

In the

Supreme Court of the United States

DONALD PAUL HODEL, ACTING SECRETARY)
OF THE INTERIOR,)

APPELLANT,)

v.)

No. 79-1538

VIRGINIA SURFACE MINING AND RECLAMA-)
TION ASSOCIATION, INC., ET AL.,)

and)

VIRGINIA SURFACE MINING AND RECLAMA-)
TION ASSOCIATION, INC., ET AL.,)

APPELLANTS,)

v.)

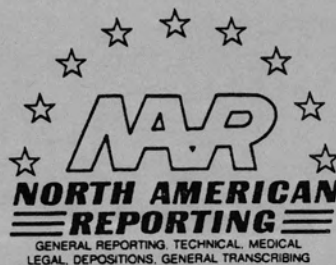
No. 79-1596

DONALD PAUL HODEL, ACTING SECRETARY)
OF THE INTERIOR, ET AL.)

Washington, D.C.
February 23, 1981

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ORIGINAL



202/544-1144

1 IN THE SUPREME COURT OF THE UNITED STATES

2 -----:
3 DONALD PAUL HODEL, ACTING SECRETARY :
4 OF THE INTERIOR, :

5 Appellant, :

6 v. :

No. 79-1538

7 VIRGINIA SURFACE MINING AND RECLA- :
8 MATION ASSOCIATION, INC., ET AL., :

9 and :

10 VIRGINIA SURFACE MINING AND RECLA- :
11 MATION ASSOCIATION, INC., ET AL., :

12 Appellants, :

13 v. :

No. 79-1596

14 DONALD PAUL HODEL, ACTING SECRETARY :
15 OF THE INTERIOR, ET AL. :

16 -----:

17 Washington, D. C.

18 Monday, February 23, 1981

19 The above-entitled matters came on for oral ar-
20 gument before the Supreme Court of the United States
21 at 1:09 o'clock p.m.

22 APPEARANCES:

23 PETER BUSCEMI, ESQ., Assistant to the Solicitor
24 General, U. S. Department of Justice, Wasington,
25 D.C. 20530; on behalf of Appellant (No. 79-1538)
and of Appellees (No. 79-1596).

J. MARSHALL COLEMAN, ESQ., Attorney General of
Virginia, 1100 East Broad Street, Richmond, Vir-
ginia 23219; on behalf of Appellees (No. 79-1538)
and of Appellants (No. 79-1596).

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MILLERS FALLS
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COTTON CONTENT

1 P R O C E E D I N G S

2 MR. CHIEF JUSTICE BURGER: We will hear arguments
3 next in Secretary of Interior v. The Surface Mining Company
4 and the related case. Mr. Buscemi.

5 ORAL ARGUMENT OF PETER BUSCEMI, ESQ.,
6 ON BEHALF OF THE APPELLANT IN NO. 79-1538 &
7 ON BEHALF OF THE APPELLEES IN NO. 79-1596

8 MR. BUSCEMI: Thank you, Mr. Chief Justice, and may
9 it please the Court:

10 This case, like the one that follows it, involves
11 several challenges to the constitutionality of the Surface
12 Mining Control and Reclamation Act of 1977.

13 This case is here on direct appeal from the United
14 States District Court for the Western District of Virginia.
15 The original plaintiffs were an association of coal mining
16 companies and 63 of its members. The Commonwealth of Virginia
17 intervened as a plaintiff in the District Court.

18 The primary constitutional provisions involved are
19 the Commerce Clause, Article I, Section 8; the Tenth Amend-
20 ment; and the Just Compensation and Due Process Clauses of
21 the Fifth Amendment. I plan to address the constitutional
22 questions in that order after I first describe the statutory
23 provisions that are at issue here in the overall statutory
24 scheme for regulating surface mining of coal.

25 For present purposes the critical portion of the

1 statute is Title V which is entitled, "Control of Environ-
2 mental Impacts of Surface Coal Mining." Section 501 of the
3 Act establishes a two-stage program for the regulation of
4 surface mining. During the initial stage, also called the
5 interim stage in the Secretary's regulations, mine operators
6 are required to comply with only some of the performance
7 standards set up by the Act. Among the ones applicable dur-
8 ing this interim stage are the so-called steep slope provi-
9 sions in Section 515(d). They apply to surface mining on
10 slopes greater than 20 degrees. They require mine operators
11 to avoid the placement of debris, spoil material, or aban-
12 doned equipment on the downslope beneath the mining cut.
13 They further require restoration of the mining site to its
14 approximate original contour after mining is completed, and
15 complete coverage of the so-called high wall, which is the
16 vertical face of the mine cut.

17 Another portion of the Act that becomes immediately
18 effective during the interim period is Section 522(e),
19 particularly 522(e)(4) and -(5), which with various qualifi-
20 cations and exceptions prohibit surface mining altogether
21 within specified distances of roads, schools, churches, parks,
22 public buildings, and cemeteries.

23 During the interim period the Secretary of the
24 Interior is primarily responsible for enforcing the Act. The
25 interim regulatory program remains in effect in each state

1 until a permanent program has been established in that state.
2 States wishing to assume primary responsibility for regulation
3 of surface coal mining during the permanent phase must submit
4 to the Secretary a proposed permanent program demonstrating,
5 first, that the state legislature has adopted the necessary
6 laws implementing the environmental protection standards es-
7 tablished by the Act. And second, that the state has the
8 administrative and the technological capability to enforce
9 those standards.

10 QUESTION: Mr. Buscemi, supposing that that statute
11 at the phase you now describe didn't talk about coal at all,
12 it simply talked about the desirability of zoning on a na-
13 tional level, and Congress passed a law saying that for any
14 state that doesn't zone land and keep a certain amount of
15 prime farm land in existence that is now in existence, we
16 will supersede that state's regulatory power with our own
17 zoning act. Do you think it has the power under the Commerce
18 Clause to do that?

19 MR. BUSCEMI: Well, I'm not sure that I completely
20 appreciate the question, Mr. Justice Rehnquist, because I'm
21 not sure that I understand the factual underpinning that
22 Congress would have for that sort of regulation. My answer
23 to that question and hypotheticals of that kind is essentially
24 that if Congress finds, and has a rational basis for finding,
25 that a particular situation that exists in the states is

1 affecting interstate commerce. And if Congress devises a
2 method that's rationally related to the protection of the
3 regulation of interstate commerce, the statute is constitu-
4 tional. I'm not sure what the justification would be for
5 the statute that you've just suggested, but I think that the
6 test would be the same as it is here.

7 QUESTION: Well, in Chief Justice Hughes' opinion
8 in Jones & Laughlin v. NLRB, when he was upholding the
9 National Labor Relations statute, he said that, regarding
10 the Commerce Clause, "Undoubtedly the scope of this power
11 must be considered in the light of our dual system of govern-
12 ment and may not be extended so as to embrace effects upon
13 interstate commerce so indirect and remote that to embrace
14 them in view of our complex society would effectually oblit-
15 erate the distinction between what is national and what is
16 local and create a completely centralized government."

17 Now, does the Government take the position that the
18 law has gone so much beyond that that that is no longer the
19 limit on the Commerce Clause?

20 MR. BUSCEMI: Well, Mr. Justice Rehnquist, I think
21 that the Court's decision in National League of Cities v.
22 Usery establishes that there is some impact of the federal
23 system of government, our state system, the Tenth Amendment,
24 or the federal system of government generally, however you
25 want to characterize that decision, on the exercise of the

1 commerce power. And so I don't think that Mr. Chief Justice
2 Hughes' statement that you've just read can be completely dis-
3 avowed. We don't take that position here.

4 QUESTION: Then, do you think that Congress after
5 reciting the history of surface farm lands in Oklahoma being
6 blown over into Kansas and other places, back in the '30s,
7 could require under the Commerce Clause that all farmers
8 plough their land with contour plowing as distinguished from
9 straight line plowing?

10 MR. BUSCEMI: Well, Mr. Chief Justice, again, my
11 answer to that question is essentially the same as it was to
12 Mr. Justice Rehnquist.

13 QUESTION: My question gives you a concrete, speci-
14 fic statute, though.

15 MR. BUSCEMI: Well, I have to confess ignorance as
16 to the situation in the Dust Bowl in the '30s, and as to the
17 impact of contour plowing as opposed to some other kind of
18 plowing --

19 QUESTION: Well, assuming -- add to it the con-
20 gressional recital that scientific research and practice has
21 demonstrated that contour plowing will preserve the soil for
22 future generations.

23 MR. BUSCEMI: I assume, Mr. Chief Justice, that if
24 Congress rationally found that the failure to adopt a particu-
25 lar method of plowing or a particular method of cultivating

1 farmlands had an adverse effect on interstate commerce and
2 if Congress further rationally concluded that regulation of
3 the method of plowing would help to alleviate that effect,
4 that Congress could regulate that sort of agricultural activ-
5 ity, just as Congress has in fact regulated agricultural
6 cultivation, for example, with the pricing regulations and
7 also with the farm subsidy laws.

8 QUESTION: Well, but they've done that by use of
9 the power of the purse, granting subsidies if farmers com-
10 plied with certain regulations. I'm talking about a flat
11 requirement that all farmers on certain findings engage in
12 contour plowing. Do you think they might be able to do it?

13 MR. BUSCEMI: Well, Mr. Chief Justice, I think that
14 the findings are critical. That is not the sort of thing that
15 can be so lightly assumed in the hypothetical, because Con-
16 gress here, in the Surface Mining Act, as it has in the other
17 Commerce Clause legislation that the Court has sustained,
18 has very carefully examined exactly the situation that did
19 prevail and has determined that particular adverse effect on
20 interstate commerce did exist. And I think that if you are
21 willing to assume that Congress has made all the necessary
22 findings and Congress has determined that there is a rational
23 relationship between --

24 QUESTION: The word necessary presupposes the
25 answer a little bit, doesn't it?

1 MR. BUSCEMI: That's essentially what I'm trying to
2 say, Mr. Chief Justice. I think that once you make that
3 assumption you are presupposing the answer. The question
4 really is, what is the basis for the congressional action,
5 and that's something that, you know, we can only talk about
6 in connection --

7 QUESTION: The basis would be that the United States
8 Department of Agriculture says it knows more about farming
9 and soil conservation than the states do, and Congress accepts
10 that.

11 MR. BUSCEMI: But, Mr. Chief Justice, that's not
12 the situation we have here. We have a very careful, detailed,
13 lengthy investigation by Congress into surface mining and its
14 adverse effects on commerce, and we have the legislative his-
15 tory that we've set out in the Appendix of our brief in this
16 case which demonstrates, I think, that Congress has taken a
17 very close look at surface mining and its effects on inter-
18 state commerce, and I don't --

19 QUESTION: Mr. Buscemi, what does that investiga-
20 tion show the effect on commerce is or may be if there is
21 surface mining of coal without restoring the -- say, the
22 high wall?

23 MR. BUSCEMI: Well, I think, Mr. Justice White --

24 QUESTION: I can understand why surface mining might
25 be said to affect commerce, but that wouldn't mean that

1 anything that Congress said, ordered with respect to surface
2 mining would have an effect on commerce.

3 MR. BUSCEMI: I think that's correct, Mr. Justice
4 White, but I think in particular the high wall regulation
5 that you, or the high wall statutory provision that you refer
6 to is very closely connected to preventing adverse environ-
7 mental effects from surface mining. I think that the --

8 QUESTION: Well, you mean anything that affects
9 the environment affects commerce? Is that your suggestion?

10 MR. BUSCEMI: Well, I think that that is one of
11 the kinds of effects on commerce that Congress can consider,
12 and I think that in this case that Congress has found that
13 there is substantial environmental damage caused by surface
14 mining.

15 QUESTION: Well, what if -- what if Virginia had a
16 law that required, when you surface mine on these steep areas,
17 that when you're through mining you flatten them and cover
18 them. Now, you suggest that the United States would be em-
19 powered to say, because of its effect on commerce, would be
20 empowered to say, no, you may not flatten them, you must re-
21 build them and reestablish their original contour?

22 MR. BUSCEMI: Subject, of course, to the test that
23 it would have to bear a rational relationship.

24 QUESTION: Well, I'm asking you what that is. What
25 difference does it make to commerce whether they flatten the

1 land and cover it or restore it to the contour? That's what
2 I'm asking you.

3 MR. BUSCEMI: I understand, Mr. Justice White, but
4 in point of fact, in this statute, under Section 515, it is
5 permissible to flatten the land. The mountaintop removal
6 method is specifically authorized by the statute so that
7 Congress has not prevented that sort of activity.

8 QUESTION: So you suggest that if miners want to
9 not restore its original contour in these steep places, they
10 need not?

11 MR. BUSCEMI: That's correct. They can use the
12 mountaintop removal method of mining which essentially slices off
13 the peak of the mountain rather than gouging out strips along
14 the side of the mountain.

15 QUESTION: Well, so you're not answering my ques-
16 tion, again. Suppose that Virginia says, go ahead and gouge
17 out and strip mine the way you're doing it, but then flatten
18 it. Instead of recontouring the area, flatten it out, just
19 flatten, make it flat, and cover it. Now, the United States
20 could nevertheless require that they restore the contour
21 under the Commerce Clause?

22 MR. BUSCEMI: I'm not sure specifically what you
23 mean by flattening it and covering it, but in fact, again
24 with respect to the strip mining, the surface mining on the
25 side of the mountain, the steep slope provisions do provide

1 variances that will allow the maintenance of flat benchland
2 if that is necessary for public use or a higher economic use.

3 QUESTION: Well, you still haven't suggested to me
4 what the effect on commerce is.

5 MR. BUSCEMI: What the effect on commerce is of
6 strip mining?

7 QUESTION: No, of not restoring the contour but
8 flattening it and covering it some other way.

9 MR. BUSCEMI: Well, Mr. Justice White, I refer you
10 to the findings that Congress made in Section 101 of the
11 statute.

12 QUESTION: Well, don't refer me, I want to ask --
13 you can tell me what --

14 QUESTION: We have no way of reviewing those
15 findings.

16 MR. BUSCEMI: Well, that's precisely my point,
17 Mr. Justice Rehnquist. Section 101 of the statute contains
18 Congress's findings with respect to the environmental impact
19 that surface mining has.

20 QUESTION: Well, you go ahead and tell me what
21 impact on commerce it has. That's what I'm asking you.

22 MR. BUSCEMI: In Section 101 of the statute
23 Congress has found that coal mining operations contribute
24 significantly to the nation's energy requirements, that sur-
25 face mining results in disturbance of surface areas, that

1 burden and adversely affect commerce by destroying and
2 diminishing the utility of land for commercial, industrial,
3 residential, recreational, agricultural, and forestry pur-
4 poses by causing erosion and landslides, by contributing to
5 floods, by polluting the water, by destroying fish and wild-
6 life habitats, by impairing natural beauty, by damaging the
7 property of citizens, by creating hazards dangerous to life
8 and property --

9 QUESTION: I can understand all of that but I still
10 don't identify in that listing any specific impact on commerce
11 by a failure to restore the original contour when these
12 steep places are mined.

13 MR. BUSCEMI: Well, I think, Mr. Justice White, the
14 question is not whether every individual failure to restore
15 a particular surface mine to its approximate original contour
16 has a substantial effect on commerce. Rather, the question is
17 whether Congress can regulate this entire activity that has
18 a substantial effect on commerce.

19 QUESTION: So your answer to me is that it doesn't
20 make any difference whether this particular phase that's
21 regulated has any effect on commerce, as long as strip mining
22 is subject to regulation, that's the end of the -- ?

23 MR. BUSCEMI: Well, it certainly doesn't make any
24 difference whether you can point to a particular mine and
25 identify the particular effect on commerce from that mine.

1 That is certainly correct.

2 QUESTION: Well, I'm still a little puzzled. Do you
3 take the position that the general practice for mines as a
4 whole of requiring the restoration of the slope does in fact
5 have some impact on commerce by preventing the various things
6 that Congress found, such as erosion and floods and so forth
7 and so on? Do you take that position?

8 MR. BUSCEMI: Yes.

9 QUESTION: Or are you taking the more extreme posi-
10 tion that you don't even have to have that as long as the
11 activity is regulated, is subject to regulation?

12 MR. BUSCEMI: Well, I think that with respect to
13 the form of regulation that Congress chooses, there must be a
14 rational relationship between that regulation and the protec-
15 tion and the regulation of commerce. I don't think Congress
16 is free to say surface mining is subject to regulation --

17 QUESTION: What your answer to Mr. Justice White,
18 then, is, is that some of the things that you read are in
19 fact, looking at the class of activity as a whole, related to
20 commerce.

21 MR. BUSCEMI: Yes.

22 QUESTION: Which is different from the -- all right.

23 MR. BUSCEMI: Now, I want to make the point --

24 QUESTION: Can you give us an example or two of
25 what would be the negative impact on commerce? Flush that out

1 a little.

2 MR. BUSCEMI: I really don't know how to respond to
3 that except by saying that the list that I just read, I think,
4 indicates that there is a substantial effect on commerce.

5 Certainly --

6 QUESTION: Well, because Congress says so doesn't
7 make it true, necessarily. I'm asking you for illustrations,
8 concrete illustrations, as to what you think Congress was
9 driving at.

10 MR. BUSCEMI: Well, I think, Mr. Chief Justice, for
11 example, the Buffalo Creek flood disaster, which we've cited
12 or mentioned in one of the briefs and which is mentioned in
13 the congressional reports, is the kind of disaster that Con-
14 gress is trying to avert through regulating surface mining,
15 and I think that where hundreds of lives are lost, there's no
16 question of the --

17 QUESTION: That's not a Commerce Clause issue, is
18 it? The loss of lives?

19 MR. BUSCEMI: I think, for example, that if you look
20 at the child labor legislation that this Court upheld under
21 the Commerce Clause in Darby, there's no question that Con-
22 gress can try to pursue other ends in the exercise of its
23 Commerce Clause power.

24 I want to make the point that as far as I can under-
25 stand their argument, plaintiffs don't disagree with any of

1 what we've been saying so far. Their point is that the
2 Surface Mining Act affects land use and land use is something
3 that is committed exclusively by the Constitution to the
4 states, and that that's why this statute exceeds the
5 Commerce Clause. And they cite this Court to the decision in
6 McCready v. Virginia in 1877, and they talk about the separa-
7 tion of production and commerce. But, as the Court held in
8 Darby and in Jones & Laughlin which Mr. Justice Rehnquist re-
9 ferred to, and in Wickard v. Filburn, and Brightwood Dairy and a
10 host of other cases, that the rigid separation of production and
11 commerce is no longer the rule that's followed by this Court.

12 QUESTION: But if there is no rigid separation,
13 then it seems to me you're just pushing it to the outer edge
14 and saying that Congress can supersede any state authority by
15 simply a set of findings which are unreviewable in this
16 Court, or any other court.

17 MR. BUSCEMI: Mr. Justice Rehnquist, I think that,
18 for example, in your dissent in this Court in Fry v. United
19 States, you make the point that there is a very broad discre-
20 tion in Congress to make findings, and that's part of what
21 Congress is entitled to do, and you made that point, I be-
22 lieve, in the connection of United States v. California, which
23 you specifically said you thought was a correct decision be-
24 cause Congress had made certain findings about the impact of
25 railroad hazards on public safety and on commerce. It is true

1 that Congress does have an extremely broad factfinding capa-
2 bility and discretion, but I don't -- that does not mean that
3 there is no review whatsoever. There must be a rational basis
4 for a factual finding that Congress has made, and I think
5 that the legislative record in this case, which includes
6 volumes and volumes of hearings and evidence of the negative
7 effects that surface mining has had, demonstrates that there
8 is a basis for the congressional findings.

9 Now, there are, by the way, a number of federal
10 statutes that affect land use. I don't think there can be
11 any question about that, and I'm not sure exactly what the
12 district court and what appellees mean when they say that
13 Congress is not free to effect land use, because, for example,
14 the Clean Air Act and the Clean Water Act, the historical
15 preservation statutes in the Federal Code that we discussed
16 in the Grand Central Station brief, the Wild and Scenic Rivers
17 Act, a number of these statutes have effects on land use, and
18 plaintiffs, I don't believe, contend that all of those sta-
19 tutes go beyond the Commerce Clause. There's nothing about
20 the phrase "land use" that's sacrosanct under the Constitution.
21 I mean, the Constitution does not say that states are the
22 only governmental entities entitled to regulate land use.

23 QUESTION: There was something about powers not
24 expressly granted having been reserved, isn't there somewhere?

25 MR. BUSCEMI: That's true, Mr. Chief Justice, but

1 here the Commerce Clause power is expressly granted. That's
2 precisely the point.

3 QUESTION: Well, we've been trying, I think, several
4 of us to get a specific focus on just how it affects inter-
5 state commerce.

6 MR. BUSCEMI: Well, Mr. Chief Justice, I think I've
7 given my best answer to that question. I think that Congress
8 has found that it affects interstate commerce in several
9 ways and I think that those findings are rational findings
10 and they're supported by the evidence in the legislative record,
11 in the committee reports, in the hearings, and so on.

12 I think, Mr. Chief Justice, even the record in the
13 district court in this case provides several examples of --
14 the district court's own opinion says that in the absence of
15 this legislation, or if this legislation is invalidated, there
16 will be negative consequences, not only for coal mining it-
17 self, but also for the safety and the health of the people in
18 mining communities. Now, of course --

19 QUESTION: On this issue, you're the respondent,
20 aren't you?

21 MR. BUSCEMI: That's exactly right. That's
22 exactly the point I was just about to make, because from
23 this point --

24 QUESTION: The Court of Appeals held in your favor
25 on this issue?

1 MR. BUSCEMI: -- the district court ruled in our
2 favor. That's not true in the Indiana case, but the district
3 court here sustained the statute on the Commerce Clause
4 ground. Now, admittedly, this Commerce Clause-Tenth Amendment
5 or Federal System argument emerges to some extent in -- this
6 Court in National League of Cities said that the statute
7 there was unquestionably valid under the Commerce Clause,
8 but that the Tenth Amendment or the state-federal relation-
9 ship in our constitutional system imposed some limitations on
10 Congress's power to exercise the Commerce Clause delegated
11 power. So that that was -- even in National League of Cities
12 there was no question that the Commerce Clause power alone
13 was sufficient to justify the congressional action. The
14 question is whether there was some additional limit.

15 And that brings me to the first point on which the
16 district court ruled against the Secretary, and that is on
17 this Tenth Amendment argument. But this statute is far dif-
18 ferent from the one that the Court considered in National
19 League of Cities, and the reaffirmation of the decision in
20 United States v. California, in National League of Cities, I
21 think is very instructive because there, in California, we
22 had a federal statute that was being applied directly to the
23 states. This statute does not apply directly to the states in
24 any way. This statute applies only to coal mine operators.
25 The Federal Government does not require the states to

1 undertake any measures whatsoever. If the states do not
2 wish to participate in the regulatory program that the federal
3 statute establishes, they need not do so. If they wish to do
4 so, they can submit a proposed program to the Secretary and
5 -- by the way, there is a substantial amount of discretion
6 left to the states in those proposed programs. In fact, in
7 Section 101(f) of the Act Congress itself stated that because
8 of the diversity in terrain and climate, chemical and other
9 physical conditions, the primary governmental responsibility
10 should rest with the states. That was Congress' whole plan
11 under this statute. And the Court of Appeals for the District
12 of Columbia Circuit in reviewing a request for preliminary
13 injunction in the rule, the regulation review proceeding
14 that's going on there right now, denied the preliminary in-
15 junction and in an opinion by the court -- the panel included
16 Judge Tamm, Judge McKinnon, and District Judge Greene -- an-
17 nounced that this statute was truly an exemplary piece of
18 federalist legislation because of the interaction between the
19 state and the federal governments.

20 And I think that Congress has tried to strike the
21 balance in a fair way here between the state and the federal
22 government without requiring the states to do anything.
23 The states may -- there is a substantial amount of leeway in
24 framing these proposed permanent programs, and several of
25 those proposed programs have already been approved, including

1 one by the State of West Virginia.

2 QUESTION: But a state is not free to decide that
3 it will have no program?

4 MR. BUSCEMI: Well, a state, Mr. Justice Rehnquist,
5 is free to decide that it will not regulate surface mining
6 at all, but in that event the Federal Government will regulate
7 surface mining.

8 QUESTION: Under the Commerce Clause?

9 MR. BUSCEMI: Under the Commerce Clause. That's
10 correct. And my only point, at this stage, is that the Tenth
11 Amendment does not restrict the congressional decision to do
12 that because, as this Court recognized in National League of
13 Cities, there is nothing in the Tenth Amendment that prohi-
14 bits regulation of individual entrepreneurs in private busi-
15 ness. That distinction was expressly preserved.

16 I think that I would like to reserve the balance of
17 my time for rebuttal at this point, and I think I will ad-
18 dress the taking questions in connection with the Indiana
19 case, since they are exactly the same. Thank you.

20 MR. CHIEF JUSTICE BURGER: Very well. Mr. Attorney
21 General.

22 ORAL ARGUMENT OF J. MARSHALL COLEMAN, ESQ.,

23 ON BEHALF OF THE APPELLEES IN NO. 79-1538 &

24 ON BEHALF OF THE APPELLANTS IN NO. 79-1596

25 MR. COLEMAN: Mr. Chief Justice, and may it please

1 the Court:

2 In this case we are really talking about the idea of
3 a state. This is not a question of whether something is too
4 local to be reached by the Congress through the exercise of
5 its authority under the Commerce Clause. That is settled.
6 It's not even a case that involves whether the Congress can
7 do things that affect state functions, because that is also
8 settled. Environmental laws have some impact on that.

9 Here we're talking, on the other hand, about a
10 wholesale displacement of integral state functions, because
11 the Act in question results in the abridgment of state power
12 to shape its communities and to shape its future.

13 QUESTION: Is this, then, a matter of the extent
14 of the commerce power, or is it a matter of an impediment,
15 in this case a constitutional impediment, erected by the Ninth
16 and Tenth Amendments, perhaps, to the exercise by Congress
17 of the commerce power?

18 MR. COLEMAN: Well, you know, the district court
19 found that it was not the first, that the commerce power was
20 sufficient. I would urge to the Court that taking the com-
21 merce power this far would stretch it to the breaking point,
22 and I am sympathetic with counsel --

23 QUESTION: As I understand the National League of
24 Cities, which is a case cited a good deal by both sides, at
25 least in their briefs and relied on considerably by you, as I

1 understand that case, it didn't go to the scope of the
2 commerce power --

3 MR. COLEMAN: That's right.

4 QUESTION: But rather to an impediment to the exer-
5 cise of the commerce power.

6 MR. COLEMAN: That's right. And that's what I want
7 to focus on, because that was the holding of the court, and
8 it's the --

9 QUESTION: In this case.

10 MR. COLEMAN: -- in this case. I think that --

11 QUESTION: I mean, in other words, nobody could
12 quarrel with the scope of the commerce power. If Congress
13 passed a law regulating newspapers, that -- some of them go
14 to two or three or more states, but it might run directly
15 afoul of the First Amendment.

16 MR. COLEMAN: Well, that's right, and I'm not going
17 to concede that the commerce power can be stretched this far.
18 But even if it were found that it could --

19 QUESTION: As the Court of Appeals did find.

20 MR. COLEMAN: As the court has said --

21 QUESTION: The district court.

22 MR. COLEMAN: -- it still collides with the idea of
23 federalism, which is the essence of American democracy. The
24 idea that the people speak not just through the Congress but
25 that they speak through the Constitution, which means that

1 there is a role that exists, that's real, that's tangible,
2 that's reserved to the states and cannot be abridged.

3 The flaw in this case is not that it touches land
4 use, because this Court has held that Congress can provide
5 who must be served in restaurants, how much can be
6 grown on property, who it can be sold to. But this decision
7 of the Congress erodes the whole power of self-determination
8 because it prohibits to a community from saying what goes
9 where. No one will contest but that the state is free to
10 say where its capital will be located, where its county seat
11 is to be located, and until this hour, it has not been
12 seriously contested that the question of community planning
13 to determine the layout of the community, its shape, its face,
14 its map, is integral to the authority and the integrity of
15 a system of state responsibilities in a constitutional frame-
16 work.

17 QUESTION: Of course at the time the Constitution
18 was adopted, I suppose there would have been a considerable
19 doubt about the power of a state to regulate or determine that.

20 MR. COLEMAN: That may be true; in the last 80
21 years, I suppose, it's become a traditional function of state
22 government, recognized time and time again by this Court as
23 recently as last term that the state does have considerable
24 authority in community planning. And even in earlier times
25 it was the state, after all, that mapped out the roads and

1 streets and the confines --

2 QUESTION: There were no zoning laws.

3 MR. COLEMAN: There were no zoning laws. I think
4 the first zoning law was a 20th century development. But
5 it's not the question of the period of time, how long it's
6 been in effect, whether it's a traditional function or not,
7 it's how important it is, and how much of it is deepseated
8 in the way states operate today.

9 QUESTION: Well, are you saying that whatever may
10 have been the rights at that time, they were not granted to
11 the federal government?

12 MR. COLEMAN: They were not. And there has been
13 no change since that time.

14 QUESTION: I think that's a different argument.
15 A minute ago you said there was plenty of power in the
16 federal government, but there's an independent curtailment
17 of the exercise of that power.

18 MR. COLEMAN: Right.

19 QUESTION: If there weren't this independent doctrine
20 that you could identify for us, there would be ample federal
21 power, you don't concede, under the district court's reasoning --

22 MR. COLEMAN: Well, I don't concede that --

23 QUESTION: Arguendo, you say?

24 QUESTION: Arguendo.

25 MR. COLEMAN: Arguendo, and I think that --

1 I understood the Chief Justice to talk about whether or not
2 this power had been given rise to by the states, or exercised
3 by the states themselves. And It probably wasn't in as
4 thoroughgoing a manner as it is now, but I think there was al-
5 ways the idea of community planning. After all, Justice Chase
6 told us in these two 1869 cases that a state is really de-
7 fined as territory, people, and government, and that the over-
8 riding idea is the idea of a community.

9 And what we're arguing here is not some doctrinaire
10 view of localism but the idea of self-determination, that
11 this is really a promoter of democracy.

12 QUESTION: Well, wasn't the theory at any rate of
13 people who framed the Constitution the idea that the powers
14 of government resided in the states to innovate as they would
15 or would not and they delegated certain powers to Congress?

16 MR. COLEMAN: That was; yes.

17 QUESTION: The Federal Government, although perhaps
18 somewhat fictionally in the last 30 or 40 years, has been
19 referred to as a government of limited powers.

20 MR. COLEMAN: Well, that's one of the happy bypro-
21 ducts of the Tenth Amendment and the entire structure that
22 one state, as Justice Brandeis says, is free to experiment
23 and not put the whole nation in peril, that legislation that
24 is novel can be tried in one state. If it works well there
25 it can be adopted other places, but it doesn't run the risk

1 of making a national, a mistake that's hard to rectify and
2 doesn't take into account the differences from locality to
3 locality. I think that this Act of Congress is a quantum
4 leap into the vitals of the Tenth Amendment. Because it does
5 preempt essential attributes of state sovereignty and the
6 scheme is exceedingly intrusive.

7 We're not talking here about extractive techniques,
8 we're not talking about how you transport coal once it has
9 been mined, we're not talking about pollution control. We're
10 talking about the shape of a community. And I think in answer
11 to the question put to counsel before I arose, Chief Justice
12 Marshall has told us that this Court is not bound by Con-
13 gressional findings, if those findings in fact are a pretext
14 for taking on authority that it doesn't have.

15 The character of a community really is founded in
16 land. Now, I don't contest that indirectly Congress can
17 reach local uses, that it can in some ways affect the private
18 use of land. But here it is taking away from a community the
19 control over its own map.

20 The Congress can pass clearly and constitutionally
21 a whole range of regulations to affect all manner of subjects,
22 but not to displace as it does here reserved powers to the
23 state. This is really, if I might say, and I hope it will be,
24 a Usery II, because --

25 QUESTION: Mr. Attorney General, may I just ask, to

1 be sure I understand your contention, supposing Congress ex-
2 pressly found that the failure to restore the slope to the
3 original contour would result in numerous floods of interstate
4 waterways. It has the power to do that. Would you say the
5 doctrine you describe would prevent Congress from enacting
6 the statute based on such a finding?

7 MR. COLEMAN: Well, I'd say, first, that the find-
8 ings of Congress are not conclusive.

9 QUESTION: No, but assume that there was adequate
10 support for such a finding. I'm just trying to get the legal
11 position you're taking.

12 MR. COLEMAN: If there was such a finding, I would
13 believe that the law should be in that case that if the means
14 for effectuating the end of an abating clause is so intrusive
15 of state powers, that the Usery opinion would come into effect
16 and would prohibit the means. In effect, it would be a kind
17 of balance.

18 QUESTION: In other words, this law would still be
19 unconstitutional?

20 MR. COLEMAN: That's right.

21 QUESTION: Because you say that requiring the
22 restoration of the slopes is intrusive of some inherent state
23 power?

24 MR. COLEMAN: It's intrusive, and of course, as
25 the Court knows, the district court found as a matter of law

1 that these slopes did not themselves cause floods. In south-
2 west Virginia, Mr. Chief Justice and Members of the Court,
3 in Buchanan and Dickenson and Russell and Lee and Scott and
4 Tazewell and Wise Counties, so much land is so steep-sloped
5 that if this Act is upheld, those communities in the State of
6 Virginia are going to lose control of their destiny. And
7 I think that this case draws into question our whole system
8 of local governance.

9 Land use planning is an integral part of statehood,
10 just as fire protection, police protection, sanitation, parks
11 and recreation.

12 QUESTION: And the enforcement of local criminal
13 law.

14 MR. COLEMAN: And taxation.

15 QUESTION: And yet, how do you reconcile a case
16 like Perez v. the United States?

17 MR. COLEMAN: Is it necessary for me to reconcile
18 that too?

19 QUESTION: Well, I'd succeed -- as you know, I
20 dissented in that case, but I was alone.

21 MR. COLEMAN: Well, I think you were on the right
22 track in your -- It's clear, Mr. Chief Justice, and the
23 state and its people --

24 QUESTION: No, I'm serious in my question. It seems
25 to me that that case runs exactly against everything you've

1 been arguing to us.

2 MR. COLEMAN: Well, I think it does too;
3 and I've been before the Court on previous occasions to urge
4 that much of our criminal law is being usurped by the writ
5 of the habeas corpus, but you've told me about that and I
6 won't raise it again. But I think it's a serious question.

7 I just believe that it is appropriate to urge be-
8 fore the Court today that the Congress can't zone the whole
9 character of a community. Now, it's clear that while there are
10 other significant issues in this case, the diminution of value
11 to the property as the result of the original approximate
12 contour requirement is a serious question of constitutional
13 dimensions, because investment-backed expectations have been
14 from time out of mind that decisions about land use, certainly
15 in the 20th century, if they're made by anybody except the
16 people themselves, will be made by the state and not by
17 the Federal Government.

18 QUESTION: One other question, Mr. Attorney
19 General. The Virginia steep slope provision, unlike the
20 Indiana case, where there's a farmland, has a variance
21 authorization for the Secretary of the Interior. If in fact
22 the statute were administered in a way that frequently
23 resulted in variances in this part of the country where steep
24 slopes are so common, would it still have the same impact,
25 or are we perhaps getting to this question before we have to,

1 until we know how often the -- ?

2 MR. COLEMAN: Well, I think -- I can say this about
3 it, that it has no benefit to Virginia, first of all, fac-
4 tually, because the high wall must still be filled back in;
5 there still must be backfilling. So a variance is of no
6 benefit to us at all. We still have to comply with the law
7 of gravity which really overrules the law in this case, be-
8 cause we can't fill it back and make it stay. These slopes
9 are so extremely steep that when you put the fill material
10 back in at an angle like this, the sedimentation just -- it
11 won't hold; it won't bind to the rock, and it will drift
12 away, and it makes it impossible, as the district court has
13 found, to do that. But the question of if it were adminis-
14 tered in a manner not to intrude upon the Tenth Amendment and
15 the authority of the states to be masters of their own des-
16 tiny, it would be an open question. I would think it would
17 still be so intrusive to say to Virginia, you could only have
18 coal mined and the land taken care of at all if you do it ac-
19 cording to the federal law.

20 QUESTION: I must have misunderstood. You're saying
21 that there is no authority for -- a variance would not relieve
22 the miner of the obligation to restore to the original con-
23 tour?

24 MR. COLEMAN: That's right. The original approxi-
25 mate contour permits of a variation, on the face of the

1 statute, but another provision requires that the high wall
2 must still be backfilled in. And so, as the court has said
3 on page 36-A of the Appendix, "For all practical purposes the
4 backfilling stipulation destroys the usefulness of the var-
5 iance, since the high wall must still be covered."

6 QUESTION: I don't understand those terms and I
7 can't visualize that.

8 MR. COLEMAN: Contour mining is involved in these
9 counties in the following manner. Someone goes into the side
10 of a mountain where you have these veins of coal that are
11 maybe two to three feet in depth and they outcrop all the way
12 up the mountain. They go in and cut their initial cut, which
13 leaves a bench and a high wall. And according to the Act,
14 the overburden, the material that's dug out --

15 QUESTION: High wall is a vertical wall?

16 MR. COLEMAN: It's like a cliff. They'll just dig
17 straight into it till they come to a 90-degree angle. The
18 overburden is then required, under the Act, to be put back
19 down in a valley and you go all the way around the mountain.
20 The way it works in southwest Virginia, you contour right
21 around the side of the mountain. We don't really have, as
22 the court has found, any of this top of the mountain mining.
23 It's not practical down there.

24 Then, after you get started, under the Act, you
25 take the overburden which is at the bottom of the valley and

1 put it back up on your bench, and then you backfill all the
2 way around, and the high wall under the Act has to be covered
3 up completely, even though the Act says there is a variance
4 under the original approximate contour, if you have to fill
5 the back wall up.

6 QUESTION: Well, the requirement of filling up the
7 high wall completely cancels out the variance?

8 MR. COLEMAN: That's right.

9 QUESTION: As a practical matter?

10 MR. COLEMAN: That's right. Mr. Chief Justice,
11 as I have said before, the people, territory, and government
12 add up to a state, and the primary concept is a community.
13 There are certain functions that have been recognized by this
14 Court to be essential to the separate and independent exis-
15 tence of a state. Nothing permits the direct abridgment of
16 certain powers. The Act in question displaces the state's
17 freedom to structure its integral operations of traditional
18 government functions, and this law clearly does not comport
19 with a federal system which is the essence of our
20 system of democracy.

21 Chief Justice Chase's words are perhaps best on
22 this point when he said that our republic is founded in a
23 Constitution which in all of its provisions looks to an inde-
24 structible union composed of indestructible states. The ques-
25 tions raised in this case are serious and of constitutional

1 moment because if those communities in the State of Virginia
2 cannot determine what the face and shape and map of those
3 communities are going to be, then we have no limits to the
4 commerce power anywhere in the Constitution, and to cabin and
5 to curb it someday in the future will be even more difficult.
6 This is the best case that the Court now has before it to
7 make plain what has been thought for a long time, that there are
8 limits to the commerce power, that those limits are contained
9 in the Constitution itself, and that when the commerce power
10 is exercised in a way to undo the right of a state or locality
11 to be master of its destiny, they are not constitutional.

12 The question of taking has been amply brought out
13 in the brief. The Court has found, and in this case the
14 Court I know will give due deference to the findings of the
15 court in this case which finds that the land is of no benefit
16 to the landowners except that it can be surface-mined. It is
17 so steep and of so little value that this Act in effect con-
18 stitutes a violation of the Fifth Amendment.

19 QUESTION: Well, Mr. Attorney General, I take it,
20 I think I did read something in the brief or in the papers
21 somewhere that if the land could be flattened instead of
22 recontoured and restored, it might well be of considerable
23 value.

24 MR. COLEMAN: That's correct.

25 QUESTION: Now, I suppose that even if you didn't

1 mine it and flattened it, it would be of considerable value?

2 MR. COLEMAN: That's right. And there's an anomaly
3 here, because if I own a mountain and decide to flatten it,
4 and built a school in the exact countours that the man who
5 owns the mountain next to me does, but first takes the coal
6 out, I can do it, I can put my school or shopping center
7 there, but he can't.

8 QUESTION: Well, I take it the Federal Government,
9 this law wouldn't forbid the next day after you've restored
10 all these contours and all these high -- and covered all the
11 high walls, if for some other reason you decided to flatten
12 the land?

13 MR. COLEMAN: Not tomorrow, because the regulations
14 that have been promulgated say that the bond has to remain in
15 effect for five years.

16 QUESTION: Five years.

17 MR. COLEMAN: So you sit there and wait for five
18 years and then you can come back and remove the overburden
19 all over --

20 QUESTION: What happens if you didn't mine it in
21 the first place? You could just --

22 MR. COLEMAN: Exactly.

23 QUESTION: -- take the whole mountain away and
24 since -- and have it --

25 MR. COLEMAN: Dump it down the hill.

1 QUESTION: And develop your land that way? Rather
2 than taking the coal out first?

3 MR. COLEMAN: That's correct, Your Honor. But if
4 you take the coal out first you're prohibited for a period of
5 five years from putting that land to its only economical
6 use, which is a flat land on which a school or a hospital or
7 a shopping center or an industrial development can be
8 constructed.

9 QUESTION: Well, what -- the only taking there can
10 possibly be, then, I suppose, is in the sense that it forbids
11 you from taking the coal? Because you could now go ahead and
12 flatten the land and build a school or a factory on it
13 without mining it.

14 MR. COLEMAN: It would be very expensive to do that
15 if you weren't going to get paid for getting the coal out
16 first.

17 QUESTION: Oh, I know, but if you believe your alle-
18 gation that if you flatten the land it's of great value?

19 MR. COLEMAN: That's right.

20 QUESTION: Which you do say so.

21 MR. COLEMAN: That's right.

22 QUESTION: I suppose you wouldn't need to mine it
23 to have it be of value if you flattened it?

24 MR. COLEMAN: But I think that the Court recog-
25 nizes still that one of the important factors in taking is

1 the diminution of value. Obviously the diminution of value
2 is pretty large if you've got valuable coal in your mountain
3 and you can't take it out because you can't afford to put it
4 back --

5 QUESTION: Well, I take it that you would say that
6 either under the Tenth Amendment or under the Fifth or both,
7 the Federal Government could not forbid --

8 MR. COLEMAN: That's right.

9 QUESTION: The strip mining of this land, just flat.
10 Just an outright ban on strip mining?

11 MR. COLEMAN: I would guess that it could. No --
12 I agree with you. Mr. Chief Justice, thank you very much.

13 MR. CHIEF JUSTICE BURGER: You have four minutes
14 remaining. Do you wish to exercise that as rebuttal in this
15 case?

16 ORAL ARGUMENT OF PETER BUSCEMI, ESQ.,
17 ON BEHALF OF THE APPELLANT IN NO. 79-1538 & ON BEHALF
18 OF THE APPELLEES IN NO. 79-1596 -- REBUTTAL

19 MR. BUSCEMI: Mr. Chief Justice, I'd like to say
20 just a couple of things in connection with this Tenth Amend-
21 ment Commerce Clause argument.

22 First of all, this is not a zoning statute in the
23 way that expression is ordinarily used. This is not an
24 attempt by the Federal Government to change the communities'
25 maps in the State of Virginia.

1 QUESTION: What about the prime farmland regulation?

2 MR. BUSCEMI: Well, that is in the next case,
3 Mr. Justice Rehnquist, but I will say that, again, there is
4 nothing in the prime farmland regulations that attempts to
5 tell a local community how to use its land or what areas are
6 to be used for residential purposes or commercial purpose or
7 anything. All of this goes only to surface mining. And more-
8 over it's not a prohibition on surface mining. It's just a
9 statutory provision that says that if you're going to surface
10 mine, you've got to do it in this way, and you've got to
11 restore the land so you don't cause damage.

12 QUESTION: Yes, but it does say that if a state
13 wants to permit, or private owners want to strip mine and then
14 use it for something besides farmland, the Federal Government
15 says you may not do that, at least without first making it
16 back into farmland.

17 MR. BUSCEMI: That's correct, Mr. Justice White.
18 And the purpose of that is to preserve the productive capa-
19 city of the farmland.

20 QUESTION: And is it, as the Attorney General sug-
21 gested, is there a five year hiatus?

22 MR. BUSCEMI: Well, the bond, the full amount of the
23 bond, and if I understand Section 519 of the Act, is not re-
24 leased until after five years, but 60 percent of the bond is
25 released in a much shorter time, as soon as the approximate

1 original contour is restored. I think Section 519 will make
2 that quite clear. And moreover, I do want to respond to this
3 business about covering the high wall, because Mr. Coleman --

4 QUESTION: What's the consequence?

5 MR. BUSCEMI: Oh, well, the consequence is that
6 there's only a small amount of the bond is retained for that
7 full five-year period, and if the mine operator or the owner
8 of the land believes that the financial --

9 QUESTION: What may the owner do within the five
10 years?

11 MR. BUSCEMI: Oh, within the five years the owner
12 may put the land back into a flattened state if necessary,
13 if he wishes to do so, if the financial rewards are as
14 great as they are supposed to be on the basis of --

15 QUESTION: Well, he puts it into a flattened state.
16 May he build on it within five years?

17 MR. BUSCEMI: Yes. Yes.

18 QUESTION: By sacrificing his bond.

19 MR. BUSCEMI: Perhaps, Mr. Justice White, by sacri-
20 ficing part of the bond. But this is how Mr. Justice Stewart's
21 question connects to yours, Mr. Justice Brennan. There is
22 nothing in the variance procedure that prohibits the cover-
23 ing of the high wall and still leaving of a substantial amount
24 of flat benchland. All Congress was trying to do with re-
25 spect to covering the high wall is to prevent the open

1 vertical face from still showing. Once there is land that is
2 placed back against that and sloped down and restabilized,
3 flat benchland can still be left and still comply with that.
4 Now, there's no --

5 QUESTION: What's benchland?

6 MR. BUSCEMI: Oh, benchland is the horizontal por-
7 tion.

8 QUESTION: So why not just call it flat land?

9 MR. BUSCEMI: The word bench is designed to indi-
10 cate that it's up above, it's on the mountainside.

11 QUESTION: It's a plateau?

12 MR. BUSCEMI: Well, it's the horizontal portion of
13 the cut into the side of the mountain. When the mountain
14 started out it was just one straight line and then they cut
15 out at the corner, as they go around the mountain. And the
16 flat part is called a bench.

17 QUESTION: I get you.

18 QUESTION: Yes, but the Attorney General says that
19 that's just a piece of rock and you can't put anything on it,
20 it won't stand that.

21 MR. BUSCEMI: Well, Mr. Justice Marshall, I think
22 that if you look at the pictures, for example, here in the
23 committee reports, you will see that it has been done.
24 Pennsylvania and Ohio have both had statutes requiring this
25 similar kind of restoration and it is practical, and Congress

1 found that it was so.

2 QUESTION: This argument, would you just respond to
3 this for me, because I'm still a little puzzled. His argu-
4 ment, as I understand it, is that the slopes are so steep
5 that if you pile the stuff back up against the wall there's
6 no room for a bench.

7 MR. BUSCEMI: Mr. Justice Stevens, I think that
8 that may well be his argument, but I think that Congress has
9 found that that is not so, and I think that many of these
10 benches are wide enough --

11 QUESTION: But didn't the district court findings
12 support what he says?

13 MR. BUSCEMI: The district court also said that
14 compliance with the approximate original contour requirement
15 was physically impossible. But we know from the pictures
16 in the legislative record that it's not, because it's been
17 done. It seems to me --

18 QUESTION: It's been done in Ohio and Pennsylvania,
19 and presumably the mountains there are just as steep as they
20 are -- ?

21 MR. BUSCEMI: Well, the State of West Virginia has
22 had no problem in complying with this statute. They have in
23 fact submitted an acceptable program to the Secretary which
24 has just been approved, and I think that the topographical
25 conditions there are very similar to what they are in

1 the western district of --

2 QUESTION: Well, where -- are the rocks in Pennsyl-
3 vania different from the rocks in Virginia?

4 MR. BUSCEMI: I don't think they are.

5 QUESTION: I don't think we're going to be able to
6 solve this problem.

7 QUESTION: One last question. Do you rely on the
8 variance as necessary to support this application of the
9 statute in Virginia?

10 MR. BUSCEMI: I would say not, Mr. Justice Stevens,
11 but it is in the statute, and so we're telling you about it.
12 But I don't think it's absolutely necessary. Thank you.

13 MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.
14 This case is submitted.

15 (Whereupon, at 2:00 o'clock p.m. the case in the
16 above-entitled matter was submitted.)

17 COTTON CONTENT

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CERTIFICATE

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North American Reporting hereby certifies that the attached pages represent an accurate transcript of electronic sound recording of the oral argument before the Supreme Court of the United States in the matter of:

No. 79-1538
DONALD PAUL HODEL, ACTING SECRETARY OF THE INTERIOR
V.
VIRGINIA SURFACE MINING AND RECLAMATION
ASSOCIATION, INC., ET AL.

&
No. 79-1596
VIRGINIA SURFACE MINING AND RECLAMATION ASSN., INC., ET AL.
V.
DONALD PAUL HODEL, ACTING SECRETARY OF THE INTERIOR, ET AL.

and that these pages constitute the original transcript of the proceedings for the records of the Court.

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