No. 112, Original

In The

Supreme Court of the United States

October Term, 1987

STATE OF WYOMING,

Plaintiff,

v.

STATE OF OKLAHOMA,

Defendant.

On The Report Of The Special Master
Dated June 29, 1990

AMICUS CURIAE BRIEF OF THE WYOMING MINING ASSOCIATION SUPPORTING THE STATE OF WYOMING

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AMICUS CURIAE BRIEF OF THE WYOMING MINING ASSOCIATION SUPPORTING THE STATE OF WYOMING

INTRODUCTION

Since January 1, 1987, an Oklahoma statute has required Oklahoma's electric utilities to purchase at least ten percent of their coal supplies from Oklahoma mines. Okla. Stat. tit. 45, § 939 (Supp. 1991). The purpose and effect of the statute is to force the utilities to modify their prior practice of obtaining virtually 100 percent of their coal supplies from Wyoming mines.

In April, 1988, the State of Wyoming instituted this original action to challenge the constitutionality of Oklahoma's blatant interference with the interstate coal market. The Court granted Wyoming leave to file its complaint, denied the State of Oklahoma's motion to dismiss the complaint for lack of standing, and referred the matter to Special Master Philip W. Tone for his consideration. The parties provided the Special Master with cross motions for summary judgment based on a stipulated set of facts ("SF," attached to Wyoming's Brief). The Special Master now has issued his recommendations to the Court. Report of Special Master Philip W. Tone (June 29, 1990) (hereinafter "Report").

Pursuant to Supreme Court Rule 37.3, the Wyoming Mining Association ("Association") respectfully submits this Brief Amicus Curiae Supporting the State of Wyoming. The Association agrees with the State of Wyoming that the Special Master correctly concluded that the Oklahoma statute is unconstitutional, but erred in recommending that this Court rewrite the Oklahoma statute to permit it to remain in effect on a more limited basis.

INTEREST OF THE AMICUS CURIAE

Oklahoma's actions have had a direct economic impact on the Association's members. The Association's members mine coal in Wyoming and historically have supplied virtually all of the coal burned by Oklahoma's electric utilities. The Oklahoma statute has caused these sales to decline substantially. Other states have adopted (or are threatening to adopt) similar protectionist measures, increasing the injury to the Association's members.

This wave of protectionism comes at a historically significant time. Congress recently revised the Clean Air

Act to impose stringent new limits on coal-burning utilities' sulfur dioxide emissions. But for protectionist barriers like Oklahoma's, the Association's members, all of which produce low-sulfur coal in Wyoming, stand to play a major role in helping utilities meet this important national goal.

The outcome of this proceeding obviously will have a significant impact on the Association's members. This Court recognized as much at the inception of this proceeding when it granted the Association leave to file an Amicus Curiae Brief in Support of Wyoming's Motion for Leave to File a Complaint. Since then, the Association has participated in every stage of this action, and both parties have consented to the Association's participation at this stage. *See* Letters of Consent attached as Appendix B.

SUMMARY OF ARGUMENT

The Special Master has recommended that the Court declare Oklahoma's protectionist statute unconstitutional, but leave it in place as it applies to one state-owned power plant. The first part of the Special Master's recommendation is legally irrefutable. The second part, however, asks the Court to assume a legislative role and rewrite the Oklahoma statute to achieve a questionable result. Legal principles and considerations of public policy demand that this Court strike the statute as it is written, in its entirety.

The State of Wyoming has explained the legal reasons why Oklahoma's statute must fall with respect to all utilities in Oklahoma. The Association submits this brief for the limited purpose of emphasizing the impact of the Oklahoma statute on the national coal market and the nation's environmental policy. At least ten other states have adopted statutes similar to Oklahoma's "closed-border" law, and the number threatens to grow. These parochial laws severely impede the efficient operation of the national coal market and, because they are aimed primarily at low-sulfur Western coal, hamper the federal environmental policy set forth in the recent amendments to the Clean Air Act, Pub. L. No. 101-549 (1990), making it more difficult for the nation to solve its pressing air pollution problem. The broad implications of this case underscore the unconstitutionality of Oklahoma's statute.

ARGUMENT

I. The Special Master Correctly Concluded That The Oklahoma Statute Imposes An Impermissible Burden On Interstate Commerce.

A formidable body of legal precedent supports the Special Master's recommendation that the Oklahoma statute be struck down as an unconstitutional interference with interstate commerce. As the Special Master recognized, the Commerce Clause, U.S. Const. art. I, § 8, cl. 3, subjects state statutes designed to insulate an in-state industry from out-of-state competition to a "virtually per se rule of invalidity." *City of Philadelphia v. New Jersey,* 437 U.S. 617, 624 (1978); *see, e.g., Healy v. Beer Inst., Inc.,* 491 U.S. 324, ___, 109 S. Ct. 2491, 2499 n. 14 (1989); *Northwest Cent. Pipeline Corp. v. State Corp. Comm'n,* 489 U.S. 493, 523 (1989); *New Energy Co. of Indiana v. Limbach,* 486 U.S. 269, 273-74 (1988); *Brown-Forman Distillers Corp. v. New*

York State Liquor Auth., 476 U.S. 573, 579 (1986). A statute like Oklahoma's which "overtly blocks the flow of interstate commerce at a State's border" is the clearest example of illegal protectionism. *City of Philadelphia*, 437 U.S. at 624. Such laws invite retaliation and promote the disintegration of the Nation's economy, contrary to the Constitution's fundamental principle of an undivided nation. *See, e.g., Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 522-23 (1934) (opening door to protectionist rivalries runs counter to philosophy of federalism); *Hughes v. Oklahoma*, 441 U.S. 322, 326 (1979) (central concern of Founders was "to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation"). The facts of this case demonstrate that the Special Master was correct in concluding that Oklahoma's statute cannot withstand this scrutiny.

The Special Master's Report clearly illustrates the significant effect that Oklahoma's statute has had on the flow of coal from Wyoming mines to Oklahoma users. Report at 6-9, 20-21. For example, in 1986, the year before the statute became effective, the Western Farmers Electric Cooperative purchased 100% of its coal from Wyoming and none from Oklahoma. *Id.* at 8. The following year, it purchased 5.8% from Oklahoma. *Id.* This direct impact of the Oklahoma statute is substantial, Report at 20-21, and alone justifies the Special Master's recommendation that the Oklahoma statute be declared unconstitutional. *See, e.g., Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 268-69 (1984) (discriminatory statute cannot be saved merely because it affects only a small volume of commerce).

The direct impact of the Oklahoma statute chronicled by the Special Master, however, is merely the tip of the protectionist iceberg that plagues the national coal industry and the millions of Americans who purchase coal-generated electricity. "[T]he practical effect of [Oklahoma's] statute must be evaluated not only by considering the consequences of the statute itself, but also by considering . . . what effect would arise if not one, but many or every State adopted similar legislation." *Healy*, 109 S. Ct. at 2499; *accord Hughes*, 441 U.S. at 329-30; *Baldwin*, 294 U.S. at 522-23.

Coal is an extremely important commodity in the national energy market. In 1987 it accounted for 60% of the Nation's electrical generation. National Coal Association, *Steam Electric Plant Factors* at i (1988). Coal is bought and sold in a highly-efficient national market, by long-term contract or by spot-market transaction. Over half of the states produce coal, and competition for markets is fierce. Competition focuses both on the coal's delivered price per unit of energy (different types of coal produce different amounts of energy per ton) and on the coal's burning characteristics (*e.g.*, sulfur content, waste product, etc.). Superiority in either attribute can generate a competitive advantage. *See* Flaim & Hemphill, *The Economic Effects Of Oklahoma Statutes Title 45 § 939. Title 45 § 939.1 and Title 74 § 85.32 On Oklahoma Electric Utilities' Fuel Purchasing Decisions* § 8, at 18 (submitted by the State of Wyoming in support of its Motion for Summary Judgment) (hereinafter "Flaim & Hemphill").

Wyoming coal, which is both cheap to mine and clean burning, is in high demand. Flaim & Hemphill at 18-21. In 1988, Wyoming mines produced 164 million tons of coal – more than any other state. SF ¶ 29 & Ex. 3. Over 85% of this coal was burned in other states, SF Ex. 4, rendering the Wyoming coal-mining industry highly dependent upon interstate commerce. Like Oklahoma, many of the states to which Wyoming exports have coal reserves of their own. This coal, however, typically costs more to mine than Wyoming coal and produces far more undesirable by-products (namely sulfur dioxide) when burned. *See* Flaim & Hemphill at 2-3, 18-21. Accordingly, the coal industries in these states – like Oklahoma's – are withering in the face of external competitive pressure. Recent changes to the Clean Air Act (*see infra* Parts II & III) place an even greater emphasis on reducing sulfur emissions and thus stand to increase this trend even further.

Coal mining occupies an important place in the history and economy of many of these states, prompting them to turn to protectionist legislation as a means for offsetting their competitive disadvantages in the free market. In addition to Oklahoma, at least ten other states have enacted discriminatory legislation in an effort to enhance artificially the competitive position of their coal industries.[1] *But see Brown-Forman Distillers*, 476 U.S. at

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[1] Ala. Code § 37-12-5 (Supp. 1990); Ark. Stat. Ann. § 23-18-105 (Supp. 1989); Colo. Rev. Stat. § 39-22-308 (Supp. 1990); Ill. Rev. Stat. ch. 111 2/3 para. 8-403.1(g) (Supp. 1990); Ind. Code §§ 8-1-2-6.1, 8-1-2-6.6 (Supp. 1990); Ky. Rev. Stat. Ann. §§ 211.390, 211.392 (Michie Supp. 1990); Md. Tax-Gen. Code Ann. §§ 8-406, 10-704.1 (Supp. 1990); 66 Pa. Cons. Stat. Ann. § 514 (Purdon Supp. 1990); Va. Code Ann. § 58.1-433 (Supp. 1990); W. Va. Code §§ 11-13-3g, 11-13H-1 through 11-13H-3 (1987).

These statutes are reprinted in Appendix A.

580 (State "may not insist that producers or consumers in other States surrender whatever competitive advantages they may possess"). The discrimination in these statutes ranges from the establishment of quotas like Oklahoma's[2] to the granting of special tax credits to utilities that either burn in-state coal or construct facilities specially designed to burn in-state coal.[3] Every one of these

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[2] *See* Ala. Code § 37-12-5 (requiring cogenerators that burn coal to use Alabama coal); Ark. Stat. Ann. § 23-18-105 (requiring utilities to burn minimum percentage of Arkansas coal); Ill. Rev. Stat. ch. 111 2/3 para. 8-403.1(g) (requiring utilities complying with federal mandate to purchase cogenerated power to displace burning of out-of-state coal before displacing burning of Illinois coal).

[3] *See* Colo. Rev. Stat. § 39-22-308 (providing credit against state income tax for purchase of Colorado-mined coal); Ind. Code § 8-1-2-6.1 (allowing recovery of costs associated with research and development designed to increase use of Indiana coal); *id.* § 8-1-2-6.6 (allowing utility to include value of pollution facilities under construction in rate base if utility uses only Indiana coal as its primary fuel once facility is operating); Ky. Rev. Stat. Ann. § 211.390, 211.392 (tax exemption for facilities that burn Kentucky coal and use certain pollution control technology); Md. Tax-Gen. Code Ann. §§ 8-406(b), 10-704.1 (providing credits against franchise tax and state income tax for using Maryland-mined coal); 66 Pa. Cons. Stat. Ann. § 514 (preferential form of rate recovery for utilities "upgrading the capability of an existing coal fueled plant to use coal mined in Pennsylvania"); Va. Code Ann. § 58.1-433 (tax credit to cogenerators burning Virginia coal); W. Va. Code §§ 11-13-3g, 11-13H-1 through 11-13H-4 (tax credit for utilities burning coal from West Virginia mines or from mines employing at least 100 West Virginia residents). *Cf.* Utah Code Ann. § 59-7-110.5 (Supp. 1990) (providing tax credit for export of Utah-mined coal outside of United States).

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statutes burdens interstate commerce, *see New Energy Co.*, 486 U.S. at 275-77 (discriminatory tax incentives unconstitutional), and together they demonstrate that the Balkanization of the nation's coal industry is well under way. Furthermore, history demonstrates that protectionist statutes like these, if countenanced, will spread to other industries as well. *See, e.g., Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984) (discriminatory tax on imported liquor); *Maryland v. Louisiana*, 451 U.S. 725 (1981) (discriminatory tax on exported natural gas); *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951) (ban on imported milk).

The Special Master correctly concluded that the direct impact of the Oklahoma statute alone demonstrates its unconstitutionality. This conclusion becomes even more inescapable when the Oklahoma statute is examined in the context of the national energy market.

II. The Special Master Correctly Concluded That Oklahoma's Discriminatory Statute Cannot Be Justified.

"[S]tate statutes that clearly discriminate against interstate commerce are routinely struck down, unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism." *New Energy Co.*, 486 U.S. at 274. Oklahoma bears the burden of showing

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The discriminatory effect of these types of statutes is substantial. Electricity generation facilities generally are designed to burn a specific type of coal, which greatly limits the utility's ability to shift to a different type of coal in the future.

that its discriminatory statute advances a legitimate local purpose that cannot be adequately served by reasonable non-discriminatory alternatives. *Id.* at 278; *see also Maine v. Taylor,* 477 U.S. 131, 138 (1986); *Hunt v. Washington State Apple Advertising Comm'n,* 432 U.S. 333, 353 (1977). This burden is a heavy one. "[T]he proffered justification for any local discrimination against interstate commerce must be subjected to 'the strictest scrutiny.' " *Taylor,* 477 U.S. at 144 (quoting *Hughes v. Oklahoma,* 441 U.S. 322, 337 (1979)).

The justifications advanced by Oklahoma for its discriminatory statute are purely economic. *See* Report at 24. Furthermore, Oklahoma does not "argue or offer to prove that the asserted purposes of the Oklahoma Act cannot be achieved by non-discriminatory means." *Id.* at 28. Therefore, the Special Master's finding that Oklahoma did not, and could not, justify its discrimination against interstate commerce is compelled by the applicable law.

Oklahoma's inability to justify its discrimination against Wyoming's low-sulfur coal is further confirmed by Congress' recent adoption of the Clean Air Act Amendments of 1990, Pub. L. No. 101-549, 1991 U.S. Code Cong. & Admin. News (104 Stat.) 2399 (to be codified at 42 U.S.C. §§ 7401-7642). Congress recognized that sulfur dioxide emissions from coal-fired power plants constitute one of the most serious sources of air pollution in the country,[4] and expressly targeted electric power plants in an effort "to reduce the adverse effects of acid deposition

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[4] Power plants account for approximately two-thirds of the country's total sulfur dioxide emissions. *See* H.R. Rep. No. 101-490, 101st Cong., 2d Sess., pt. 1, at 357 (1990); S. Rep. No. 101-228, 101st Cong., 2d Sess. 282 (1989).

through reductions in annual emissions of sulfur dioxide . . . . " Clean Air Act § 401(b), 104 Stat. 2585. Specifically, the legislation mandates that affected power plants reduce their emissions rate of sulfur dioxide to 2.5 pounds of sulfur dioxide per million British thermal units ("Btu") of heat input by January 1, 1995, and to 1.2 pounds of sulfur dioxide per million Btu by January 1, 2000. *Id.* §§ 404, 405, 104 Stat. 2592-2613. Thereafter, total aggregate emissions of sulfur dioxide from coal-fired power plants are capped to maintain those reductions on a nation-wide basis. *Id.* § 403(a), 104 Stat. 2589.

By forcing Oklahoma's utilities, against their wishes, to replace low-sulfur Wyoming coal with high-sulfur Oklahoma coal, Oklahoma's statute directly interferes with Congress' express legislative objectives.[5] *See* Flaim & Hemphill at 18-21. While this may provide economic benefit to Oklahoma's miners, it cannot benefit the health of Oklahoma's citizens and hinders the national effort "to protect and enhance the quality of the nation's air resources." Clean Air Act, as amended, § 101(b)(1), 42 U.S.C. § 7401(b)(1) (1988). At a time when Congress has committed the nation to renewed and intensified efforts

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[5] The annual average sulfur dioxide emission rate of Wyoming coal is 0.92 pounds of sulfur dioxide per million British thermal units ("Btu"), compared to 4.63 pounds of sulfur dioxide per million Btu of Oklahoma coal. *See* National Coal Association, *Steam Electric Plant Factors* at I-12, 13 (1987). *See also* SF ¶¶ 24-26. Although the Clean Air Act's emissions limitations can be met by adding scrubbers and other control technology, forcibly curtailing the utilities' use of clean coal hinders the utilities' ability to benefit from the Act's emission allowance allocation and transfer system. *See infra* Part III.

to reduce air pollution, Oklahoma's "Buy [Dirty] Oklahoma [Coal]" Act (like its counterparts in other states) stands out as an anachronistic example of a local barrier to the achievement of important national objectives.

III. The Oklahoma Statute Must Be Stricken In Its Entirety.

Oklahoma argued, and the Special Master agreed, that because the Grand River Dam Authority ("GRDA") is a state-owned facility, Oklahoma is free to compel it to purchase Oklahoma-mined coal under the "market participant doctrine." The Association joins in Wyoming's argument that while the Oklahoma legislature is free to adopt a statute applicable only to the GRDA, the Special Master's recommendation that this Court effectively rewrite the statute to achieve this result is in error.

The statute requires *"all entities* providing electric power for sale to the consumer in Oklahoma and generating said power from coal-fired plants located in Oklahoma" to burn a mixture of coal that contains at least ten percent Oklahoma-mined coal. Okla. Stat. tit. 45, § 939 (Supp. 1991) (emphasis added). Clearly, this statute is not susceptible to any construction that would limit its application to the GRDA. Amendment of the phrase "all entities" to read "the GRDA" or "state-owned utilities" must be done, if at all, by the Oklahoma legislature. *See, e.g.*, Mo. Ann. Stat. § 34.080 (Vernon 1969) (expressly requiring all state agencies to purchase Missouri coal if it is available at a competitive price).

The severability clause applicable to the Oklahoma statute is of no consequence here because no part or provision of the statute is sufficiently independent of the remainder of the Act to permit separation. *See Baldwin v. Franks*, 120 U.S. 678, 688 (1887). The severability clause provides as follows:

> The provisions of this act are severable and if any part or provision shall be held void the decision of the court so holding shall not affect or impair any of the remaining parts or provisions of this act.

Act of March 26, 1986, ch. 43, 1986 Okla. Sess. Laws 74. By its very terms, this clause presupposes that a discrete and separable portion of the law is unconstitutional, and that such a portion may be excised from the remaining valid portions of the Act. That clearly is not the case here: the statute applies to "all entities," and there is nothing that can be removed from that phrase to limit its application to state-owned utilities.

Furthermore, this Court should not presume that the Oklahoma legislature would, if given the opportunity today, adopt a statute applicable only to the GRDA. The Clean Air Act Amendments will have far-reaching consequences for state-owned as well as privately-owned utilities that the Oklahoma legislature would no doubt wish to consider before making such a policy decision. Under the amended Clean Air Act, utilities receive a limited number of "pollution allowances," each allowance entitling it to emit one ton of sulphur dioxide in a calendar year. Clean Air Act § 402(3), 104 Stat. 2585. Allowances are transferable and are likely to be of great value. By requiring the GRDA to burn high-sulphur coal, the Oklahoma statute greatly limits the GRDA's flexibility under this scheme, jeopardizing its ability to offer competitive rates to its consumers. Thus, despite the usual presumption in favor of severability relied upon by the Special Master, *see* Report at 33 (citing *Williams v. Oklahoma,* 542 P.2d 554, 595-96 (Okla. Crim. App. 1975), *judgment vacated on other grounds,* 428 U.S. 907 (1976); *Englebrecht v. Day,* 208 P.2d 538, 544 (Okla. 1949)), the doctrine of severability has no application to this case and the Oklahoma statute must be ruled on as written.

CONCLUSION

Oklahoma's blatantly discriminatory statute has no legitimate purpose, and represents but one component of a broad patchwork of protectionist state legislation which threatens to disrupt the highly-efficient national coal market and thwart the objectives of the Clean Air Act. The principles of federalism embodied in the Commerce Clause demand that Oklahoma's statute be declared unconstitutional *in toto*.

Dated: April 2, 1991

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APPENDIX A

Alabama

Ala. Code § 37-12-5 (Supp. 1990)

Purchase of coal produced in Alabama required.

. . . [A] cogenerator who uses coal as a fuel source to produce electrical power shall purchase coal produced in the state of Alabama provided that such Alabama coal is available to the cogenerator at prices and under terms and conditions (including availability, quantity, quality and reliability of supplier) at least as favorable as coal produced outside the state of Alabama.

Arkansas

Ark. Stat. Ann. § 23-18-105 (Supp. 1989)

Use of Arkansas-mined coal.

(a) To the extent that it is technically, economically, and environmentally feasible, all electric utilities in Arkansas providing electric power for sale to consumers in Arkansas and generating electric power from coal-fired plants located in Arkansas shall burn a mixture of coal that contains a minimum of:

(1) Three percent (3%) Arkansas-mined coal as calculated on a British Thermal Unit (BTU) basis from January 1, 1988, until December 31, 1988;

(2) Six percent (6%) Arkansas-mined coal as calculated on a British Thermal Unit (BTU) basis from January 1, 1989, until December 31, 1989; and

(3) Ten percent (10%) Arkansas-mined coal as calculated on a British Thermal Unit (BTU) basis each calendar year after January 1, 1990.

(b)(1)(A) No electric utility shall be required to comply with this section if to do so would result in increasing the cost of electricity to its consumers over the cost incurred to serve them under existing or alternative coal purchase arrangements.

(B) Types of increased costs to be considered in addition to the cost of the coal include, but are not limited to. . . .

* * *

(2) No public utility shall be required to comply with this section if to do so would result in the utility exceeding any of its state or federal air quality emission standards or any other conditions of its environmental permits.

(3) No public utility shall be required to comply with the provisions of this section if to do so would result in the utility being unable to fulfill any existing contractual commitments for the purchase of coal or result in the purchase of a quantity of Arkansas coal above the amount the utility can utilize.

* * *

Colorado

Colo. Rev. stat. § 39-22-308 (Supp. 1990)

Credit allowed for purchase of Colorado coal.

(1) For income tax years commencing on or after January 1, 1989, but prior to January 1, 1995, there shall

be allowed, as a credit against any taxes imposed on income by this part 3, an amount equal to one dollar per ton for each ton of Colorado coal purchased by and delivered to the taxpayer in excess of the number of tons of Colorado coal purchased by and delivered to the taxpayer in the income tax year commencing on or after January 1, 1988. If the amount of the tax credit allowed by this section exceeds the amount of income tax due for the taxable year, the excess amount may be carried forward as a credit against subsequent years' income tax liability for a period not exceeding three years and shall be applied first to the earliest income tax years possible. For purposes of this section, Colorado coal means coal mined in Colorado, as certified by the producer of such coal.

(2)(a) Any public or private corporate purchaser who is not liable for or subject to state income tax during the year the coal is purchased and who is otherwise eligible for the credit allowed by subsection (1) of this section may by written agreement transfer such credit to the producer of the coal. Said producer shall be allowed, as a credit against any taxes imposed on income by this part 3, an amount equal to the amount of credit for which the purchaser would otherwise have been eligible pursuant to subsection (1) of this section. Any such credit shall be subject to any limitations established in subsection (1) of this section. Said producer shall reduce the purchase price of said coal to such corporate purchaser by the amount of the credit so transferred. . . .

Illinois

Ill. Rev. Stat. ch. 111 2/3 para. 8-403.1(g) (Supp. 1990)

Electric utilities – Purchase of electricity from qualified solid waste energy facilities.

(g) The Illinois Commerce Commission shall require that: (1) electric utilities use the electricity purchased from a qualified solid waste energy facility to displace electricity generated from nuclear power or coal mined and purchased outside the boundaries of the State of Illinois before displacing electricity generated from coal mined and purchased within the State of Illinois, to the extent possible, and (2) electric utilities report annually to the Commission on the extent of such displacements.

Indiana

Ind. Code §§ 8-1-2-6.1(c), 8-1-2-6.6(b) (Supp. 1990)

Clean coal technology – Definitions – Recoverable expenses.

(c) Except as provide in subsection (d), the commission shall allow a utility to recover as operating expenses those expenses associated with:

(1) Research and development designed to increase use of Indiana coal; and

(2) Preconstruction costs (including design and engineering costs) associated with employing clean coal technology at a new or existing coal burning electric generating facility if the commission finds that the facility:

(A) Utilizes and will continue to utilize (as its primary fuel source) Indiana coal; or

(B) Is justified, because of economic considerations or governmental requirements, in utilizing non-Indiana coal; after the technology is in place.

§ 8-1-2-6.6(b) Qualified pollution control property – Addition of value for ratemaking purposes.

(b) Upon the request of a utility that began construction after October 1, 1985, of qualified pollution control property that is to be used and useful for the public convenience, the commission shall for ratemaking purposes add to the value of that utility's property the value of the qualified pollution control property under construction, but only if at the time of the application and thereafter:

(1) The facility burns only Indiana coal as its primary fuel source once the air pollution control device is fully operational; or

(2) The utility can prove to the commission that the utility is justified because of economic considerations or governmental requirements in utilizing some non-Indiana coal.

Kentucky

Ky. Rev. Stat. Ann. §§ 211.390, 211.392 (Michie Supp. 1990)

Definitions for KRS 211.392.

(1) "Fluidized bed energy production facility" shall mean any facility or property, located in this state, which is fueled by Kentucky coal. . . .

§ 211.392. Fluidized bed combustion technology tax exemption certificate.

* * *

(9) The fluidized bed combustion technology tax exemption certificate, upon approval, shall exempt the facilities from taxes outlined in the provision of this section and KRS Chapters 132, 136, 138, and 139. . . .

Maryland

Md. Tax-Gen. Code Ann. §§ 8-406(b), 10-704.1 (Supp. 1990)

§ 8-406(b) Credits.

(b) Maryland-mined coal. – A public service company, including any multijurisdictional public service company, may claim a credit against the public service company franchise tax in the amount of $3 for each ton of Maryland-mined coal that the public service company purchased in the calendar year in excess of the number of tons of Maryland-mined coal that the public service company purchased in 1986.

§ 10-704.1 For purchase of Maryland-mined coal.

(b) Amount of credit generally. – A cogenerator that is not subject to the public service company franchise tax may claim a credit against the State income tax in the amount of $3 for each ton of Maryland-mined coal that the cogenerator purchased in the taxable year in excess of the number of tons of Maryland-mined coal that the cogenerator purchased in calendar year 1986.

Missouri

Mo. Stat. Ann. § 34.080 (Vernon 1969)

1. That the board of trustees or other officer or officers in charge of every institution in the state of

Missouri which is supported in whole or in part by public funds, and who are required to purchase coal for fuel purposes in the operation of any such institution, shall be required to purchase and use coal which is mined in the state of Missouri, if the cost of the coal mined in the state of Missouri is not greater than the cost of coal mined in any other state or states, including the cost of transportation.

2. The term "institution" shall be construed to include all institutions supported by public funds of the state, but shall not include municipal corporation, political subdivisions or public schools.

Pennsylvania

66 Pa. Cons. Stat. Ann. § 514 (Purdon Supp. 1990)

Use of coal.

(c) Cost of upratings . . . [T]he commission may allow a portion of the prudently incurred costs, determined on a per megawatt basis and not to exceed 50% of the unit's undepreciated original cost per megawatt, of uprating the capability of an existing coal-fueled plant to use coal mined in Pennsylvania to be made a part of the rate base or otherwise included in the rates charged by the utility before such uprating is completed. . . .

Virginia

Va. Code Ann. § 58.1-433 (Supp. 1990)

Qualifying cogenerators and small power producers credit.

A. For all taxable years beginning on and after January 1, 1988, every cogenerator . . . shall be allowed a credit against the tax imposed by § 58.1-400 in the following amount: one dollar per ton for each ton of coal mined in Virginia, purchased by any cogenerator which sells electric power to a public service corporation in Virginia.

B. For all taxable years beginning on and after January 1, 1989, every cogenerator . . . shall be allowed an additional credit against the tax imposed by § 58.1-400 in the following amount: one dollar per ton for each ton of coal mined in Virginia, purchased by any cogenerator which sells electric power to a public service corporation in Virginia.

* * *

West Virginia

W. Va. Code §§ 11-13-3g, 11-13H-I through 11-13H-3 (1987)

§ 11-13-3g. Tax credit for increased generation of electricity from coal.

(a) There shall be allowed as a credit against the tax imposed by section two of this article, on the privilege taxable under section two-m of this article, the amount determined under article thirteen-h of this chapter, providing a credit for increased generation of electricity at electric power plants in this state which burn coal produced by miners who are residents of this state.

* * *

§ 11-13H-1. Legislative finding.

The Legislature finds that electricity generated in this state is by and large generated from coal; that this state and this region are blessed with large quantities of minable coal that is suitable for use as fuel to generate electricity; that there are sound economic purposes to locating electric power generating facilities in the coal fields and to encouraging power companies to operate such plants at their most cost-effective level; and that many West Virginia miners work in mines located in other states and live or reside in this state. Therefore, encouraging greater utilization of existing power plants and their use of coal produced by West Virginia miners at mines located in this or other states, is in the public interest and promotes the general welfare of the people of this state, in that it will increase employment opportunities for West Virginia residents.

§ 11-13H-2. Definitions.

* * *

(2) Eligible coal. – The term "eligible coal" means coal produced from an eligible mine, as defined in subsection (3).

(3) Eligible mine. – The term "eligible mine" means any mine located in this state and any mine which employs at least one hundred West Virginia residents (as defined for personal income taxes in section seven, article twenty-one of this chapter) located in another state.

* * *

§ 11-13H-3. Credit allowed; amount of credit; effective date.

(a) An electric power company that generates electricity at a power plant located in this state, that uses coal as its primary source of fuel to generate such electricity, shall be allowed a credit, as determined under subsection (b) of this section, against its liability for tax under section two-m, article thirteen of this chapter, if the taxpayer increases the amount of electricity it generates in this state, consuming coal produced from an eligible mine that employs miners who are residents of this state.

(b) Amount of credit. – The credit allowed by this section is an amount equal to the amount determined by. . . .

* * *

Utah

Utah Code Ann. § 59-7-110.5 (Supp. 1990).

Utah steam coal tax credit.

(1) For taxable years beginning on or after January 1, 1990, there is allowed, as a credit against any taxes imposed by this chapter or Chapter 8, an amount equal to $1 per ton for each ton of Utah steam coal sold from a permitted mine by the taxpayer to a purchaser outside of the United States in excess of the number of tons of Utah steam coal sold from a permitted mine by the taxpayer to a purchaser outside of the United States in the taxable year beginning on or after January 1, 1989.

(2) For purposes of this section, "Utah steam coal" means coal mined in Utah, as certified by the producer of such coal.

(3) The credit allowed by this section is repealed effective for tax years beginning on or after January 1, 1993.

(SEAL)

APPENDIX B

LETTERS OF CONSENT

ROBERT H. HENRY

ATTORNEY GENERAL
STATE OF OKLAHOMA

March 29, 1991

Lawrence J. Wolfe
Holland & Hart
Attorneys at Law
P.O. Box 1347
Cheyenne, WY 82000-1347

Re: *Wyoming v. Oklahoma,* United States Supreme Court No 112, Original

Dear Mr. Wolfe:

I am writing to inform you that the State of Oklahoma has no objection to your firm filing an amicus curiae brief, in the above-referenced cause, on behalf of the Wyoming Mining Association.

Sincerely,

/s/ Neal Leader
NEAL LEADER
ASSISTANT ATTORNEY GENERAL
CHIEF, CIVIL DIVISION

NL/vid/wolfe

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THE STATE [SEAL] OF WYOMING

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MIKE SULLIVAN
GOVERNOR

JOSEPH B. MEYER
ATTORNEY GENERAL

* * *

Lawrence J. Wolfe
HOLLAND & HART
P.O. Box 1347
Cheyenne, WY 82003-1347

RE: Amicus Curiae Brief
for Wyoming Mining Association
Wyoming v. Oklahoma, Docket No. 112

Dear Mr. Wolfe:

This is to inform you that the State of Wyoming consents to the filing of an amicus curiae brief by your client, the Wyoming Mining Association, to be submitted in the above referenced original action before the United States Supreme Court, for the purpose of supporting and excepting to the Special Master's Report. As you may know, our brief is due on April 2, 1991. We would anticipate that the Wyoming Mining Association brief should be filed on the same day.

Please let me know it I can be of any further assistance.

Sincerely,

/s/ Steve Jones
Steve Jones
Senior Assistant
Attorney General

SCJ/bg

1890-1990
WYOMING
CENTENNIAL
A LASTING LEGACY