Coal Slurry: All Quiet on the Western Front?

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I. INTRODUCTION

One of the more celebrated myths about the American West is the great war between cattlemen and sheepmen over grazing rights. Like many such myths, it sharply distorts the reality of Western history; more blood was shed in battles over the use of water than the use of land.1 The struggle over water rights did not end in the late nineteenth century. It has continued, as one historian predicted years ago, into the present, since even minor changes in the allocation of water uses invite "careful scrutiny" and new conflict.2

In the forefront of more recent battles over water use are proposals by coal companies and electric utilities to move coal from western mines to distant markets via slurry pipelines.3 Slurry lobbyists seek

3. The technology of coal slurry pipelines has been examined in depth by several authorities, e.g., Comptroller General Of The United States, Coal Slurry Pipelines: Progress And Problems For New Ones (April 20, 1979) [hereinafter cited as Comptroller General's Report]. Basically, the slurry process involves crushing mined coal into a fine powder, and mixing the powder with water to make slurry. The slurry is then pumped over several miles in underground lines to its final destination, usually a coal fired generating plant. A centrifuge process separates the coal from the water. The coal is burned for fuels, while the water is used as a coolant in the plant. Id. at 3. For an analysis of economic considerations, see Office Of Technology Assessment, A Technology
federal legislation granting rights of eminent domain to energy consortia to accelerate construction of these pipelines. Much of the debate over this legislation has focused on the controversial subject of water rights. There is no indication that this debate has ended, especially since the demand to mine and market coal in the most economical fashion has become increasingly important.

While several states have welcomed the construction of coal slurry pipelines by granting state eminent domain powers and rights to water, Montana has placed a major roadblock in the way of operating a pipeline by legislating an absolute prohibition on access to water supplies. This Comment will examine the purpose underlying Montana's relatively unique statute through a study of its legislative history. The possibility of a successful challenge to the statute under the Commerce Clause will also be explored. Finally, the impact of federal coal slurry legislation on state water law will be reviewed. Ultimately, this Comment seeks to clarify legal and political problems associated with the development of coal slurry pipelines. Lessons learned from the Montana experience should prove critical to a better understanding of state interests in the national energy debate.

II. LEGISLATIVE HISTORY OF THE MONTANA STATUTE

A. The Concern for Water Resources in Montana

Water law has increasingly occupied the attention of Montanans since the early 1970's. Lawmakers have attempted to provide for beneficial or non-wasteful uses for the state's waters and to balance conflicting demands for water use rights among various interests. This concern has been heightened by (1) fears of federally-sanctioned deple-

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4. See infra text accompanying notes 119-159.
5. Id., especially notes 134-152.
6. According to researchers for the World Coal Study, coal must and will provide up to two-thirds of world energy sources by the year 2000. Overall use should increase to 34.6 percent of all energy sources by that time, as opposed to the current (1977) figure of 18.5 percent. Coal: Fuel of the Future, Newsweek, May 19, 1980, at 65-66.
10. Montana water law is based on the "Arid Region Doctrine of Appropriation," which recognizes use-rights to water subject to the principles of "first in time, first in right" and beneficial (non-wasteful) use. Webb, supra note 2, at 435; MCA §§ 85-2-101 to 102; 85-2-301 (1981).
tion of Montana waters by downstream states;\(^\text{11}\) (2) the need to moderate near-insatiable demands on water for energy development;\(^\text{12}\) and (3) the desire to systematically define and protect the water rights of current agricultural, residential, industrial, and recreational users.\(^\text{13}\)

Concern culminated in provisions in the 1972 Montana Constitution providing for state ownership of waters, and requiring centralized administration and regulation of water rights.\(^\text{14}\) These provisions were adopted primarily to protect claims by in-state users against the potential for competing claims by downstream users and the federal government.\(^\text{15}\) The 1973 Legislature adopted the Montana Water Use Act\(^\text{16}\) to implement the constitutional mandate. Subsequent amendments have altered the water rights adjudication process to speed the filing and declaration of claims.\(^\text{17}\) The general purpose of conserving precious water resources remains unchanged.

B. Coal Slurry Legislation 1963-1979

In response to the needs of an ailing coal industry, the 1963 Montana Legislature adopted an amendment to its common carrier pipeline statute granting construction and eminent domain rights for coal slurry pipelines.\(^\text{18}\) Records of the debate over this amendment are few, but available sources reveal that the legislation was not controversial, and that potential water-use problems were not envisioned.\(^\text{19}\) Interestingly,

11. Congress has authorized the Secretary of Commerce to study the depletion of the Ogallala Aquifer, a large water bearing stratum which stretches from Mexico to Canada, and formulate plans for recharging the aquifer. 42 U.S.C. § 1962d-18 (1976). Montana water is being eyed to replace the depleted stratum. Great Falls Tribune, Mar. 12, 1980, at C10, col. 1. Although federal authorities have assured Montanans of the priority of water rights within the state, such assurances have not been warmly received. Ladd, *Federal and Interstate Conflicts in Montana Water Law: Support for a State Water Plan*, 42 MONT. L. REV. 267, 288-289 (1981) [hereinafter cited as Ladd].


14. MONT. CONST. art. IX, § 3.


the new provisions were left gathering dust in the lawbooks, as no slurry companies stepped forward with applications to construct pipelines.

Initial opposition to the siting of slurry pipelines in Montana surfaced during the 1974 legislative session. Lawmakers adopted an amendment to the Water Resources Act providing that the “use of water for slurry to export coal from Montana is not a beneficial use of water. Although the legislation nearly died after its first hearing, it was narrowly revived by the House of Representatives and forwarded to the Senate, which gave the bill near-unanimous support. Coal industry representatives did not oppose the anti-export statute; opposition in the House appears to have been motivated by legislators who feared that the bill would unnecessarily hinder industrial development in the years to come.

The state Department of Natural Resources and Conservation tried to win support from the 1977 Legislature for a two-year study of economic and environmental aspects of coal slurry development. DNRC representatives alleged that coal production was expanding beyond the capacity of railroads to transport the coal to market, necessitating a study of slurry transportation as a possible alternative. During hearings, the study was opposed by railroad management and employees, who saw pipelines as unfair competitors, and by agricultural interests fearful that pipelines would deplete scarce water resources. Despite protests by DNRC that only a study, and not immediate approval, of slurry pipelines was proposed, the House Subcommittee on Water unanimously scuttled the proposal in view of

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issue of water exportation was not raised. The desire to help the coal industry occupied most if not all of the debate.


25. Minutes of the State House of Representatives Committee on Judiciary, Subcommittee on Water, February 1, 1977 (testimony of Ted Doney, Chief Legal Counsel for DNRC, on House Joint Resolution No. 31) [hereinafter cited as 1977 House Subcomm. Min.].

26. Id. (testimony of representatives from the Montana Railroad Ass'n, Burlington Northern Ry., United Transportation Union, Western Environmental Trade Ass'n, and Montana Farm Bureau).
the existing state policy against export of water in slurry pipelines.\textsuperscript{27}

Legislators took a second look at the anti-export statute in 1979. On its face, the law clearly discriminated against interstate pipeline operation; use of water for an intrastate pipeline was not prohibited.\textsuperscript{28} Fears were expressed that this distinction could run afoul of the federal Commerce Clause.\textsuperscript{29} An amended policy was drafted to prohibit the use of water in in-state as well as multi-state pipelines, by declaring that all such uses were not beneficial.\textsuperscript{30} A statement of legislative findings on conservation problems associated with slurry pipelines was added by a House committee.\textsuperscript{31} The proposal was warmly received by a coalition of railroad, labor, environmental, agricultural, and even business development groups, and easily won overwhelming support in the Montana House of Representatives.\textsuperscript{32}

The Senate Natural Resources Committee balked at the House proposal. Several committee members expressed reservations; some even suggested turning the bill into a pro-water export proposal, by allowing the use of so-called "brackish" water as a transportation medium, and requiring return shipment of any slurry water to Montana.\textsuperscript{33} These suggestions were rejected as either contradictory to legislative procedures, or economically and technologically infeasible.\textsuperscript{34} The

\begin{itemize}
\item \textsuperscript{27} 1977 House Subcomm. Min., February 8, 1977. See also 1 House Journal of the Forty-Fifth Legislature 359 (1977) (House Joint Resolution No. 31).
\item \textsuperscript{29} Minutes of the State House of Representatives Select Committee on Water, February 16, 1979 (statement of State Rep. Dan Kemmis). The 1974 statute had been criticized by several commentators; e.g., Tarlock, Western Water Law and Coal Development, 51 U. Col. L. Rev. 511, 539 (1980); McDaniel, Commerce Clause and Water Availability Issues Concerning Coal Slurry Pipelines, 12 Nat. Res. Law 533, 545 (1979).
\item \textsuperscript{30} House Bill 230, 46th Mont. Legis. Sess., § 2(2), at 3, 1979 (Introduced Bill).
\item \textsuperscript{31} The statement read: "The use of water for the slurry transport of coal is found not to be a beneficial use of water because such use is detrimental to the conservation and protection of the water resources of the state; because of the shortage of economically available water within Montana; because such use is detrimental to water quality and is an impairment of an otherwise reusable resource; because such use is adverse to existing water rights and foreseeable future water uses; because the present demands upon water of the state are unquantified; and because of the undetermined hydrological relationships between surface and subsurface water, all of these adverse effects are found to support the prohibition of the use of water for slurry transportation." House Bill 230, § 2(2), at 4, 1979 (Third Reading Copy).
\item \textsuperscript{32} 1 House Journal of the Forty-Sixth Legislature 484, 552 (1979) (House Bill 230).
\item \textsuperscript{34} Id. at 4. Montana legislative rules prohibit changing intent of a bill prior to passage. Return shipment of water is highly impractical given Montana's high elevation relative to most slurry pipeline destination centers. (Statement of State Sen. Robert Watt.)
\end{itemize}
committee eventually concurred with the House that a non-discriminatory ban on water use should be enacted, but not before it deleted the legislative findings and substituted a one-sentence statement about conservation problems associated with slurry.\(^{35}\)

The House rejected these amendments, but a conference committee eventually accepted the Senate language, adding a prefix to the new statement of intent to insure that the finding of conservation problems was a legislative determination.\(^{36}\) Remarks made during final debate by key backers of the legislation clearly indicate that water-use issues were most important in legislators' minds. Since the state was embarking on the formulation of a comprehensive water plan, it was necessary to clarify the definition of beneficial uses for water; use of water in coal slurry pipelines would create an unmanageable conflict with existing and future demands for scarce water supplies.\(^{37}\) There was no indication that the majority of legislative supporters were influenced to support the proposal on account of pressure from the railroad industry. A conservation statute that could pass constitutional muster was the major concern.\(^{38}\)

Although the legal emphasis of the Montana statute has shifted from one of non-interstate exportation to one of beneficial use, the practical effect of prohibiting the use of water raises incidental implications affecting interstate commerce. It is appropriate that the constitutional issues surrounding Montana's law be examined.

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35. The amended statement read: "The use of water for the slurry transport of coal is detrimental to the conservation and protection of the water resources of the state." House Bill 230, § 2(1), at 3-4, 1979 (Senate Reference Copy); 1979 Sen. Nat. Res. Comm. Min., supra note 33, at 4-6, (March 2, 1979). Some committee members were concerned that the legislative findings in the original House proposal had not received enough attention to be "bona fide findings." Letter from Rep. Dan Kemmis to Bill Bronson (Oct. 13, 1981) (Some of the findings may have been factually inaccurate, and therefore a potential target for any constitutional challenge to the law.) The staff attorney to the Senate committee expressed similar concerns. 1979 Sen. Nat. Res. Comm. Min., supra note 33, at 6 (March 2, 1979) (statement of staff attorney Jim Lear).


38. The law now reads: "Slurry transport of coal. (1) The legislature finds that the use of water for the slurry transport of coal is detrimental to the conservation and protection of the water resources of the state. (2) The use of water for the slurry transport of coal is not a beneficial use of water." MCA § 85-2-104 (1981). It is included among the general provisions of the Montana Water Use Act, which speak to the interests of conservation and wise utilization of the state's waters. See MCA § 85-2-101 (1981) and accompanying sections.
III. THE MONTANA STATUTE AND THE COMMERCE CLAUSE

A. Political Pressures on the Statute

Montana's statute has not been subjected to a court challenge. However, a consideration of possible attacks is not just the occupation of academics. Attorneys for the Interstate Commerce Commission have suggested that the law may be an unconstitutional burden on interstate commerce. A federal government study of coal slurry lists two proposed pipeline projects that would draw on Montana water but for the current law. Some development interests have hinted that a change in the law allowing export of water would be appreciated; one company promoting a Montana-to-Wisconsin line has recently organized in the state. A Texas developer has sought permission to appropriate Yellowstone River water in Montana reserved to Wyoming under the Yellowstone River Compact for use in Wyoming coal-fired generating plants, coal liquification and gasification facilities, and possibly a slurry pipeline. These developments suggest potential legal and political pressures on the Montana statute, and invite an analysis of how it might fare in a judicial contest.

B. Case Analysis

1. Precedent Upholding State Prohibitions on the Export of Water

The only United States Supreme Court decision to address the crucial issue of export prohibitions on water is *Hudson County Water Co. v. McCarter*. A water company in New Jersey wanted to transfer river water from that state to customers in New York, but the proposal was enjoined by New Jersey's attorney general as contrary to a state law prohibiting interstate water diversion. The company sued the state, alleging, among other things, that the law was an infringement on the free flow of interstate commerce. The company sued the state, alleging, among other things, that the law was an infringement on the free flow of interstate commerce. The New Jersey high court ultimately rejected the company's claim, deciding that the state had a "residuum" of public ownership in the river water, based on the state's clear title to the beds and banks of all streams. What the state chose to do with its

44. Letter from Mr. Donald McIntyre, Chief Legal Counsel, Department of Natural Resources and Conservation, to William Bronson (Aug. 26, 1981) (discussion of proposed slurry project in Wyoming by Jan Paul of Texas).
45. 207 U.S. 349 (1908).
property was not subject to question.\textsuperscript{46}

On appeal, the United States Supreme Court affirmed the state court decision, but on a different theory. The court neither accepted nor rejected the state ownership thesis;\textsuperscript{47} in its place, the court held that the law was a valid exercise of the state’s power to regulate certain matters affected with a public interest.\textsuperscript{48} The state, acting as quasi-sovereign, had the power to protect waters within its boundaries “irrespective of the assent or dissent of the private owners of the land immediately concerned.”\textsuperscript{49} As guardian of the public interest, there was nothing unreasonable in allowing the state to protect its “natural advantages,” especially when an interstate transfer of the resource would diminish the use-rights of all. Therefore, the state had constitutional authority to permit or deny the export of “natural advantages” like water.\textsuperscript{50}

This general principle of state control over water resources has been reiterated by the Supreme Court on at least one other occasion.\textsuperscript{51} Since Montana’s statute has an incidental effect of prohibiting export of state water, the Hudson rule would appear to render it immune from constitutional attack. However, this rule, as applied to coal slurry pipelines, has come under serious criticism, principally because of two alleged defects: (1) Hudson has been overruled, sub silentio, by more recent decisions affecting natural resource law;\textsuperscript{52} and (2) even if not repudiated, the rule is antiquated in light of modern Commerce Clause case law, suggesting a need to reanalyze the important legal issues sug-

\textsuperscript{46} Id. at 353-354. See also McCarter v. Hudson County Water Co., 70 N.J. Eq. 525 (1905), aff’d 70 N.J. Eq. 695 (1906).
\textsuperscript{47} Hudson, 207 U.S. at 354.
\textsuperscript{48} Id. at 356-358.
\textsuperscript{49} Id. at 355.
\textsuperscript{50} Id. at 356-357. The court’s language implicitly suggested that the state’s exercise of quasi-sovereign powers over water resources could be farreaching. “[T]he constitutional power of the state to insist that its natural advantages shall remain unimpaired is not dependent on any nice estimate of the extent of present use or speculation as to future needs . . . [W]hat it has it may keep and give no one a reason for its will.” This argument, as advanced by Mr. Justice Holmes, closely parallels the “residuum of ownership” theory advanced by the New Jersey court, supposedly avoided by the majority’s opinion. This curious twist is probably best explained by Mr. Justice Holmes’ long-held belief that, until natural resources were somehow “captured” and reduced to possession, they could not be considered “articles of commerce.” Cf. Pennsylvania v. West Virginia, 262 U.S. 553, 600-603 (1923) (Holmes, J., dissenting) (natural gas not an article of commerce until reduced to possession). Thus, the state could exercise a power to pre-empt capture of natural resources within its borders without asserting any prior ownership interest. However, it is hard to conceive of this theory as resembling anything but some kind of an ownership interest by a state in its water.
\textsuperscript{51} Trenton v. New Jersey, 262 U.S. 182 (1923).
\textsuperscript{52} Tarlock, supra note 29, at 539; Hellerstein, Hughes v. Oklahoma: The Court, the Commerce Clause, and State Control of Natural Resources, 1979 SUP. CT. REV. 51, 91; 2 CLARK, WATERS & WATER RIGHTS § 132 (1967) [hereinafter cited as CLARK].
gested by *Hudson*.  

2. **Criticisms of the Hudson Decision**

The first argument is based on reasoning from two recent cases involving export prohibitions. In *City of Altus, Oklahoma v. Carr*, a Texas statute forbidding the interstate transfer of subsurface water without consent of the legislature was held unconstitutional, as the law was blatantly discriminatory on its face, and was burdensome to interstate commercial transactions. The three-judge federal district court hearing the case rejected claims by the state of Texas that the law was enacted to promote conservation, and further denied the claim that the water involved was not an "article of commerce" so as to escape judicial scrutiny. The United States Supreme Court upheld the lower court judgment in a *per curiam* opinion, leading one to believe that it was departing from the reasoning in *Hudson*.

Careful inspection of the holding in *City of Altus* reveals that it does not depart from the court's previous position on state control over water. Any application of the more recent decision to Montana's law is extremely limited, especially since *per curiam* opinions are not reliable indicators of the court's position on an issue beyond the particular set of facts adjudged. The district court distinguished water that is privately owned, or used under an adjudicated right, from water that is owned and regulated, or as yet unappropriated, by a state. Under Texas law, it was well settled that a landowner had the right to drill for, capture and use subsurface water like personal property. This private property was, therefore, an "article of commerce" insofar as constitutional issues were involved. The Supreme Court had already decided that statutes barring the interstate shipment of privately-appropriated natural gas amounted to an unconstitutional burden on commerce; by

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55. 255 F. Supp. at 837-840. The city of Altus, Oklahoma, had contracted with a Texas landowner to tap his subsurface water supply for transfer to the city.
56. *Id.* at 838-840. There was a hint that the legislation was purely protectionist. The bill was passed about the same time as Altus contracted for the water, at the urging of a legislator from the supplier's district. *Id.* at 832. Since a party did not need legislative consent to move water *within* Texas, the statute was discriminatory.
60. *Id.*, citing City of Corpus Christi v. City of Pleasanton, 154 Tex. 289, 276 S.W.2d 798 (1955); Houston & T.C. Ry. Co. v. East, 98 Tex. 146, 81 S.W.2d 279 (1904).
analogy, this reasoning was extended to privately-appropriated water.\textsuperscript{63}

Except for the strictures against discrimination, \textit{City of Altus} does not address the validity of Montana's statutory approach. Since no water rights are allowed for slurry pipelines, there are no export rights to be protected by the Commerce Clause. Further, the decision sheds no light on what rule will prevail in the case of state ownership of water, or in the mere exercise of state police powers to conserve water resources.

The ownership issue is allegedly addressed in a more recent Supreme Court case, \textit{Hughes v. Oklahoma}.\textsuperscript{64} An Oklahoma law prohibited the interstate shipment of minnows captured in state waters. When the law was challenged, the state relied on precedent established in an earlier case, \textit{Geer v. Connecticut},\textsuperscript{65} which upheld a similar law prohibiting interstate shipment of wild game birds. Connecticut claimed "ownership" of the wildlife, and therefore a prerogative to keep the birds within its borders.\textsuperscript{66} Oklahoma authorities asserted the rule was equally applicable to game fish.\textsuperscript{67}

The \textit{Hughes} court rejected the "legal fiction" of state ownership of wildlife, and in so doing, overruled \textit{Geer}.\textsuperscript{68} Captured game were more like private possessions, and state restrictions on their transfer were therefore subject to scrutiny under the Commerce Clause.\textsuperscript{69} The Oklahoma statute was found to be an unconscionable and discriminatory burden on shipment of the captured minnows, and was declared unconstitutional.\textsuperscript{70}

How does this determination affect the prohibition on water exportation? Some commentators believe that, since the majority in \textit{Hudson} relied on \textit{Geer} as controlling precedent for state prohibitions on water exportation,\textsuperscript{71} the \textit{Hughes} ruling effectively undermines any attempt by a state to claim ownership or protective powers over any natural resources.\textsuperscript{72} The great leap from game fish to all natural resources is debatable on the merits, but the Court's growing skepticism about embargoes raises important concerns for the practical effect of the Montana statute.

The suggestion that the anti-exportation rule has been implicitly

\begin{itemize}
\item \textsuperscript{63} \textit{City of Altus}, 255 F. Supp. at 837-839.
\item \textsuperscript{64} 441 U.S. 322 (1979).
\item \textsuperscript{65} 161 U.S. 519 (1896).
\item \textsuperscript{66} \textit{Id.} at 530.
\item \textsuperscript{67} Hughes, 441 U.S. at 324-325.
\item \textsuperscript{68} \textit{Id.}
\item \textsuperscript{69} \textit{Id.} at 335.
\item \textsuperscript{70} \textit{Id.} at 335; 338.
\item \textsuperscript{71} \textit{Hudson}, 209 U.S. at 356.
\item \textsuperscript{72} Hellerstein, \textit{supra} note 52, at 63. \textit{See also} Tarlock, \textit{supra} note 29, at 539.
\end{itemize}
repudiated is poorly conceived, because it (1) fails to properly understand the role of *Geer* in the *Hudson* decision; and (2) ignores more recent, narrow interpretations of the *Hughes* ruling. Justice Holmes did not rely solely on *Geer* to craft an argument for state control. He carefully established the rule from powers of quasi-sovereignty to conserve resources, and not merely some "royal prerogative" to own and protect these resources. The *Hughes* court found no fault with this principle of conservation. The "royal prerogative" foundation can be removed without undermining the basis for state protection of water resources.

Recent federal decisions have limited the impact of *Hughes* with respect to the state ownership question. The United States Supreme Court appears to have narrowed the construction of *Hughes* to privately-owned articles of trade and their prohibition from entering interstate commerce. Lower courts have not extended the reach of the decision beyond wildlife captured or reduced to private possession. A similar rationale was cited by the Nebraska Supreme Court in refusing to apply *Hughes* to prohibitions on the interstate transfer of state-regulated groundwater. These recent constructions compel rejection of any broad assertion that *Hughes* reaches a state's interest in owning, or at least conserving by prohibition of interstate transfer, its water resources.

The second argument purporting to address the validity of *Hudson* in view of modern Commerce Clause case law is not so easily dismissed. If a state can successfully claim ownership of its water resources, as Montana purports to do, then it can choose, like an owner of private property, whether or not to place its property in interstate commerce and not be subject to judicial scrutiny for its decision. However, if the state's interest is merely one of a police power to conserve and protect water for the benefit of all its citizens, then judicial intervention may be unavoidable in the event of an outright prohibition on the export of water beyond the state.

Most authorities reject the idea of state ownership of water as a

74. Hughes, 441 U.S. at 357.
75. Reeves, Inc. v. Stake, 100 S. Ct. 2271, 2275 n. 4 (1980).
76. E.g., Mescalero Apache Tribe v. New Mexico, 630 F.2d 724, 737 (10th Cir. 1980); United States v. Helsley, 615 F.2d 784, 788 (9th Cir. 1979); United States v. Washington, 506 F. Supp. 187, 201 (W.D. Wash. 1980).
77. State ex rel. Douglas v. Sporhase, 208 Neb. 703, 305 N.W.2d 614, 619 (1981). The court refused to apply the reasoning in *City of Altus, West, and Pennsylvania*, for the same reasons. Id. at 708-709, 305 N.W.2d at 619.
78. MONT. CONST. art. IX, § 3, col. 3.
weak legal fiction. At the very most, ownership can only be understood to mean a sovereign interest in the state to regulate water resources for the public good; it is not a proprietary interest like that of, say, a farmer in his land. Arid western states like Montana may exercise this sovereign interest or police power to allocate and protect use rights to water, so long as these uses are not wasteful. No court has ever denied this power. This exercise may be exclusive with respect to waters wholly within a state's borders, but all waters are potentially subject to the constitutionally-derived navigation servitude and certain federal reserved water rights. Consequently, a state may exercise control over navigable waters so long as it is not inconsistent with federal action or functions, and does not unreasonably burden interstate commerce connected with water. These principles suggest that Montana would be on weak ground alleging absolute ownership of waters within its borders, as a defense of its slurry statute. Reliance on Justice Holmes' unusual concept of state authority over water, as set forth in certain passages in Hudson, would also be rejected, since it too closely resembles an ownership interest of the state in water. A court faced with ruling on the Montana law would probably reject assertion of any proprietary interests and determine instead whether the law was a proper exercise of police powers under the rubric of the Commerce Clause.

3. The Statute Under the Pike Test

Since the federal government has not acted to regulate water use in coal slurry pipelines, the dormant commerce clause test is relevant for judicial scrutiny. The general test of whether an exercise of state power is constitutional under these circumstances was outlined in Pike v. Bruce Church, Inc. State legislation affecting interstate commerce, under Pike, will be upheld if (1) it regulates evenhandedly with respect to interstate and intrastate commerce, and where the effects on inter-  

80. Mortz & Grazis, supra note 79, at 38.  
81. 1 CLARK, supra note 52, at §§ 22.3, 22.7.  
85. 78 AM. JUR. 2d Waters § 76 (1975); 2 CLARK, supra note 52, at § 101.2(A), n. 39 (Supp. 1978).  
86. See note 50, supra.  
state commerce are only incidental; (2) it serves a legitimate local purpose; and (3) no alternative means of regulation are available that would have less of an impact on interstate commerce. Unfortunately, these tests do not define a legitimate local purpose or what constitutes evenhandedness. The court also does not indicate whether all the tests must be resolved in favor of the statute in order to find it constitutional. There is not even unanimous agreement among current members of the court over whether this test is proper in conservation cases.

This analysis attempts only to present the most plausible conclusion in light of Pike and other court decisions concerning control over water rights. But conclusions reached here may lack permanence. Reasonable men may differ in the process of interpretation.

Clearly, the Montana statute passes the first test. Water under Montana control cannot be used for interstate or intrastate slurry transportation. One commentator has suggested that such statutes may be discriminatory in effect, since most proposed slurry lines would run between states, therefore creating an excessive burden on interstate commerce. The United States Supreme Court has recently rejected this argument as an "adventitious consideration," and has indicated that it will look only at facial aspects of discrimination. More importantly, the effect of the statute on interstate commerce is incidental to its ultimate purpose: prohibiting a non-beneficial use of water.

Montana could also make a strong argument that the statute serves a legitimate local purpose. The court has recognized the importance of states controlling the appropriation and use of water within their boundaries. This principle is most relevant in the western states, where soil and climatic conditions require special care in the administration of water. While Congress may invoke supervisory control over many state waters, the court will not act in the place of Congress

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88. Id. at 142. The test was used in Hughes, 441 U.S. at 336.
89. Hellerstein, supra note 52, at 67 n.85.
90. Hughes, 441 U.S. at 343 n.7 (Rehnquist, J., dissenting) (in the absence of pre-emptive federal legislation, the party challenging a conservation statute must establish a far greater burden than a mere statutory prohibition).
91. The old statute would have failed this test. See supra text of Part II (B).
92. McDaniel, supra note 29, at 545.
and interfere with state water law. These fundamentals bolster skeletal arguments in *Hudson* with respect to a state's interest in conserving its water resources.

It was noted earlier that no court has denied the power of states to declare certain water-use practices as unreasonable or non-beneficial. Practices of considerably less weight than use in coal slurry pipelines have been banned without subsequent reversals by higher courts. Indeed, so long as a state like Montana acts with legitimate intent to conserve and protect its resources, the local purpose test should be satisfied.

The legislative record in Montana is dominated by concern for the quality and quantity of water. Admittedly, coal slurry technology makes more efficient use of water than coal-fired electrical generation or coal gasification processes operating on a comparable scale, but this comparison is not especially critical. Montana's decision to ban one form of water use is influenced by the desire to provide for other uses in the present and in the future. The construction of one slurry line could significantly interfere with alternate uses of water, be they for agricultural, residential, recreational, or other industrial needs. Since the demand for water may exceed the supply for all potential uses, possibly threatening the state's economic well-being, a state imposed limitation is reasonable and understandable. And, since the courts have generally deferred to state decisions governing water use, Montana's action would not likely be overruled as irrational.

When confronted with a challenge to the statute, a court would look to determine whether or not selfish economic protectionist motives were predominant in its adoption. Such motives are constitutionally impermissible. Railroad lobbyists have opposed construction of

97. 1 CLARK, *supra* note 52, at §§ 22.3, 22.7.
98. *E.g.*, Tulare Irr. Dist. v. Lindsey-Strathmore Irr. Dist., 3 Cal. 2d 389, 45 P.2d 972 (1935) (flooding to exterminate gophers found to be unreasonable); Blaine County Inv. Co. v. Mays, 49 Idaho 766, 291 P. 1055 (1930) (winter flooding of field to promote surface water retention held non-beneficial).
100. COMPTROLLER GENERAL'S REPORT, *supra* note 3, at 8.
102. Applications for water rights in the Bighorn River Basin already exceed the total available supply. COMPTROLLER GENERAL'S REPORT, *supra* note 3, at 5. A 1974 study by the Bureau of Reclamation indicated that a massive dislocative shift in Montana's economic base would occur if demands on water for energy development were to be satisfied. TOOLE, *supra* note 1, at 174-175.
103. City of Philadelphia v. New Jersey, 437 U.S. 617 (1978); see also Comment, *State
slurry pipelines in Montana, but there is no hard evidence to show that their views were preeminent in the judgment of the legislature.\textsuperscript{104} The argument that protectionism can be served by legislative \textit{means}, if not the \textit{ends}, is not applicable here, since courts will probably give greater weight to the ends if it is a legitimate local purpose like the conservation of water.\textsuperscript{105}

Montana can make a strong case with respect to the legitimate local purpose test, especially in the absence of conflicting federal legislation and any national consensus over whether slurry operations are crucial to meeting the nation's energy needs. The final test—the alternate means requirement—may prove a more formidable hurdle.

Opponents of anti-exportation laws have argued that slurry companies should at least have the opportunity to obtain water rights through the usual state water adjudication procedures. The state would then be forced to critically analyze each proposal to determine if it would lead to wasteful uses, and could always reject those proposals that placed undue demand on available water supplies. Since some slurry pipelines might be granted rights to water under this process, it is argued that this procedure would be less burdensome on commerce.\textsuperscript{106} This claim is highly speculative, since a state water marketing authority might always refuse water to slurry pipelines, citing a need to conserve water for other future uses. The unwillingness of the federal courts to interfere with state control over water policy in the absence of a specific congressional mandate would seem to render this test less important than previous tests. Unless it could be demonstrated that the Montana statute barely met the standards implied by the first and second tests, a court may not be inclined to give much weight to the third.

In another sense, it must be remembered that the underlying economic interest behind any challenge to Montana's statute is the assurance that coal can be mined and transported out-of-state for industrial use. \textit{The statute does not prevent the mining and transportation of coal.} A slurry line can still be constructed in Montana under the common carrier law, which has never been repealed. Other liquid or gas media


\textsuperscript{104} The former director of DNRC, disturbed by railroad lobbying efforts in 1977, \textit{supra} notes 25 & 26, believes their presence was the most influential in adoption of the statute. Great Falls Tribune, Apr. 8, 1981, at A9. col. 5. However, there is no concrete evidence to suggest that the primary purpose for supporting the new law was to bolster the railroad industry in Montana.

\textsuperscript{105} \textit{See} City of Philadelphia, 437 U.S. at 626-627. The unconstitutional statute involved in that case attempted to shift one state's sewage problem to another state. It is unlikely that this involves the same interest as protecting scarce water supplies.

\textsuperscript{106} \textit{E.g.}, McDaniel, \textit{supra} note 29, at 545.
are available to mix with crushed coal to make slurry; for example, methanol,\textsuperscript{107} carbon dioxide,\textsuperscript{108} or crude or refined oil.\textsuperscript{109} Further, the Burlington Northern Railroad continues to transport coal from Montana on a regular basis, and competition from other railroads for some of the coal hauling business is expected.\textsuperscript{110} A pipeline that has access to water \textit{might} involve lower operational costs for shippers and utility companies, but slurry proponents cannot claim a constitutionally guaranteed access to the cheapest transportation medium.\textsuperscript{111} The state's interest in water conservation has a more certain claim to constitutional protection.

In summary, the Montana statute would probably survive a Commerce Clause challenge. It is designed to prevent a non-beneficial use of water, on a non-discriminatory basis, with only an incidental impact on commerce. The declared interest in conservation is not irrational, given the legislature's concern for allocation and use of scarce water in the face of enormous demands. The strong deference by the court to state water policy strengthens the defense of the statute. Further, the need to obtain energy resources is not forestalled, but is only balanced by a constitutionally protected state interest in the wise management of water resources. The general principle of export prohibition advanced in \textit{Hudson} is vindicated, even if not on the same legal theory. Yet, congressional intervention could render this argument moot. The possibility of such interference will frame the discussion in the remainder of this work.

IV. THE SPECTER OF FEDERAL PRE-EMPTION

A. Federal Legislation and Water Rights

Since the early 1960's, private and public officials have sought to involve the federal government in the construction of coal slurry pipelines.\textsuperscript{112} Proposed legislation would facilitate construction through

\begin{itemize}
\item \textsuperscript{107} \textit{A Coal Slurry Idea That May Save Water}, \textit{Business Week}, Jan. 15, 1979, at 39-40.
\item \textsuperscript{110} \textit{Burlington Northern's Fight to Repel Invaders}, \textit{Business Week}, Nov. 30, 1980, at 116, 121-122.
\item \textsuperscript{111} Cf. \textit{Commonwealth Edison v. Montana}, 101 S. Ct. at 2955 (implicit rejection of claim that mere objection to rate of a state severance tax on coal shipped in interstate commerce poses a legitimate constitutional problem with the tax itself).
\item \textsuperscript{112} In 1962, President Kennedy suggested that the federal government promote slurry pipelines to bolster the financially depressed Appalachian coal industry. \textit{OTA Report, supra} note 3, at 1. Interest waned until the advent of the "energy crisis" of the mid-1970's; legislature granting eminent domain to slurry pipeline companies has been proposed regularly since 1975. C.R.S. Issue Brief, \textit{supra} note 108, at 1.
\end{itemize}
grant of federal eminent domain powers to pipeline companies to condemn public and private lands for rights-of-way. Application for easements under state eminent domain laws is considered too cumbersome, since companies would face the financial burdens of common carrier status and multiple compliance procedures.

Federal legislation has been hotly debated since 1975. One measure survived lengthy committee hearings, but was soundly defeated by the House of Representatives in 1978. As of this writing, another slurry bill is advancing towards a critical vote. A prime consideration delaying federal intervention is the possible impact it may have on state control of water use. Certainly, railroads have had no small role in the opposition, but the water issue stimulates a ground swell of opposition from agricultural and environmental lobbies entrenched in the western states.

Proponents of federal involvement in coal slurry development have concentrated their efforts on securing eminent domain legislation. They have been reluctant to criticize state efforts to regulate or prohibit water use in slurry pipelines, and have not advocated efforts to override state water law. However, western politicians have still sought legislative assurances that federal legislation would neither explicitly nor impliedly pre-empt the exercise of state law. Legislation that nearly succeeded in winning approval in 1978 contained clauses forbidding judicial construction of eminent domain powers to encompass condemnation of water rights. It also prevented permitting authorities from licensing a pipeline using underground water without an initial determination by the United States Geological Survey that use of the water would not adversely impact the surrounding water table. Finally,
provisions in state water laws regulating or prohibiting the use of water in pipelines were protected from federal usurpation.\textsuperscript{122} Federal jurisdiction was limited solely to the grant of eminent domain powers to obtain rights-of-way. Similar restrictions have been included in recently-introduced legislation.\textsuperscript{123} The authority of Congress to consent by law to state statutes which might otherwise impose an unconstitutional burden on commerce is unquestioned by the courts.\textsuperscript{124}

The fears of slurry opponents have not been allayed. The federal Office of Technology Assessment (OTA) suggested in 1978 that so-called “savings clauses” in proposed federal legislation that protected state water laws might not survive a judicial determination that, once a pipeline was found by the government to meet requirements of public necessity and convenience for the granting of eminent domain powers, state efforts to withhold water from the line would be constitutionally pre-empted.\textsuperscript{125} The OTA opinion relied on the Supreme Court decision in \textit{First Iowa Hydroelectric Co-Operative v. Federal Power Commission}.\textsuperscript{126} Lawmakers have also cited precedents in \textit{Arizona v. California}\textsuperscript{127} and \textit{City of Fresno v. California},\textsuperscript{128} which allegedly further diminish the effect of savings clauses.\textsuperscript{129} Such clauses generally have been referred to as mere rhetoric to impress the citizens of western states.\textsuperscript{130}

Close inspection of these decisions reveals little reason to fear their influence in any attempt to invalidate portions of federal legislation protecting state water law. \textit{First Iowa} did not address the validity of a savings clause affecting water rights; rather, it repudiated an attempt by the state of Iowa to enforce its laws regulating the construction and operation of dams on navigable streams, an area of regulation shared by the federal government.\textsuperscript{131} Another section of the same statute, which prevented federal interference with state procedures for appro-

\begin{itemize}
  \item \textsuperscript{122} \textit{Id.} (§ 9).
  \item \textsuperscript{123} H.R. 4230, 97th Cong., 1st Sess. (1981), § 5 (no implied grant of eminent domain powers to acquire, use, and develop water); § 10(a) (government and companies to follow procedural and substantive provisions of state law when obtaining water); § 10(c) (legislation does not alter state water laws or compacts governing appropriation, use, or diversion).
  \item \textsuperscript{124} Prudential Life Ins. Co. v. Benjamin, 328 U.S. 408 (1946).
  \item \textsuperscript{125} OTA REPORT, \textit{supra} note 3, at 19.
  \item \textsuperscript{127} 373 U.S. 546 (1963).
  \item \textsuperscript{128} 372 U.S. 627 (1963).
  \item \textsuperscript{129} HOUSE COMM. ON PUB. WORKS & TRANS., 96th CONG. 2D SESS., REPORT ON COAL PIPELINE ACT OF 1980 at 34 (Comm. Print 1980).
  \item \textsuperscript{130} \textit{Cf.} Sax, \textit{Problems of Federalism in Reclamation Law}, 37 U. COL. L. REV. 49, 80 (1964).
  \item \textsuperscript{131} First Iowa, 328 U.S. at 160-161, 163-164.
\end{itemize}
priating and using water, was not affected by the court's ruling.\textsuperscript{132} Any other interpretation of \textit{First Iowa} would more than strain the court's perspective on savings clauses.

\textit{Arizona v. California} is also unrelated to the current legislation, since it involved a conflict between state water law and a congressionally-established water allocation project.\textsuperscript{133} Section 8 of the Reclamation Act certainly required federal adherence to state law concerning acquisition of water, but it did not encompass state intervention in the distribution of water from the completed federal project.\textsuperscript{134} Since language in slurry legislation recognizes state control over water acquisition \textit{and} distribution, \textit{Arizona} is distinguishable. So is the rule in \textit{City of Fresno}, which held that Section 8 did not prohibit federal acquisition of water rights held by private or public entities through the exercise of eminent domain powers provided for in other sections of the Reclamation Act.\textsuperscript{135} Proposed coal slurry legislation does not grant similar express powers, nor can this power be impliedly extended to the government or companies acting under federal license, either.\textsuperscript{136}

Any doubts about the strength of language respecting state water law have been dispelled by more recent Supreme Court decisions. \textit{California v. United States},\textsuperscript{137} decided in 1978, upheld a state's attempt under Section 8 of the Reclamation Act to enforce its water laws against the federal government. \textit{United States v. New Mexico},\textsuperscript{138} while not concerned with a specific savings provision, held that since the federal reserved rights doctrine entitled the federal government to only that water necessary for the purposes for which the reserve was established, the government could not automatically acquire water for additional purposes in the absence of an express congressional mandate. These rulings should satisfy the concerns of westerners anxious about opposition to savings clauses, and admonish the federal bureaucracy for giving overbroad and irrelevant interpretations of judicial opinions.\textsuperscript{139}

Obviously, the exercise of federal control becomes ominous in the

\begin{itemize}
\item \textsuperscript{132} \textit{Id.} at 175-176.
\item \textsuperscript{133} \textit{Arizona}, 373 U.S. at 587-588 (interpreting the Boulder River Canyon Project Act, for which Congress intended to create a comprehensive water allocation scheme for three states on the Colorado River).
\item \textsuperscript{134} \textit{Id.} at 586-587.
\item \textsuperscript{135} \textit{City of Fresno}, 372 U.S. at 630, \textit{citing} Ivanhoe Irrigation Dist. v. McCracken, 357 U.S. 275 (1958).
\item \textsuperscript{136} \textit{Cf.} United States v. Carmack, 329 U.S. 230 (1946); Mortz v. Grazis, \textit{supra} note 79, at 67.
\item \textsuperscript{137} 438 U.S. 645 (1978).
\item \textsuperscript{138} 438 U.S. 696, 702, 718 (1978).
\item \textsuperscript{139} For a discussion of the savings clause problem, see Comment, \textit{Coal Slurry Pipelines Are Ready, Willing, and Unable to Get There}, 11 ST. MARY'S L. J. 765 (1980).
\end{itemize}
absence of any savings clause. And even if protective language were inserted today, it could easily be removed at some future time, perhaps in the name of solving another "energy crisis." The longevity of this language may ultimately depend less on the inclinations of the judiciary than on the passing winds of political change.

B. Recent Developments

In a major about-face from the stance of its predecessors, the Reagan administration has come out in opposition to federal assistance for coal slurry pipeline construction, and has evidenced greater concern for protecting state water law. Secretary of the Interior James Watt publicly opposed the most recent slurry bill during congressional hearings. He announced the administration's position that federal intervention was unnecessary, and could ultimately threaten state control over water allocations for many projects. Watt has also repudiated the controversial 1979 Solicitor's Opinion on "non-reserved water rights," which asserted ultimate federal authority over unappropriated waters. This decision removes another potential threat of federal intervention in state water law. The political weight of this new position will, according to slurry opponents, effectively bury congressional approval for slurry initiatives, at least until the end of Reagan's term.

Some slurry companies have abandoned efforts to obtain federal eminent domain legislation, believing that it could lead to bureaucratic delays in the permitting and siting of pipelines. One joint venture—Energy Transportation Systems, Inc. [hereinafter ETSI]—has already obtained rights-of-way for most of the land to be crossed by its proposed pipeline and no longer lobbies for federal legislation.

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142. Id. See also Great Falls Tribune, Sept. 12, 1981, at A14, col. 4; ROCKY MOUNTAIN MAGAZINE (March-April 1981) at 32.
145. Cf. COMPTROLLER GENERAL'S REPORT, supra note 3, at 18.
146. Id.
tion belief that existing institutions can adequately serve pipeline companies.

Several political figures believe that pipeline construction proposals should be carried out, even without direct federal intervention. President Reagan has indicated that federal agencies may work directly with state and private parties to ensure that pipelines are “not prevented from competing by unjustified impediments to their ability to negotiate for rights of way.” The direction this apparent federal “jawboning” will take in the field of eminent domain powers or water law remains unclear. Interests close to the current administration remain committed to construction of slurry pipelines, even without federal legislation, as one method of supplying coal not only to the nation, but to much of the world as well. There is a distinct possibility that states like Montana may have to forego protection of their desire for conservation and in-state water utilization in order to serve broader global interests allegedly connected with national security. How lawmakers will balance local, national, and international interests remains an open question.

V. Conclusion

The Montana statute should survive a judicial challenge. Congressional intervention could prove more detrimental to its survival, depending on the degree of deference national lawmakers pay to state policies regulating water use. In a broader sense, Montana water is never completely sheltered from use in slurry pipelines, regardless of the statute. For example, ETSI’s proposal to use Missouri River water in South Dakota poses no immediate legal or hydrological problems to Montana, but there may be a precedent established for upstream guar-

148. Excerpts of Letter from President Ronald Reagan to House of Representatives Committee on Interior and Insular Affairs, reprinted in Great Falls Tribune, Nov. 18, 1981, at A1, col. 2 [emphasis added].

149. “[The United States] must facilitate the wider use of coal . . . Our nation has the capability to become the world’s principal supplier of this fuel, but in order to do so we must be able to transport it. It should . . . be a goal of the new administration to . . . open the way for investment in upgrading our rail system and in the construction of coal slurry pipelines.” Copulos, The Department of Energy, in Mandate For Leadership: Policy Management In A Conservative Administration 236 (ed. C. Heatherly 1981) (emphasis added).

150. Miles Costich, President of the Institute on Strategic Trade, has suggested that the Soviet Union’s insistence on supplying natural gas to energy-poor Western European nations could damage the strength of the Western Alliance. He proposes that the United States supply Europe’s energy needs. American coal would be shipped from mines via rail or slurry pipelines to Atlantic seaports for trans-shipment to Europe. Costich, That Soviet Pipeline to the West 32 NAT’L REV. 956, 975 (August 21, 1981).
COAL SLURRY

The mandates of downstream water for such projects. Consequently, Montana could not extend its policy regarding coal slurry beyond its borders. This raises questions about the statute and possibly conflicting water allocation procedures under the Yellowstone River Compact. At least one proposal to divert Montana water in the Yellowstone Basin reserved to Wyoming under the Compact contemplates use of the water for slurry development. An interstate compact is generally construed to be a quasi-treaty or federal statute; therefore, a state law in conflict with obligations under the compact could be found unconstitutional. This could nullify enforcement of the statute insofar as rights to water in the Yellowstone Basin are concerned. Since the Compact allows Montana to veto any water appropriations, however, Montana could defeat any proposed diversions without bringing its slurry statute into play. Enforcement of the Compact has already invited litigation on related matters, and it is as yet unclear what role it will play in future transbasin diversions.

Water located within Montana but held by federal water project authorities would appear to be beyond the reach of the statute, and therefore available for industrial use, say, in a slurry line. Plans for industrial use must comply with federal reclamation law, and an environmental impact statement is required for a general water marketing program and each supply contract. This, coupled with land-purchase, condemnation, and rights-of-way problems, renders large-scale water projects like slurry pipelines entirely problematic.

Water purchased by the state from the federal Fort Peck Reservoir can be

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156. MCA § 85-20-101 (1981) (art. X). This provision was construed in Utah Int'l Inc. v. Intake Water Co., 484 F. Supp. 36, 45 (D. Mont. 1979) (each state under the compact can control every aspect of the appropriation). See also 38 Op. MONT. ATT'Y GEN. No. 18, 1-4 (1979) (diversion of water under Article X requires consent of all states privy to the compact).


159. See Environmental Defense Fund, Inc. v. Andrus, 596 F.2d 848 (9th Cir. 1979).

used for industrial projects,\textsuperscript{161} and one source has suggested use of this water in slurry pipelines.\textsuperscript{162} It is not certain whether this acquired water could (legally) be used for a coal slurry line.\textsuperscript{163} Nor is it certain how the technical and economic problems associated with transfer of the water to coal fields would be solved, even if the water were legally available. Litigation may yet arise under these circumstances.

All of these developments suggest that Montana’s statute may yet prove to be as controversial as its other far-reaching attempts to tax and regulate such things as the production of coal and siting of major energy facilities. Conflicting views of Montana’s approach to balancing the interests of economic development, energy production, and environmental preservation have given rise to the “potentially explosive internal stresses” and the “economic equivalent of civil war” that futurist Alvin Toffler sees leading to national disunity and separatism.\textsuperscript{164} Whether or not Toffler’s worst fears will come to pass may depend in part on future opposition to Montana’s regulation of coal slurry pipelines.

\textit{Bill Bronson}


\textsuperscript{162} Great Falls Tribune, Apr. 8, 1981, at A9, col. 5 (statement of Ted Doney, former legal counsel and director for the Montana Department of Natural Resources and Conservation).

\textsuperscript{163} The provisions of the Fort Peck water acquisition statute contemplate sale, rent, or diversion of the water for industrial use. MCA § 85-1-205 (1981). Industrial use is a “beneficial use” of water under the Montana Water Use Act. MCA § 85-2-102(2) (1981), but this definition is circumscribed by the prohibition on use of water in slurry pipelines. MCA § 85-2-104(2) (1981).

\textsuperscript{164} A. Toffler, The Third Wave 332-334 (1980).