neglects or refuses" to enforce, the resident is permitted to bring a mandamus action.¹⁶⁹

While the North Dakota statute does not provide specifically for monitoring activities once the certificate has been issued, the statute does provide that "any facility, with respect to which a certificate is required, shall thereafter be constructed, operated, and maintained in conformity with such certificate, and any terms and conditions contained therein and subsequent modifications thereof."¹⁷⁰ This language clearly contemplates enforcement, as does the penalty provision which makes it a crime to tamper with or render inaccurate "any monitoring device or method required to be maintained under this chapter."¹⁷¹

164. MONT. REV. CODES ANN. § 70-807(4) (Supp. 1977); N.D. CENT. CODE § 49-22-13 (Supp. 1977).

165. The Montana act specifically provides that parties to a certification proceeding include "any nonprofit organization, formed in whole or in part to promote conservation or natural beauty, to protect the environment, personal health or other biological values . . . or any other interested person." MONT. REV. CODES ANN. § 70-808(1)(c) (Supp. 1977). The North Dakota statute provides for advisory committees, N.D. CENT. CODE § 49-22-14 (Supp. 1977), judicial review for a "party aggrieved" by the issuance of a certificate, *Id.* § 49-22-19 (Supp. 1977), and that "the commission shall adopt broad-spectrum citizen participation as a principle of operation." *Id.* § 49-22-15(1) (Supp. 1977).

166. N.D. CENT. CODE § 49-22-14.1 (Supp. 1977). See also *Id.* § 49-22-09(12) (Supp. 1977), which lists as a factor to be considered by the commission in designating sites and evaluating applications "where appropriate, . . . problems raised by federal agencies. . . ."

167. MONT. REV. CODES ANN. § 70-811(2)(a)(v) (Supp. 1977).

168. *Id.* § 70-820(2) (Supp. 1977).

169. *Id.* § 70-819(1) & (2) (Supp. 1977).

170. N.D. CENT. CODE § 49-22-07 (Supp. 1977).

171. *Id.* § 49-22-21(2) (Supp. 1977). The initial rules and regulations promulgated by the commission had provided that, among others, the following conditions were to be included in all certificates:

(1) The Commission, its authorized agents and employees may enter the site identified in a certificate of site compatibility at any reasonable time for the purpose of conducting tests, taking samples, and determining whether the site is being utilized in compliance with the Act, these rules and regulations, and the certificate. A written report of every entry with findings shall be filed in the office of the Commission and with the applicant.

Although the Wyoming statute expressly provides that

the council and the office, utilizing to the fullest extent possible the staff and resources of all state agencies, boards and commissions, shall have continuing authority and responsibility for monitoring the operations of all facilities which have been granted permits under this act . . . , for assuring continuing compliance with this act and permits issued hereunder, and for discovering and preventing noncompliance with this act and the permits,¹⁷²

apparently the Council relies solely on annual reports submitted by the permit holder for monitoring and has no scheduled site inspections.

While the foregoing is not an exhaustive analysis of the three statutes, hopefully it presents enough detail to indicate that wildlife and wildlife habitat are to receive substantial consideration in the process of granting certificates and permits for the construction of coal consuming facilities. In addition, there is a substantial role for citizens to play in this process. However, even though the statutes do provide for supervision once the certificate or permit has been granted, it does not appear that the supervising agencies are geared up to accomplish such supervision in any great detail. Perhaps in this part of the process, therefore, the citizen role will be the most important.

V. CONCLUSION

All six of the states have enacted legislation regulating surface mining for coal. These statutes are generally of recent vintage. Consideration of wildlife is required to some extent in three of these states, Montana, South Dakota, and Wyoming. It is authorized expressly in Colorado and authorized by implication in North Dakota because of specific references to wildlife in the North Dakota statute. In Utah,

(3) The utility shall allow the Commission, its agents or employees, access at any reasonable time to all such books and records the Commission deems necessary to enable it to determine whether the utility's construction, operation or maintenance of the facility located on the site is in conformity with the certificate and these rules and regulations.

(4) No facility shall be constructed, operated or maintained in a manner which is inconsistent with the authority granted in the certificate of site compatibility.

(5) The utility shall not make a material change in the size, type, or use of the facility for which the certificate was issued without Commission approval.

(6) The utility shall install, maintain and report the results of such testing and monitoring programs and devices as the Commission may from time to time require.

NORTH DAKOTA PUBLIC SERVICE COMMISSION, LAWS, RULES AND REGULATIONS GOVERNING ENERGY CONVERSION AND TRANSMISSION FACILITY SITING, R. 49-22-7(C)(10)(a). The new rules do not contain this requirement.

172. WYO. STAT. § 35-502.91 (Supp. 1977).

however, consideration of wildlife is authorized only by implication from general language since there is no specific reference to wildlife in the Utah statute. Except in North Dakota and Utah, the rules and regulations promulgated pursuant to these statutes by the supervising agencies expand the amount of consideration that wildlife will receive. However, in none of the six states is the consideration of wildlife the predominant factor.

Although all six of the states appear to recognize some role for the state's wildlife management agency in this process, very little of that role has been formalized either in the statutes or in the rules and regulations. The formalization that does exist, as well as the informal input, seems to focus on the permit application process. Thus, the wildlife management agencies have almost no input into the monitoring and enforcement processes. Whether the wildlife management agency roles should be further clarified or not, what should be clarified is whether game management areas established pursuant to state statute are to be subject to surface mining.

These laws have been changed substantially during the past several years, often during each legislative session. Thus, before the supervising agencies can begin operating under one set of implementing regulations, changes have been made in the enabling statute. With the newness of these statutes and the regulations promulgated thereunder and the frequent changes, there is no history or tradition of interpretation or practice. Furthermore, there will be more changes in the near future, at least as a result of the new federal surface mining act if not as a result of each state's own experience. Hopefully, the comparative exposition presented in this article will facilitate future evaluation and amendment of the statutes and the rules and regulations.