ENVIRONMENTAL LAW

The Surface Mining and Reclamation Control Act
Hodel v. Virginia Surface Mining and Reclamation Association, Inc.
101 S. Ct. 2352 (1981)

&

Hodel v. Indiana
101 S. Ct. 2376 (1981)

America’s energy crisis has forced reevaluation of the country’s energy resources. In 1974, coal represented only 18% of the nation’s energy supply,1 but because of the expense of importing oil, the decreasing supply of natural gas, the potential hazards of nuclear power and the initial expense of solar energy, the country will have to rely more on coal as a source of fuel. Presently, coal represents 90% of our total hydrocarbon energy reserves2 and a tremendous source of tappable energy. Surface coal mining, however, takes a devastating toll on the environment, ruining streams, killing fish and wildlife, and destroying the land which is mined.3 Regulation is necessary to curtail the deleterious effect of strip mining; however, a problem arises in balancing the energy needs of America with the damage to the environment. If compliance with regulation becomes too costly, coal mining becomes economically infeasible, while without regulation, other valuable and limited resources may be destroyed.

Congress responded to this “balancing” task by enacting the Surface Mining and Reclamation Control Act of 1977 (the Act).4 The Act establishes “a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations”5 and envisions a two-stage regulatory program consisting of an interim and a permanent phase. The interim phase is controlled by federal regulations; the states control the permanent phase within federal guidelines.6 The permanent program regulates in more areas and contains more detailed performance standards than does the interim program.7 In order to comply with the Act, coal mine

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2 Id.
3 Id. at 596.
7 Rodgers & Schaechter, Federal Regulation of Strip Mining, 1979 Ann. Survey Am. Law 227, 266.
operators must obtain permits before mining. To receive a permit, the operator must provide detailed information on the proposed mining operation and subsequent reclamation plan. Congress expressed its concern for the problems of the mine operators and its desire to limit restrictions on coal production by providing exceptions and variances to the regulations.

Prior to passage of the Act, many states allowing surface mining on private lands had regulatory programs covering strip mining. However, there was little uniformity among the states and generally the regulations were inadequate, under-financed and poorly enforced. There were also some federal regulatory programs dealing with mining and environmental protection in general. The Act, although farther reaching, did not alter the existing law. Congress specified that "[n]othing in this Chapter shall be construed as superseding, amending, modifying, or repealing the Mining and Minerals Policy Act of 1970, the National Environmental Policy Act of 1969, or any of the following Acts or any rule or regulation promulgated thereunder...." The Act, while promulgating new regulations dealing specifically with the strip mining of coal, has no preemptive effect on pre-existing law in the area. It does, however, provide minimum guidelines which states may incorporate into their own plans, or they may leave enforcement to the federal government.

The constitutionality of the Surface Mining Act has been challenged several times. Two of the most recent cases are Hodel v. Virginia Surface Mining and Reclamation Association, Inc. (Virginia) and Hodel v. Indiana (Indiana). The challenges are directed mainly at the performance standards contained in Title V of the Act. Since the permanent regulatory program was not scheduled to go into effect until June 3, 1980, the chal-

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8 Id., at 260. 30 U.S.C. § 1258 requires that prospective operators show among other things: 1) the present condition of the land, 2) the uses existing at the time of application, 3) the ability of the land to support different uses, 4) a soil survey, 5) the productivity of the land prior to mining, and 6) a detailed description of their proposed post-mining reclamation plan.

9 Rodgers & Schaechter, supra note 7 at 260.


15 101 S. Ct. 2376 (1981). This casenote focuses primarily on the Virginia case.
lenges in these cases arising prior to that date were directed only at the interim program.\textsuperscript{16} Plaintiffs in \textit{Virginia} contended that the Act exceeds congressional authority under the Commerce clause,\textsuperscript{18} and violates the tenth amendment,\textsuperscript{19} and the Just Compensation\textsuperscript{20} and Due Process clauses\textsuperscript{21} of the fifth amendment. In \textit{Indiana}, because the only additional argument was an equal protection challenge, the court deferred to the decision in \textit{Virginia} on all but that issue.

The district court in \textit{Virginia} rejected the appellees' Commerce clause, substantive due process and equal protection challenges but held that the Act as a whole violates the Just Compensation clause, and that several of its enforcement provisions violate procedural due process. The court enjoined enforcement of those provisions.\textsuperscript{21} In \textit{Indiana},\textsuperscript{22} the district court sustained each constitutional challenge to the Act—equal protection, Commerce clause, due process and just compensation—and permanently enjoined enforcement of the challenged provisions.\textsuperscript{23} The United States Supreme Court, however, rejected all challenges to the Act and held that, at least in the context of a facial challenge, the Surface Mining Act is constitutional.\textsuperscript{24}

THE COMMERCE CLAUSE AND THE TENTH AMENDMENT

The appellees, plaintiffs at the district court, maintained first that the Act exceeds the congressional power to regulate interstate commerce. They based their argument on the premise that the Act controls only private land within individual states as opposed to interstate commerce \textit{per se}. In determining whether an act of Congress is valid under the Commerce clause, the Court must find only that there exists a rational basis for a Congressional finding that the regulated activity affects interstate com-

\textsuperscript{16} 101 S. Ct. at 2358.
\textsuperscript{17} The plaintiffs in \textit{Virginia} were the Virginia Surface Mining and Reclamation Association, Inc., 63 of its member coal companies, and 4 individual land owners. The Commonwealth of Virginia and the town of Wise, Virginia intervened as plaintiffs.
\textsuperscript{18} Congress has the power to "regulate commerce with foreign nations and among the several States, and with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3.
\textsuperscript{19} "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X.
\textsuperscript{20} "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V.
\textsuperscript{22} The plaintiffs in \textit{Indiana} were the State of Indiana and several of its officials, the Indiana Coal Association, several coal mine operators, and others.
\textsuperscript{24} 101 S. Ct. at 2354, Hodel v. Indiana, 101 S. Ct. at 2389.
While this challenge was directed only at the interim regulations and the permanent regulations may later be challenged, the Court in Indiana held that:

A complex regulatory program such as established by the Act, can survive a Commerce Clause challenge without a showing that every single facet of the program is independently and directly related to a valid congressional goal. It is enough that the challenged provisions are an integral part of the regulatory program and that the regulatory scheme when considered as a whole satisfies this test.25

If a rational basis is found, the only other point of inquiry is whether the regulatory means selected are reasonable and appropriate.27 In answering these questions, the Court looked to the extensive hearings held prior to the enactment of the statute. Evidence presented to Congress indicated the detrimental effect which strip mining has on interstate commerce by virtue of its effect on the land, water and wildlife.28 The Act itself recites Congress' finding that "many surface mining operations result in disturbances of surface areas that burden and adversely affect commerce and the public welfare."29 In view of this finding and an expressed desire for minimum national protective standards, the Court held that Congress had exhibited a rational basis for regulating surface mining through its Commerce clause powers.30 In so holding, the Court also noted a Congressional desire to insure that competition in interstate commerce would not undermine the states' ability to maintain adequate regulatory standards.31 Thus, the Court rejected appellees' Commerce clause challenge to the Act, finding that the Act's provisions are rational and legitimately connected to interstate commerce.

Next, the Court examined appellees contention that the regulatory provisions of the Act infringe on the states' "reserved powers" in violation of the tenth amendment.32 This challenge was directed at the "steep-slope" provisions which require operators to "reclaim the mined area by com-

25 101 S. Ct. at 2360, (citing inter alia Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 258 (1964)). Justice Rehnquist and Chief Justice Burger concurred in the judgment but were concerned that this language would lead to a broadening of the Commerce clause. Justice Rehnquist stressed that "some" effect on interstate commerce is not enough; there must be a "substantial" effect. While he agreed that in this case the Act was a valid exercise of the commerce power, Justice Rehnquist felt that Congress was stretching its authority to the "nth degree." It is clear that neither Rehnquist nor Burger is in favor of further expansion of the commerce power. 101 S. Ct. 2352 at 2391-92.
26 101 S. Ct. at 2385 n.17.
27 101 S. Ct. at 2360 (citing inter alia, Heart of Atlanta Motel, 379 U.S. at 262).
28 See 101 S. Ct. at 2360-63.
30 101 S. Ct. at 2362-63.
31 Id. at 2363 (quoting 30 U.S.C. § 1201(g) (Supp. 1, 1977)).
32 See note 19, supra.
pletely covering the highwall and returning the site to its 'approximate original contour.' " The district court agreed with appellee's argument that these requirements interfere with the states' "traditional governmental function" of regulating land use.

In responding to, and rejecting appellee's argument, the Supreme Court drew on language from National League of Cities v. Usery where the Court stated:

It is one thing to recognize the authority of Congress to enact laws regulating individual businesses necessarily subject to the dual sovereignty of the government of the Nation and of the State in which they reside. It is quite another to uphold a similar exercise of congressional authority directed not to private citizens, but to the States as States.

For this challenge to succeed, appellee had to demonstrate that the statute regulates the "states as states" in their exercise of dominion over land within their borders.

The Court held that it did not. The steep-slope provisions govern only the activities of coal mine operators who are private individuals or businesses and the federal government bears the full financial and regulatory burden if a state does not implement a permanent program of its own. The Court found that the Act does not regulate states as states but rather establishes a flexible federal program which allows the States to create their own program. The Court noted that Congress may legitimately pre-empt state law when there is a valid exercise of its Commerce clause powers. Therefore, the Court held, the steep-slope provisions do not infringe on the reserved powers of the states.

30 U.S.C. § 1265(b) (Supp. I 1977). The statute defines "approximate original contour" as "that surface configuration achieved by backfilling and grading of the mined area so that the reclaimed area, including any terracing or access roads, closely resembles the general surface configuration of the land prior to mining and blends into and complements the drainage pattern of the surrounding terrain, with all highwalls and spoil piles eliminated."

483 F. Supp. at 432.


Id. at 845.

In Usery the Court held that to invalidate commerce power legislation, it must be shown that

1) the legislation regulates states as states,
2) the regulations address matters that are indisputably attributes of state sovereignty, and
3) the State's compliance with the federal law would directly impair their ability to structure integral operations in areas of traditional functions.

426 U.S. at 845-54.

101 S. Ct. at 2368-69.

Id. at 2366.

Id. at 2367.
Appellees alleged, and the district court held, that steep-slope provisions, prime farmland provisions, and provisions prohibiting mining in certain areas effectuated an uncompensated taking of appellees' land in violation of the fifth amendment. Appellees contended that the steep-slope and prime farmland regulations were economically and physically impossible to comply with, and that the prohibition provisions prevented an owner from mining his own land. The lower court found that the Act deprived operator's of any use of their land and that this constituted an uncompensated taking.

In reversing, the Supreme Court pointed out that the problem with the district courts' determination of this issue was the lack of a factual setting in which to decide it. Appellees identified no land in which they have an interest that has been "taken" by operation of the Act. They also made no showing that they had made use of any variance or waiver provisions available to them. The Court stated, "by proceeding in this fashion, the court below ignored this Court's oft-repeated admonition that the constitutionality of statutes ought not be decided except in an actual factual setting that makes such a decision necessary." There is no set formula for determining whether there has been a "taking"; it must be done on a case-by-case basis. The only question decided by this Court, then, is whether the "mere enactment" of the Surface Mining Act constituted a taking. The test utilized examined whether the regulatory provisions of the Act deny an owner the economically viable use of his land. Except in section

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43 30 U.S.C. § 1265(d) (Supp. I 1977). These provisions require "steep-slope" operators to:
1) reclaim the area by returning the land to its approximate original contour,
2) refrain from dumping spoil material on the downslope, and
3) refrain from disturbing land above the highwall.
42 30 U.S.C. § 1260 (Supp. I 1977). These provisions require, inter alia, that an applicant for a permit to mine on prime farmland show that he has the capacity to restore the land, within a reasonable time after completion of the mining, to the productivity level of prime farmland in the surrounding area.
44 See note 20, supra.
46 101 S. Ct. at 2369; Hodel v. Indiana, 101 S. Ct. at 2387.
47 483 F. Supp. at 441.
48 101 S. Ct. at 2369. Section 515(d) allows for variances from the approximate original contour provisions. Section 522(e) provides for waivers from surface mining restrictions.
49 Id. at 2370 (quoting Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979)).
50 101 S. Ct. at 2370. See also In Re Surface Mining Regulation Litigation, 627 F.2d 1346 (D.D.C. 1980). The Court declined to decide a similar "taking" issue because it was premature.
51 101 S. Ct. at 2370 (quoting inter alia Agins v. Tiburon, 447 U.S. 225, 260 (1980)).
1272, which prohibits mining in specified areas, the Act does not prohibit surface coal mining; it merely regulates the conditions, and none of the sections regulate non-mining use of the land. The Court concluded that, on its face, the Surface Mining Act does not prevent the beneficial use of coal bearing lands and, therefore, does not violate the Just Compensation clause of the fifth amendment.\(^5\)

The Act will be open to future litigation on this issue. The Supreme Court noted that while the issue was not ripe for judicial determination, appellees or other coal mine operators are not precluded from attempting to show a "taking" when applied to a specific parcel of affected land.\(^5\) They must first, however, make use of the variance and waiver procedures in the Act itself which could obviate the need to consider the constitutional question.

Because the purpose of the Act is to protect a substantial public interest, it will likely be found constitutional.\(^5\) The Supreme Court in *Penn Central Transportation Corp. v. New York City*,\(^5\) held that, "a 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government . . . than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good."\(^5\) The Surface Mining Act by itself does not constitute a physical invasion and it was designed to further a substantial public interest—protection of the environment.\(^5\) Thus, it may withstand a more substantial challenge than that put forth in *Virginia* or *Indiana*.

**EQUAL PROTECTION AND DUE PROCESS**

Appellees in *Indiana* alleged that the prime farmland provisions of the Act\(^5\) violated the equal protection and due process guarantees of the

\(^{55}\) 101 S. Ct. at 2370.

\(^{56}\) *Id.* at 2371. Justice Powell concurred in the judgment because he believed the Just Compensation challenge was premature. He felt, however, that the "approximate original contour" provisions were enacted with little comprehension of their possible effects on many areas. Powell strongly suggested that the Act could constitute a taking when applied to specific lands. 101 S. Ct. 2352 at 2375, 2376.

\(^{54}\) See *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). This case has been cited often by opponents of the Surface Mining Act. The Court in *Pennsylvania Coal Co.* determined that provisions of Pennsylvania statute, similar to the ones in question here, amounted to an uncompensated taking of land. The statute in question, however, did not protect public, but rather protected only private interests. The Surface Mining Act protects public interests; therefore, there is a greater burden on one trying to show a "taking." See text accompanying notes 55 and 56 *infra*, but also see Justice Powell's concurring opinion in *Hodel v. Virginia Surface Mining and Reclamation Ass'n*, Inc., 101 S. Ct. 2352 at 2375, 2376.


fifth amendment. This challenge arose from the fact that the prime farmland provisions allow no variances while such are obtainable from the original contour provisions for steep-slope and mountaintop operations.

The district court held that, the absence of variance procedures for the prime farmland provisions discriminated against midwestern states and operators where there are "significant coal reserves located under prime farmland and few or no steep-slope or mountain top mining operations."

Appellees also argued that these provisions violate substantive due process because they are arbitrary, irrational and capricious.

Where no suspect class is involved, legislation must be upheld against an equal protection attack when the means used are rationally related to a legitimate government purpose. Legislative acts "come to the Court with a presumption of constitutionality, and . . . the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way." The Court found that there was a rational relationship between the regulations and the purpose of the Act, and held that "a claim of arbitrariness cannot rest solely on a statute's lack of uniform geographic impact." The equal protection and substantive due process challenges, therefore, were deemed to be without merit.

Finally, appellees in both Virginia and Indiana argued that some enforcement provisions of the Act violate procedural due process by allowing for deprivation of a property interest without a hearing. Generally, due process requires that an individual be given an opportunity for a hearing before he is deprived of any significant property interest, except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event. The Supreme Court held that 30 U.S.C. § 1271(a)(2) falls into the "extraordinary situation" category. This provision allows the Secretary of the Interior to issue

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69 See note 20, supra.
60 101 S. Ct. at 2386, 30 U.S.C. § 1265(c) provides for variances from the approximate original contour requirement if the operator can show that it will allow a post-reclamation use that would constitute an equal or better economic or public use than would otherwise be possible.
61 501 F. Supp. at 469.
62 101 S. Ct. at 2386 (citing Schweiker v. Wilson, 101 S. Ct. 1074 (1981)).
64 The Court found that there was a rational relationship between the regulations and the purpose of the Act, and held that "a claim of arbitrariness cannot rest solely on a statute's lack of uniform geographic impact." The equal protection and substantive due process challenges, therefore, were deemed to be without merit.
65 30 U.S.C. § 1271 (Supp. I 1977). Section 1271(a)(2) authorizes the Secretary to order a mine shut down when he determines that the operation violates the Act. The district court held that this provision is not sufficiently objective to fulfill the requirements of procedural due process. 483 F. Supp. at 448.
66 See note 20, supra.
68 101 S. Ct. at 2372.
cessation orders before a hearing is held. Cessation orders can be issued only when a violation of the Act "creates an immediate danger to the health or safety of the public, or is causing, or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources ...." The Court stated that, "[i]ndeed, deprivation of property to protect the public health and safety is 'one of the oldest examples' of permissible summary action."

The district court in Virginia, held that the Act does not provide sufficient objective criteria for summary administrative action. The Supreme Court disagreed and found that the standards were more specific than those of other statutes which had been upheld in due process challenges. Therefore, the Court determined that the provisions of the Surface Mining Act allowing for issuance of cessation orders without a hearing do not violate appellees’ due process rights, and that the standard enumerated therein is sufficiently objective.

CONCLUSION

Hodel v. Virginia and Hodel v. Indiana interpret the Surface Mining and Reclamation Control Act of 1977 in the context of the interim phase only. The importance of these cases lies in their directives with regard to the permanent phase. Clearly, there remain no Commerce clause or due process arguments. Whether the Act constitutes a "taking" under the Just Compensation clause of the fifth amendment, however, remains open.

SUSAN TERRASS DURR

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70 101 S. Ct. at 2372 (citations omitted).
72 101 S. Ct. at 2373-74.
On the occasion of his decision to assume senior status on the United States Court of Appeals for the Sixth Circuit, the editors respectfully dedicate this issue to the Honorable Judge Paul C. Weick.
DEDICATION

This issue of the AKRON LAW REVIEW is dedicated to The Honorable Paul C. Weick—a judge of distinction, a leader of the legal profession and one who began his practice of law in Akron, Ohio. His affinity and loyalty to The University of Akron continued through his years of distinguished service in the federal courts. While earning the many honors and awards described herein and devoting his energies to programs designed to improve the administration of justice, Judge Weick reserved time to support The University of Akron School of Law. For his dedication to legal education and especially for the giving of himself to our school, it is appropriate that this issue of the AKRON LAW REVIEW be dedicated to him—The Honorable Judge Paul C. Weick.

DEAN DONALD M. JENKINS
The University of Akron School of Law