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## VII. Legal and Regulatory Analysis

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### INTRODUCTION

This chapter discusses the four major areas of law which affect coal slurry pipeline development. The sections on environmental and water law are relevant independently of Federal coal slurry pipeline legislation, in that if pipelines are built, even without Federal legislation, the pipelines will require acquisition of water and water rights and compliance with Federal environmental protection statutes. Allocation of water and protection of water rights has traditionally been a matter of State law. It is possible, but unlikely, that pending Federal legislation will greatly alter the legal framework of water allocation. Compliance with the National Environmental Policy Act (NEPA) will be triggered if pipeline construction involves any major Federal action which significantly affects the environment. The Federal Water Pollution Control Act (FWPCA) must be complied with if pollutants or hazardous substances are discharged into the waters of the United States.

The other two sections—transportation regulation and eminent domain law—are directly applicable to pending legislation. The kind of eminent domain—Federal or State—employed in acquisition of pipeline rights-of-way is dependent upon the specific language of the legislation enacted. Similarly, the kind of regulation imposed on coal slurry pipelines is dependent upon whether legislation is passed and what provisions are contained in that legislation. For example, as a condition of receipt of a grant of Federal eminent domain, coal slurry pipelines may be subjected to Interstate Commerce Commission (ICC) regulation as common carriers.

Eight major legal provisions, within the four areas of legal specialty, have recurred in the assessment of coal transportation by coal

slurry pipelines and railroad unit trains. Our analysis reveals that four of these provisions tend to promote pipeline development, while the other four tend to favor rail transportation. These eight major legal provisions are enumerated below.

#### Legal Provisions Which Favor Pipelines

##### **1. Stringent common carrier obligations.—**

By virtue of ICC regulation as a common carrier, railroads are required to provide some unprofitable service on low-volume branch lines, for example, and to provide equal service to small as well as large shippers. Pipelines, even if deemed common carriers, will probably not be subject to such stringent requirements if the regulatory structure for pipelines carrying other commodities is a guide.

2. Rate of return.—Although the situation may change with the implementation of the Railroad Revitalization and Regulatory Reform Act, the allowed rates of return on rail investment have historically been considerably less than those allowed in the present pipeline industry. Railroads therefore will probably find capital improvements to provide improved or less costly service more difficult to bring about than will pipelines, unless parity in ratesetting is required by legislation.

3. Railroads must negotiate rate increases.—Railroad regulation provides that tariffs can be appealed at any time, and increases must be negotiated annually. There is one minor exception in the Rail-

road Revitalization and Regulatory Reform Act of 1976 which permits a rate to stand for 5 years, if more than \$1 million is invested in related facility improvements. Pipelines, on the other hand, typically contain cost escalation clauses within the long-term delivery contracts.

**4. No long-term contracts for rail.-Under ICC regulation, railroads are prohibited from entering into long-term shipping contracts. Pipelines are not presently or foreseeably so restrained, Long-term shipping contracts enable the carrier** to protect investments in equipment and facility improvements.

#### Legal Provisions Which Favor Railroads

**5. State eminent domain. -Since new railroad trackage** will rarely be required, railroads have little need for further powers of eminent domain to gain rights-of-way. Pipelines, however, require rights-of-way through numerous States for long-distance construction. Presently, nine States have granted State power of eminent domain specifically to coal slurry pipelines, Other States have no statutes granting such power. Thus, an obstacle to pipeline construction is acquisition of rights-of-way.

**6. Water rights.-Railroads do not require more than minimal quantities of water** for coal transportation. Pipelines, on the other hand, require great quantities of water, generally in Western States where water is relatively scarce and competition therefore great. Acquisition of water rights is dependent upon the laws and administrative regulations of the particular jurisdiction.

**7. Commodities clause.-The commodities clause of the Interstate Commerce Act (I CA) presently forbids railroads from**

carrying commodities owned or manufactured by the railroad. Railroads can, in some cases, circumvent this provision through holding companies and other arrangements. The commodities clauses in proposed legislation for coal slurry pipelines would be much more stringent, Pipeline operators would be forbidden from any ownership interest in the end line activity (e. g., utility powerplant) or any source activity (e. g., coal mining or coal-land ownership rights). Under this provision utilities and mining companies or their contractors would have more difficulty in building and operating a pipeline.

**8. EIS requirement.-If Federal eminent domain legislation is enacted, or other major Federal action is invoked, such as granting of rights-of-way across Federal lands, or granting a certificate of public convenience and necessity, NE PA requires that the Federal agency file an environmental impact statement (E IS) if the action will have a significant effect on the environment. Although an impact statement is prepared only once, one will generally be required for coal slurry pipeline construction, and it will demand substantial resources of the pipeline operator. Because the tracks are already in existence, and new trains and rate changes are not usually considered major Federal actions with significant effects on the environment, railroads will be much less likely to trigger the E I S process. And even where an E I S is required it will rarely be as extensive as that required for a coal slurry pipeline.**

Coal slurry pipelines are a technological and legal innovation, and much of the following discussion therefore relies on legal precedent applicable to other types of pipelines. Other types of pipelines differ in some ways, and the present comparison at least highlights areas where distinctions indicate a need for specific legislation or regulation,

## TRANSPORTATION REGULATION

Regulation of coal slurry pipelines in interstate commerce turns initially upon whether or not pipelines qualify as common carriers. Under the property clause of the Constitution, the Federal Government has the constitutional power to require pipelines to operate as common carriers as a condition of the grant of Federal eminent domain or the grant of right-of-way across Federal lands.

Two major types of regulation are imposed upon pipelines. Pipelines carrying commodities in interstate commerce are subject to ICC reporting, valuation, and accounting requirements designed to keep ICC abreast of all current financial and physical conditions within the pipeline industry which may trigger the need for regulatory changes. Secondly, pipelines which assume common carrier characteristics are required to serve, on an equal basis, all similarly situated persons requesting pipeline transportation and to charge rates within the ICC reasonableness requirement.

The chief characteristics of common carriers is that they transport, indiscriminately for consideration, all of the freight of the type they purport to carry which is tendered to them. Common carrier regulation has been imposed even on pipeline carriers that held title to all the property they transported. Analysis of case law reveals that the term "common carrier" as defined in the ICA includes all pipelines, whether they are in fact private, contract, or common carriers. Commodities are in interstate commerce: 1) when they are transferred by purchase to pipelines prior to shipment to another State, or 2) when they are transported across State borders for sale or for use by someone other than the pipeline company; but not when they are transported for the pipelines own use to or from its own facilities. Further, the various carrier regulation provisions of ICA can be imposed on pipelines independently of one another. The reporting-type requirements may be imposed upon every pipeline carrying coal in interstate

commerce, whether the carrier is actually private, contract, or common. The Interstate Commerce Commission may impose additional ICA common carrier-for-hire duties on pipelines within its jurisdiction which acquire ownership to commodities and transport them across State borders, and which operate in such a manner as to create competitive imbalances within the industry which produces, processes, or markets the commodities transported.

The following three possible types of coal slurry pipelines could be regulated as common carriers in substance:

1. a coal slurry pipeline which transports all coal slurry tendered to it;
2. a pipeline that purchases coal from all mines in the area from which it operates; and
3. a pipeline that provides essentially the only efficient means of transportation for the coal mined in its source area.

A final possible type of carrier may well include currently contemplated coal slurry pipelines. Private carriers, which are common carriers only in the terminology of ICA, and whose services are not needed by others to cure competitive imbalances within the relevant industry, cannot be converted to common carriers-for-hire by ICC. **It may** be argued that pipelines which in fact operate to serve exclusively a few selected shippers pursuant to a private contract were not intended to be within the reach of ICC regulation as common carriers-for-hire. Assumption of common carrier duties by such coal slurry pipelines may disrupt exclusive shipping agreements, require that lines be rebuilt to accommodate added Volumes, or reduce overall efficiencies by requiring construction of higher volume lines initially and operation at less than design capacity.

States also impose common carrier duties on some pipelines. Generally a pipeline must be devoted to public service, that is, operated

as a common carrier-for-hire, to acquire State governmental privileges, such as eminent domain power.

The traditional duties of common carriers are:

1. to furnish the transportation services they offer to the public to all who seek them;
2. to furnish services and facilities adequate for satisfactorily fulfilling their transportation obligations;
3. to establish reasonable rules and regulations governing how they fulfill their transportation obligations;
4. to establish reasonable rates and charges for their transportation services; and
5. to treat equally all shippers, freight, and **locations** served which share similar characteristics.

These duties were established to ensure that all persons engaged in providing transportation services for the public operate in ways that best serve the public interest consistent with achieving a reasonable return on their investments in transportation facilities.

A number of factors can preclude pipelines from operation as common carriers. Lack of shipper connections and lack of connecting, receiving, or delivery facilities are frequent problems limiting access to pipelines. Some States require pipelines to furnish connections for shipper facilities, but Federal activity in this area is minimal. For such facilities to be required of coal slurry pipelines, the requirements should be imposed prior to construction so as to properly measure, in advance, the volume of throughput a pipeline will handle. If a pipeline must contain excess capacity for the benefit of future shippers, its present efficiency will be diminished since a coal slurry pipeline operates more efficiently at the throughput for which it is designed. Common carriers faced with transportation demands exceeding the capacity of their transportation system must attempt to serve all shippers without discrimination. This service is usually accomplished one of two ways: 1) by serving shippers on a first-come, first-served basis; or 2) by prorating the pipeline

shipping capacity among the shippers on the basis of the amount of throughput each shipper represents to the total throughput tendered. For coal slurry pipelines shipping to coal-fired electric powerplants, either method of nondiscriminatory service could result in a decrease of power availability in the area of service of the power company.

Minimum tender requirements are rules specifying the minimum quantity of a particular commodity that a carrier will accept for shipment from a specified origin point to a specified destination point. Large minimum tender requirements tend to disfavor small shippers whereas low minimum tender requirements tend to prejudice the ability of a pipeline to function at maximum capacity in a stable environment.

A 1976 **ICC ruling on pipeline** ratemaking uncovered so many significant challenges to the rationality of the ICC ratemaking practices that a comprehensive evaluation was undertaken to determine future ratemaking policy. The reevaluation was still in progress in 1977 when the Department of Energy Organization Act (P. L. 95-91) transferred regulation of petroleum pipelines from ICC to the Department of Energy (DOE). Whether the current, or even revised methods of calculating fair rates of return for pipelines will apply to coal slurry pipelines is unknown. Case law illustrates the desirability of adopting fair rates of return more tailored to the needs of pipelines as a separate class.

The present ICC ratemaking practices for pipeline employ a public utility approach. This approach is considered reasonable since there is little pipeline-to-pipeline competition. Public utility ratemaking entitles the regulated company to set rates calculated to cover its costs of providing public services plus a fair return on fair value of the property the company dedicates to public service. Rate-of-return percentages are established for categories of pipelines rather than for each individual pipeline based on its own individual needs. The Interstate Commerce Commission employs 8 and 10 percent as reasonable rates

of return for crude oil and petroleum product pipelines respectively. No reasonable rate of return has been established for coal slurry pipelines. The Interstate Commerce Commission uses the method for valuation of carrier property prescribed by section 19a of ICA as a basis for pipeline rate determinations. This annual calculation takes into account the original cost of all lands and rights-of-way used by the carrier in delivering its services, and the original cost, cost of replacement both new, and less depreciation of all other property the carrier dedicates to public service. The method also includes ICC'S consideration of working capital and going-concern value.

The relevant rail rates for comparisons with coal slurry pipeline rates are those on the unit train concept. Unit train rates are lower than other types of rates (e. g., carload, multicar, train load) because they include volume discounts, and discounts for other cost-reduction factors such as elimination of loading, unloading, and car-switching operations. The major difference between ICC'S railroad ratemaking and its pipeline ratemaking is that the reasonableness of railroad rates is judged without reference to a fair rate of return. A value-of-service consideration is applied to railroads, under which the rate is determined by consideration of

- 1 the level of the proposed rate compared with established rates for similar shipments in the territory,
2. the economic effect of the proposed rate on the shippers and their customers,
3. the relationship of the proposed rate and the cost of providing service, and
- 4 the likelihood that the rate will be compensatory.

The Interstate Commerce Commission has not given any consideration historically to the railroad's cost of equity capital in making railroad rate decisions. As long as the railroad rate covers its variable cost it is not unlawfully low. Under the Railroad Revitalization and Regulatory Reform Act (the 4R Act), ICC is not to determine the reasonableness of railroad rates by comparison to rate structures of com-

peting modes. This means that in rate competition between railroads and coal slurry pipelines, the railroads will be allowed to go below their fully allocated costs to undercut the fully allocated costs of competing pipelines, even though the coal slurry pipeline may have the lowest overall cost structure.

The Interstate Commerce Commission influences competition among distinct modes of transportation through policies focusing directly on competitive relationships and by regulating each mode differently from the way other modes are regulated. Competition between railroads and slurry pipelines is affected by ICA, subjecting only the railroads to a commodities clause and to entry, extension, and abandonment regulation. Unique features of ICC regulation of railroad rates also produce competitive impacts.

The commodities clause applies only to railroads and prohibits every railroad from transporting any commodity in interstate commerce which is manufactured, mined, or produced by it, or which it may own, in whole or in part. The commodities clause was enacted mainly to prevent railroads from achieving unfair competitive advantages in an unrelated industry by shipping commodities they owned at rates lower than they shipped commodities owned by their competitors. It does not directly prevent railroads from being commonly owned with, or being owned by, companies which engage in unrelated industries and then serving them as customers.

The proposed legislation would include a coal slurry pipeline commodities clause that would prevent anyone from having a direct or indirect ownership interest in a coal slurry pipeline who also has a direct or indirect interest in coal or would be a user of coal. This legislation would impose much greater investment limitations on any coal-related firm contemplating ownership of coal slurry pipeline enterprises than does the commodities clause on railroads.

Railroads must acquire certificates of public convenience and necessity before they can enter new markets, or extend or abandon cur-

rent markets. Coal pipelines are not now subject to any certification requirement, and are therefore free to enter or abandon any market. Entry and extension regulation is designed to **promote the most efficient carrier service possible in each area** served by a common carrier.

Coal slurry pipelines will make arrangements with shippers by throughput and deficiency agreements or ship-or-pay contracts. Although these arrangements can serve valid business purposes, they also impose a restraint on trade. If a restraint on trade is unreasonable, it is subject to antitrust action.

Throughout and deficiency agreements are essentially financing agreements designed to provide lenders to pipeline companies greater security in return for the best possible financing terms. The parties to the agreements are the pipeline company and the shippers, of which the latter agrees to guarantee the debt service obligations of the pipeline.

Ship-or-pay contracts are analogous to requirements contracts in the sense that they bind shippers to transporting a specified volume of traffic through a pipeline for a fixed

period of time. The valid business purposes of ship-or-pay contracts are:

1. to guarantee the debt service of the pipeline by securing a fixed level of revenue in order to procure favorable financing,
2. to guarantee that the pipeline operates at its design capacity so as to achieve full efficiency, and
3. to provide a stable source of transportation in a predictable volume at a reasonably stable price.

Balanced against these valid purposes are the **restraints of trade which include:**

1. **foreclosure of the traffic of the participating shippers from use of** competing modes of transportation, and
2. foreclosure of committed pipeline capacity from use by other, nonparticipating shippers.

The extent, duration, and cost of reduced competition, relative strengths of the parties, structure of the relevant industry, and other factors will determine whether the restraint of trade is reasonable.

## WATER LAW

From a survey of the water aspects of coal slurry pipeline development, several important considerations emerge. This section will briefly summarize the most important of them.

Most of the significant issues of State law influencing coal slurry pipeline development are related to prior appropriation jurisdictions in the western part of the country. However, the riparian system and the principal of reasonable use characteristic of Eastern States present two significant problems to a pipeline operator. First, under the riparian system, the use of water for a coal slurry pipeline may not be permitted, because the riparian system traditionally limits the use of water to the land adjoining the stream or body from which it is

taken. Second, even if use for a coal slurry pipeline is considered a riparian use, the riparian system is characterized by a sharing of water with all other riparian users from the same source. Thus, under conditions of heavy demand relative to supply, the pipeline operator may not be able to obtain enough water for the pipeline. Since most riparian jurisdictions are characterized by abundance of water and infrequency of litigation over water matters, the use of water for a coal slurry pipeline may not raise significant problems for any pipeline in the East.

In a prior appropriation jurisdiction the threshold consideration is the availability of water not already in beneficial use, assuming

that the use of water for a coal slurry pipeline is otherwise permissible. There are some inherent limitations on the sovereign right of a State to make water available for a coal slurry pipeline. Some of the limitations arise because a particular water source is shared with another State, and some arise because of the constitutional allocation of power between the States and the Federal Government.

Within the limits of its own sovereign power, a State may influence the availability of water in a number of significant ways. First, the policy adopted by some States for water resource management, in particular with respect to ground water resources, allows the State to permit ground water mining or permit water to be withdrawn only to the extent the water supply in the aquifer from which the water is withdrawn is replenished from natural sources. A second way in which some States influence the availability of water is by withdrawing water from present, private use to accomplish conservation, planning, and future development objectives,

Once it is determined that water is available, the next consideration is whether State water policy permits the use of water for a coal slurry pipeline, which depends upon whether the use of water for a coal slurry pipeline is a beneficial use, one which would be found to be in the public interest, under applicable State law. Guidelines under case law and under most State statutes are insufficient to resolve this question, although the legislatures of those States which have focused on the issue have generally taken a negative attitude toward water for coal slurry pipelines.

If the use of water for coal slurry is permitted, then State administrators may impose conditions on the use. Any State prohibition or unusual restriction on the use of water for coal slurry may be attacked as an unconstitutional discrimination against interstate commerce in coal. However, *unless* the restrictions were severely discriminatory against the transportation of coal out of State, the constitutional issue would probably be resolved by the courts in favor of the State determination.

Two specific State restrictions merit special mention. First, the application of the use preference policy of a State may make a water right for coal slurry somewhat uncertain. A use preference policy, either through the use of conditions in the operator's water permit or by force of statute, can invert normal priorities and require the pipeline use of water to yield to uses initiated after the pipeline was operational. In most States, a statutory use preference, as opposed to one imposed administratively, can be enforced only through the exercise of the power of eminent domain to condemn the water by a preferred user.

The second restriction of special significance is the restriction or prohibition against the exportation of water out of State. Although the movement of coal slurry out of State might be treated as the exportation of coal slurry, a manufactured product, as opposed to the exportation of water, State limitations on the exportation of water may be applicable. Serious constitutional objections to such State limitations exist, however,

In addition to the preceding issues of State law, some less-significant issues which may become significant in certain situations should be examined. Attention must be given to the effect on other users of water from the same water source if existing water rights are obtained and their use changed to a use for coal slurry. Another issue is the uncertainty of the water supply if the source chosen is byproduct water. Whether byproduct water sources will be used depends upon whether existing demands, or rights to make demands on natural water sources, will preclude the use of natural water sources without the acquisition of existing rights.

The important issues of Federal law do not relate to the constitutional power of Congress to make water available for use in a coal slurry pipeline. Constitutional power is adequate to do that, whether the source of the power is the inability of a State to thwart Federal policy through inconsistent enactments, or the power of Congress over certain water resources, notably navigable waters and water from



Federal water projects. Under the reserved rights doctrine, water under Federal control also includes unappropriated water appurtenant to lands reserved by the Federal Government to the extent necessary to accomplish the purpose of the reservation. The most significant limitation on Federal constitutional power requires that the Federal authority respect private rights, but this limitation does not apply to Federal allocation of navigable waters. The ability of the Federal Government to make reserved water appurtenant to Federal lands available for a coal slurry pipeline may be limited if the pipeline does not contribute to the purpose for which the land has been reserved.

The significant policy issues of Federal law concern the extent to which Congress will exercise its constitutional powers over commerce, property, and the general welfare. First, Congress must decide the extent, if any, to which water under Federal control should be made available for coal slurry pipelines. If Congress wishes to make Federal water available, then, at the very least, legislation should make it clear that use of water in a coal slurry pipeline is a use for which administrators of Federal projects may allocate Federal water.

The second **issue facing** Congress is the extent to which State control of water resources for a pipeline survives the enactment of legislation authorizing Federal certification and regulation of pipelines. Federal judicial treatment of Federal statutes (specifically, Federal Power Act, § 9(b), and Reclamation Act, § 8), whose design was on its face to maintain State control over water, suggests that the pending Federal legislation, in its present form, may leave little scope for State regulation of water for a coal slurry pipeline. If the intent is to preserve meaningful State regulation beyond the mere determination of the ex-

istence of vested rights in a water source, then legislation should express in specific terms exactly what State administrators may do to control water for the pipeline.

The third issue facing Congress is closely related to the second, and affects the extent to which the Federal Government must respect State law in distributing water from sources under Federal control, such as Army Corps of Engineers and Bureau of Reclamation projects. The legislative measures necessary to confer upon the States a meaningful voice in the distribution of Federal water are the same measures as those which permit State regulation to survive Federal certification and regulation of a pipeline, namely, specific expression of State authority.

An additional issue must be faced with respect to navigable waters. Congress must decide the extent to which a coal slurry pipeline operator must compensate, if at all, other private users of water from a source which is also a source for water for use in the pipeline.

**In conclusion, although traditionally, water allocation is primarily a matter of State law, increasing competitive water** needs and responsive Federal and State legislation create some uncertainty as to present law affecting water. Resolution of the uncertainty as to the present law affecting water sources for coal slurry pipelines may cost the pipeline operators in time and money. Some of this uncertainty could be resolved by a policy decision that water is to be made available for coal slurry. However, if a decision is made on the Federal level, then the long-standing integrity of State control of State water resources and the ability of State water administrators to implement State evaluations of regional water priorities would be compromised,

## ENVIRONMENTAL LAW

The major Federal environmental legislation affecting coal transportation by coal slurry

pipelines and railroads are the National Environmental Policy Act (NEPA), and the

Federal Water Pollution Control Act of 1972 (FWPCA). Additionally, the Safe Drinking Water Act of 1974 (SDWA) and Resource Conservation and Recovery Act of 1976 (RCRA) apply to prevent contamination of many ground water sources, Federal laws also protect members of the public and workers from other possible health and safety impacts of construction and operation of railroads and pipelines.

The National Environmental Policy Act applies to some activities in the construction and operation of both coal slurry pipelines and coal unit trains which involve Federal action and requires at least an environmental evaluation to determine whether an environmental impact statement is necessary. Activities common to both coal slurry pipelines and unit trains which involve Federal action and may require an E I S include: 1 ) crossing Federal lands, 2) crossing '(navigable waters of the United States" or '(waters of the United States, " 3) discharging pollutants into "waters of the United States, " and 4) being a part of the transportation element of a Mine Plan for development of a coal lease.

Under ICC regulation, rail line construction may have a significant impact on the environment, and in application to ICC the railroad must include a detailed environmental impact report, which may be incorporated into an E I S. Actions which affect the operation of a railroad line or general rate increases may also require EISs.

The exercise of regulatory power attendant to the grant of eminent domain in some of the presently pending legislation, may constitute sufficient Federal action to require an assessment of whether an E I S is necessary. Even where major Federal action is absent, State en-

vironmental regulations may require an E I S for State action or regulation.

Under various provisions of the FWPCA, "waters of the United States" are protected from pollutant discharges. jurisdiction of the FWPCA includes essentially all surface waters of the United States. Two provisions are especially applicable to coal slurry pipelines: 1 ) issuance of discharge permits under the national pollution discharge elimination system and, 2) control of point source accidental pollution discharges.

The national pollution discharge elimination system, in FWPCA, requires that a discharge permit which regulates the amount of pollutant in the discharged water be obtained. Coal preparation plants at coal slurry pipeline sources and slurry recycle and reuse plants at pipeline termini are subject to permit requirements. Accidental spills from, for example, a ruptured pipeline would subject the pipeline operator to potential liability for a discharge of toxic pollutants or hazardous substances without a permit if the discharge entered a water of the United States.

Underground waters are protected by the SDWA and RCRA. The SDWA regulates injections of fluids underground as well as the use of holding ponds, thereby limiting disposal of slurry waste water by either of these methods. The objectives of RCRA are to encourage development of solid waste management plans, prohibit open dumps, regulate handling and disposal of hazardous waste, and develop guidelines for solid waste disposal protection. Other than unusable sludge, for example, the dewatered slurry from an accidental spill, coal slurry pipelines will produce very little disposable solid waste.

## EMINENT DOMAIN

The power of eminent domain is an inherent power of a sovereign. The Federal and State constitutions do not grant the power but rather limit its exercise to a taking of property for

public purposes upon payment of just compensation to the owner of the property. The sovereign may delegate the power to non-governmental entities. The power is limited to

the territorial jurisdiction of the sovereign and may be subject to statutory limitations in connection with a particular grant of the power. The power is exercised through condemnation proceedings which award the landowner just compensation and put the condemnor in possession of the property. A prerequisite to condemnations for a pipeline may be a determination of an acceptable pipeline route after public hearings.

The coal slurry pipeline bills presently before Congress take one of two approaches. One approach is to grant Federal eminent domain authority to coal slurry pipelines upon the attainment of a certificate of public convenience and necessity from a Federal agency and to regulate them as common carriers. The other approach is to leave the matter of eminent domain to the States and to regulate coal slurry pipelines as common carriers under ICA. Under this approach right-of-way conflicts would be resolved by ICC, which could order another regulated carrier to grant an easement to a coal slurry pipeline.

Six Western States (Louisiana, Texas, Oklahoma, Montana, Utah, and North Dakota) have specifically granted eminent domain to coal slurry pipelines, and five States have no statutes which could be interpreted to include such a grant. In eight more States through which pipelines may pass, a coal slurry pipeline is not assured **of the power of eminent domain because of ambiguity** in the statutes. Some recent State legislation granting eminent domain to coal slurry pipelines limits the use of State water and subjects the pipelines to State regulation as common carrier.

For the valid exercise of State eminent domain by an interstate coal slurry pipeline within the State granting such power, the activities of the pipeline must constitute a public purpose in the State. In a "State of origin," where the pipeline picks up coal for transportation, and an "intermediate State," where a pipeline passes through the State without picking up or delivering coal, it is arguable that the pipeline may not be performing a public purpose. **In a "State of destination" where a**

delivery of coal is made by the pipeline, the pipeline would be serving a public purpose under most circumstances.

**In order to place the need or lack of need** for a grant of the power of eminent domain in legal perspective, the acquisition of legal rights-of-way without the power of eminent domain is relevant. Except for certain protected lands, rights-of-way may be granted without the exercise of eminent domain to coal slurry pipelines over Federal public lands, national forest lands, and Indian lands; however, on Indian lands, the written permission of the Indian owners must be obtained. The acquisition of rights-of-way for a pipeline across a State without either Federal or State eminent domain authority will be more expensive if recalcitrant landowners refuse to grant easements or if opportunist landowners ask hold-up prices.

In the absence of State or Federal eminent domain, an organized opposition to a coal slurry pipeline might prevent the construction of the pipeline across areas of land owned in fee by that opposition. A landowner with a fee title may prevent the pipeline from crossing under the land by refusing to grant a right-of-way. If, however, the member of the organized opposition possesses only an easement interest in the land, that person cannot prevent the pipeline from obtaining a right-of-way. Whether the present landowner has acquired fee title or an easement is dependent upon the specific language of their deed to the land.

In the Western States many of the early railroad rights-of-way were acquired under the Pacific Railroad Acts of 1862 and 1864, and the type of ownership, either in fee or as an easement, established thereunder is in dispute. Although it has been held that a railroad received only a limited fee, which would not enable it to prevent granting an easement to a slurry pipeline, further litigation may be required before a definitive conclusion is reached.

The treatment of other pipelines provide no general conclusion as to whether coal slurry

**pipelines require the grant of eminent domain. The extensive network of interstate oil pipelines, ammonia fertilizer pipelines, and railroads have been built with only State eminent domain authority. Federal eminent domain authority was granted to interstate natural gas pipelines by the 1947 Amendment to the Natural Gas Act because**

1. it was believed that crossing a State without distribution of gas therein would not be a public benefit to that State,
2. some desired to protect the exclusive jurisdiction of the Federal Power Commission (FPC) over such pipelines, and
3. it was believed that these pipelines were different from other modes of transportation because their movement of natural gas from fields to distant markets did not require them to be common carriers.

The grant of Federal eminent domain came 9 years after interstate natural gas pipelines had come under the jurisdiction of FPC, which regulated the transportation, supply, and some elements of the price of natural gas dedicated to interstate commerce.

The Cole Pipe Line Act granted Federal eminent domain authority to interstate oil pipelines for 2 years as a part of emergency legislation aimed at overcoming delays in construction of oil pipelines caused by railroad opposition and refusal of the Georgia legislature to grant them eminent domain.

The comparison of interstate coal slurry pipelines with interstate natural gas pipelines indicates that although the granting of Federal eminent domain to gas pipelines does not mandate such a grant to coal slurry pipelines, it does furnish a possible legal precedent if Congress finds such grant to coal slurry pipelines to be in the national interest.

A comparison of interstate coal slurry pipelines with interstate natural gas pipelines yields the following similarities:

1. Each usually operates pursuant to long-term supply and or transportation contracts.
2. Each will often transport its commodity

from field or mine to a distant market or user and in the process may traverse one or more States in which it neither picks up nor delivers any portion of the commodity transported.

3. Each has limitations on its ability to act as a common carrier in the States it traverses.

Coal slurry and natural gas pipelines, however, have the following dissimilarities:

- Gas pipelines own most of the gas transported while coal pipelines apparently will not own the coal transported although it appears there is nothing in the existing laws which would prohibit such ownership.
- Gas pipelines are subject to FPC regulation which extends to the price and supply of natural gas dedicated to interstate commerce and requires insulation from State regulation. Interstate coal pipelines are presently subject to minimal ICC regulation, and regulation under proposed legislation will not extend to the price and supply of coal transported.

A comparison of interstate coal slurry pipelines with interstate crude oil and petroleum products pipelines illustrates their dissimilarity as to:

1. Ownership of commodity shipped.
2. Length of term of supply contracts and transportation contracts.
3. Physical capabilities to act as a common carrier or common purchaser in States traversed.

The comparison of interstate coal pipelines with interstate crude oil and petroleum products pipelines does not establish that State eminent domain authority for coal slurry pipelines will be insufficient but does indicate that it may not be as effective in meeting needs of coal slurry pipelines as it has been for oil pipelines.

The basic option to Federal policy makers is whether or not to grant Federal eminent domain authority to coal slurry pipelines. If Con-

gress elects not to grant eminent domain authority to coal slurry pipelines, such pipelines must rely on eminent domain authority from those States which have granted or will grant **in the future such authority to the pipelines. In order to exercise eminent domain authority granted to it, a coal slurry pipeline**, in most States, will:

1. be required to obtain a license or certificate of public convenience and necessity from a State agency,
2. be designated as common carrier or public utility, and
3. be subject to State regulations which do not unduly burden interstate commerce or interfere with Federal regulation of such pipeline.

Under the "public purposes" requirement, circumstances in a "State of origin" and in an "intermediate State" may preclude a pipeline from being considered as serving a public purpose within the State or being a common carrier in fact, and thereby prevent the valid exercise of State eminent domain authority by such pipeline.

A further consequence of not granting Federal eminent domain authority to coal slurry pipelines is the possibility that one or more States traversed by the pipeline might not grant eminent domain authority to the pipeline. This could lead to costly and inefficient routing of the pipeline to avoid recalcitrant or opportunist landowners, costly delay in negotiations, increased cost of rights-of-way, and possible inability to construct a pipeline across a State due to organized opposition.

If Federal eminent domain authority is granted to coal slurry pipelines, the pipelines may rely on that authority to obtain necessary rights-of-way in each State traversed by the pipeline. Construction of the pipeline will have been deemed to constitute a national public purpose justifying the exercise of Federal eminent domain authority. The pipeline will not be required to obtain a license or certificate from the State agency in order to construct its pipeline or to exercise Federal eminent domain

authority. **If the grant of Federal eminent domain authority requires that the practice and procedure of State courts be followed, as is required by the Natural Gas Act, then it would seem that landowners within a particular State would be protected by the same due process requirements for determining "just compensation" as are applicable to a taking of their property under State eminent domain authority.**

A possible alternative to simply granting or withholding Federal eminent domain authority for coal slurry pipelines would be a conditional grant of such authority. Such a grant would be conditioned upon a showing that a particular State to be traversed by the pipeline had not granted eminent domain authority to coal slurry pipelines or that the State authority, though granted, could not be validly exercised in such State because of a lack of public purpose within the State. Federal legislation granting a conditional eminent domain power would allow each State the opportunity to grant eminent domain authority to coal slurry pipelines on conditions which the State deemed necessary to the protection of State interests. Such State legislation and the regulations thereunder could not unduly burden interstate commerce or interfere with Federal regulation of the pipeline.

In drafting a conditional grant of Federal eminent domain authority, a period of time should be allowed for States to grant eminent domain authority to coal slurry pipelines. The circumstances which would constitute a lack of public purpose within a State and thereby entitle a pipeline to exercise the Federal eminent domain authority should also be set forth. A potential problem with such legislation is that it might subject coal slurry pipelines to duplicative Federal and State legislation. Careful drafting of legislation could minimize this problem.

Also, Congress **could elect to grant the** power of eminent domain for individual pipeline projects through specific legislation. This approach would be cumbersome, but it would allow Congress to determine in each

case the degree to which the national interest is served.

In conclusion, the decision among the foregoing alternatives depends on two principal factors. The first is the degree to which

coal slurry pipelines are desirable or not, in the light of all of the considerations discussed in this assessment. The second is the extent to which national or local priorities should be reflected in the conditions under which the power of eminent domain can be exercised.