In the

# Supreme Court of the United States

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| DONALD PAUL HODEL, ACTING SECRETARY OF THE INTERIOR, ET AL., | ) | |
| APPELLANTS, | ) | |
| V. | ) | No. 80-231 |
| INDIANA ET AL. | ) | |

Washington, D.C.
February 23, 1981

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ORIGINAL

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| v. | : | No. 80-231 |
| INDIANA ET AL. | : | |

Washington, D. C.

Monday, February 23, 1981

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 2:01 o'clock p.m.

APPEARANCES:

PETER BUSCEMI, ESQ., Assistant to the Solicitor General, U.S. Department of Justice, Washington, D.C. 20530; on behalf of the Appellants.

G. DANIEL KELLY, JR., ESQ., 111 Monument Circle, Indianapolis, Indiana 46204; on behalf of the Appellees.

C O N T E N T S



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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will proceed to hear arguments in the case of the Secretary v. Indiana.

Mr. Buscemi, I think you may proceed whenever you are ready.

ORAL ARGUMENT OF PETER BUSCEMI, ESQ.,

ON BEHALF OF THE APPELLANTS

MR. BUSCEMI: Mr. Chief Justice and may it please the Court:

This case is much the same as the Virginia case, and with respect to at least the Tenth Amendment and the Commerce Clause, I'm pretty much content to rely on what has already been said and what's said in the brief.

This case is here on direct appeal from the District Court for the Southern District of Indiana. The statutory provisions challenged here are different and far more numerous than those invalidated by the Virginia District Court, and I'd like to begin by describing briefly the portions of the Act that are at issue here.

The first group of statutory provisions are the so-called prime farmland provisions. Those are six subsections of the Act that impose special requirements where a mine operator proposes to undertake surface mining operations on lands that satisfy the Secretary of Agriculture's definition of prime farmland -- and this is something that tends to be

ignored in the District Court's consideration of the case and in appellees' brief -- that historically have been used for intensive agricultural purposes. So this is just not some land that someone classifies as prime farmland on the basis of a soil sample. This is land that has been used intensively for agricultural purposes.

QUESTION: And it's your position that Congress under the Commerce Clause can freeze that classification? If it was once used as prime farmland, it's going to be prime farmland?

MR. BUSCEMI: That's not what the statute does, Mr. Justice Rehnquist. The statute only says that if surface mining is undertaken on prime farmland, then before the permit is issued the operator has to to demonstrate that his technological capability to restore that land to equivalent or higher levels of yield as non-mined prime farmland in the surrounding area under equivalent levels of management. So the statute simply says that if you've got prime farmland and it's been used as prime farmland, and you propose to surface mine it, when you finish you've got to put it back into the same productive condition that it was in before.

QUESTION: And to keep it that way for five years?

MR. BUSCEMI: There is the provision that there has to be revegetation and that revegetation has to exist for a period of five years. There is some question about how the

Act is interpreted and applied in this respect. The Secretary issued a regulation requiring the growing of row crops. That regulation was invalidated by the District Court in the District of Columbia. The Secretary has appealed that to the D.C. Circuit, but of course there is no way of knowing right now what the D.C. Circuit will do or whether the new Administration will continue all of these policies, including this one. So that, at least, as for right now, the row crop regulation is not in effect and all we're talking about is revegetation.

Now, the operator will also have to show that he can meet the soil reconstruction standards for prime farmland. They require that the different topsoil layers be removed separately and restored separately.

There are also a number of other generally applicable provisions, that is, not applicable only to prime farmland, that were challenged in the Indiana case and not in the Virginia case. They include the general requirement that topsoil be removed separately and the general requirement for the submission of reclamation plans before the beginning of surface mining. These plans are supposed to tell the regulatory authority, whether it's a state authority or the federal authority, what the premining use of the land is, what the postmining proposed use is, and describe the methods by which the postmining use will be achieved.

And finally there's a challenge in the Indiana case to Sections 522(a), -(c), and -(d) of the Act, also not challenged in the Virginia case, that involve the establishment of procedures for designating land as unsuitable for surface mining. Section 522(e), which is the statute that prohibits mining within specified areas of roads, schools, parks, and churches, and so on, was also challenged in the Indiana case as was the civil penalty provision.

Now, perhaps I can talk first, since I didn't reach it in the other case, about the Just Compensation Clause point. In this case, as in the Virginia case, our first position is that the Just Compensation argument is premature here because we're not focussing on any particular piece of land. That makes the case different from the vast majority if not all of the cases in which this Court has considered taking challenges to state or federal regulatory actions.

Neither the plaintiffs in the Indiana case nor those in the Virginia case have focussed on any particular piece of property --

QUESTION: You mean that issue could be raised at a later point by another litigant.

MR. BUSCEMI: Absolutely, Mr. Chief Justice. As this Court said in Agins v. Tiburon, just last term, the only issue here is whether the mere enactment of the statute constitutes a taking, because we don't know how the statute

is going to apply to a particular piece of property. We can evaluate the other beneficial uses that might be available to the property owner.

QUESTION: But that is interpreting a California statute where the California courts had held there was no such thing as inverse condemnation. And as I understand, the Tucker Act provides that there is inverse condemnation.

MR. BUSCEMI: Well, the Tucker Act certainly does provide a monetary remedy for alleged violations of the Constitution. Now whether the Tucker Act would give a remedy to an individual landowner on the basis of a regulatory piece of legislation like this is something that has not really been addressed by the Court of Claims. There is one indication in the Eastport Shipping case that was cited in the brief that perhaps the Court of Claims would think that the Tucker Act jurisdiction does not go that far, but I completely agree, Mr. Justice Rehnquist, that the availability of the Tucker Act is a factor that should be considered by the Court before addressing this Just Compensation Clause question because if the alleged taking of a particular piece of property can be redressed through the providing of compensation, then there's no constitutional violation, because the Just Compensation Clause requires only compensation, it doesn't prohibit --

QUESTION: Well, let me see if I understand that,

Mr. Buscemi. What you're suggesting is that if the Tucker Act in just compensation cases reaches only eminent domain cases, that is where the Government initiates the condemnation, if that's all, then we do have a constitutional question. Whereas if the Tucker Act reaches also so-called inverse condemnation, whether regulation or whatever it may be, in and of itself, constitutes a taking and provides compensation, then we don't reach the constitutional question?

MR. BUSCEMI: That's right. And I think that it's important -- I mean, I think that that just --

QUESTION: Is that true also in the other case?

MR. BUSCEMI: Yes, it is. I mean, I think that just supports the general notion that these taking questions ought to be addressed in the context of the application of the statute to particular pieces of property rather than in the context of the statute as a whole. Because we just don't know how the statute is going to be applied in a particular circumstance.

Now, I do want to say in connection with the taking argument in the Indiana case just a little bit about this high levels of management business that is emphasized by the district court, and also in the briefs of appellees. There's nothing in the statute that talks about high levels of management so far as restoration of prime farmland to productivity levels obtained at high levels of management. That's something

that the district courts have injected into the case by saying that we're going to define high levels of management as those producing yields that are impossible to reach after surface mining, and then concluding that the statute imposes an impossible burden.

QUESTION: Well, the statute requires a comparison with the same level of management as had heretofore been given.

MR. BUSCEMI: That's right. Exactly.

QUESTION: And if, in the past, that level had been a high level of management, then there's sense in what the district court said, isn't there?

MR. BUSCEMI: That's certainly true, Mr. Justice Stewart. But my point is only that the standard is not high levels of management, as if that is something separate and apart --

QUESTION: The equivalent level of management?

MR. BUSCEMI: That's exactly right.

QUESTION: At the same level of management.

MR. BUSCEMI: All it's saying is that --

QUESTION: But if the level anterior to the strip mining has been a high level of management, then one must compare what a high level of management would produce after the strip mining. Correct?

MR. BUSCEMI: That's right. There's the question

of reestablishing the yields that would be obtained before the surface mining began.

QUESTION: With the same level of management?

MR. BUSCEMI: That's right. And I think, by the way, as we mention in our brief on page 34, Note 20, the testimony of one of the plaintiffs in this case was that land can be restored to its levels of productivity after surface mining. This is the same kind of problem that exists in the Virginia case on the taking question. The district court in the Virginia case said that restoration approximating the original contour is physically and economically impossible. Well, that just ignored the finding of Congress to the contrary. And it ignored the evidence in the record to the contrary, it ignored the Pennsylvania and the Ohio experience.

Now, finally, in connection with the taking argument, I just want to call the Court's attention to the analogy here to the nuisance cases or the noxious use cases. This is a -- surface mining creates much of the same kind of effect. This is not an economic enterprise that is totally without its disadvantages to the surrounding community. Congress has found that there are many disadvantages. And in that respect it's very much like the brickyard in Hadacheck or the cedar grove in Miller v. Schoene, or the brewery in Mugler. All of these things have their value; there's no

question about that. But the Court has found that because of the impact on the surrounding communities there is room for regulation without a taking in the constitutional sense. And I think that those cases are instructive in this context.

QUESTION: That goes to the taking argument and not to the Commerce Clause argument?

MR. BUSCEMI: Yes, that's right. That's what I was -- I didn't reach that in the Virginia case and I did want to address it briefly.

QUESTION: I haven't read Mr. Conlon's letter in full, but when he states that the coal industry is quite capable, do you mean, is he saying it's physically possible or economically feasible or both?

MR. BUSCEMI: Mr. Chief Justice, I thought he was saying both, and I could be corrected on that, but we did quote the sentence in his -- on page 110 of the Appendix.

QUESTION: Yes, I have that before me. Some parts of it have an ambiguity in it.

MR. BUSCEMI: Well, I think that the -- you know, that letter is instructive for another reason as well, because it focuses on the debate that was in Congress with respect to the prime farmlands. When Congress considered this, there was a recommendation from the Administration that surface mining be banned, or at least that a moratorium be declared on surface mining on prime farmlands. And Congress decided

not to do that. And the reason it decided not to do it was because its investigation indicated that the land could be properly restored after surface mining was completed. And that's why Congress chose to act in the way it did, rather than the way that the Administration had requested. And I think Mr. Conlon's letter is addressed to the moratorium possibility.

QUESTION: As to the specific illustration he's giving, it apparently -- he regards it as economically feasible. But I wondered -- you seem to be relying on that as a general proposition.

MR. BUSCEMI: Well, but let me put it this way, Mr. Chief Justice. Certainly the Congress thought that it was feasible. And I don't believe that we have any indication here that with respect to any particular piece of property it is not feasible. I mean, there hasn't been -- to some extent this statute may be a technology-forcing statute. We don't yet know. It may be that thus far surface mined prime farmland has not been restored. But Congress at least thought that it could be restored to the equivalent levels of yield and thus far that has not been shown to be incorrect with respect to any particular piece of land.

QUESTION: Mr. Buscemi, could you help me on your argument that the taking issue is raised prematurely and we'd be better off to wait till a specific case arose involving a

specific parcel. I have some difficulty in thinking of a hypothetical case in which the issue might arise, because you surely couldn't sue in the Court of Claims under the Tucker Act till the property had been taken. I don't suppose any taking would occur if somebody just didn't use his farm. How does the -- at what point would a taking in a specific future case -- you say we should wait for a future case. Tell me how you think it could arise and what would be taken?

MR. BUSCEMI: Well, Mr. Justice Stevens, I think that perhaps the word premature implies a timing element that's not the sole content of the argument. What we're saying really is that if a particular mine operator has investigated the prospects for surface mining on his property and has also investigated whatever variance procedures may be available -- now if they're not, if they're not available --

QUESTION: Well, they're not here.

MR. BUSCEMI: -- on the prime farms -- I'm talking of the Virginia case -- and if he's further investigated the possibility of restoring the land and he's concluded on the basis of all of that information that it is either impossible or impractical, and moreover he's concluded that there are no other beneficial uses of this land, then it may be appropriate for him to come and say that, well, my property has been taken. But --

QUESTION: It seems to me all prospective operators

would be in the same boat. They all have to restore the land to agricultural condition.

MR. BUSCEMI: Well, but I think the application of the statute may well vary from place to place. It may be --

QUESTION: Well, the only variance I think of is where the postmining use might be, say, an airport, where you wouldn't want to farm on it. But why couldn't he just build the airport ahead of time? Then we get back to the -- I don't see the hypothetical case of the taking, frankly.

MR. BUSCEMI: Well, I think, Mr. Justice Stevens, that one of the critical inquiries that the Court engages in when it looks to see whether there has been a taking is to look at the other uses for the property. And that's why we're talking merely about the focus on a particular piece of property rather than on the mere enactment --

QUESTION: But is it not true that by hypothesis every parcel we're talking about would be one that is being used for farming immediately before the mining occurred?

MR. BUSCEMI: Well, at least that historically has had this intensive agricultural cultivation. Whether in the immediate year or two before mining, I'm not sure that that's necessarily the case.

QUESTION: I see.

MR. BUSCEMI: Regardless of of what it's being used for at the time, there may be other beneficial uses that are

available for that land. I mean, the Court said in Andrus v. Allard that you have to look at the entire bundle of property rights, not just to a single strand. But if it turns out that this land is usable not only for farming but also for an airport and also for any number of other things, that may well color the way the Court will look at a taking question focused solely on the operation of the Surface Mining Act.

QUESTION: Following up on Justice Stevens' question, how do you treat a case such as Mahon v. Pennsylvania Coal Company, in which Justice Holmes' opinion says the regulation is unconstitutional because you've crossed the boundary between regulation and taking? And it was an action to have the regulation declared unconstitutional. But there was no particular property involved, it was the statewide regulation of the State of Pennsylvania.

MR. BUSCEMI: Well, but, Mr. Justice Rehnquist, I think that that's a very good example of the point that I'm trying to make. There was a particular piece of property involved in that case. That was a case that was brought by a particular property owner to prevent the homeowner from taking advantage of the Pennsylvania state law. I don't know what the relief was that was granted in that case, whether it was an across-the-board injunction or whether it was an injunction strictly speaking that ran only to that one piece of land,

but in any event the critical point is that the challenge was made in the context of a particular factual situation. And I think that Mr. Justice Holmes' opinion for the Court focused on the private relationship between the coal company and the landowner. The Court was simply unwilling to allow the landowner to rely on this intervening Pennsylvania state law to get out from under the burden of his bargain that he had struck on an arm's length basis. There was no suggestion in Mahon that the Court disagreed with the general principle stated by Mr. Justice Brandeis in his dissent, which I believe was joined by several other Members of the Court.

And finally, with respect to Mahon, I'm not at all sure that the -- at least, as to the Section 522(e) of the Act, which is also part of this taking problem, the valid existing rights provision in 522(e) might well have obviated the Mahon problem if it were to arise under the Act in connection with one of the prohibitions in 522(e). Now, that's not true, of course, with respect to the prime farmlands, because that's not subject to valid existing rights. But I just do want to make that point.

Finally, I do want to address just briefly the Due Process Clause challenges here. There are two of them. The first one deals with the summary cessation order procedure under 521(a)(2). Now, again, we begin with the same kind of argument. No one in Indiana and perhaps one of the plaintiffs

in the Virginia case -- but that was not in the record at trial -- but as far as we know from the record, certainly, none of these people have ever been subjected to summary cessation orders, or to the imposition of civil penalties. And we think that under those circumstances the due process challenge is premature and that I mean in a real timing sense, rather that as far as focusing on a particular case. We just haven't had these things apply to these plaintiffs yet.

In any event, we don't think that either the civil penalty provisions in Section 518 or the summary cessation orders deprive mine operators of due process. The only time that a cessation order will be issued in a summary fashion before there's notice given and an opportunity for abatement is when the inspector determines that there is a violation of the Act or a violation of the permit condition that creates an imminent danger to the health or safety of the public, or is causing or can reasonably be expected to cause significant imminent environmental harm to the land air or water resources.

Now, that standard, we suggest, is very similar to standards that this Court has already upheld for summary administrative action. And also other federal courts, such as the Fourth Circuit, in Sink v. Morton, arose under the Mine Safety and Health Act, but involves very similar standing. Now, of course, the district court makes much of the fact that some of these summary cessation orders may have been

issued to mine operators other than the plaintiffs erroneously and in the first few months of the statute's effectiveness I gather that there were a small number of erroneous summary cessation orders. In fact, the one that was issued to Paramount Mining Corporation, which is the plaintiff in the Virginia case, was issued erroneously and it was reversed approximately two months later when there was an administrative hearing held. And in the interim there is no indication whatever that there was any harm suffered by the company. It was simply a question of whether they could dump spoil in one area rather than another.

But, in any event, that's not the relevant inquiry, and I just want to make that point clear. The question is not whether inspectors may have made errors in particular cases, but whether the whole process is deficient. We don't think that it is, because Congress could legitimately decide that when an on-site inspection reveals such an imminent danger to the public or to the environment, something has to be done about it beforehand. And then Congress has tried to protect the rights of the mine operator by allowing him to seek temporary relief from the Secretary and requiring the Secretary to react in five days, in that circumstance.

Now, with respect to the civil penalty provisions, there are just a few points to be made. First of all, there are no penalties that are finally imposed until after there

has been full administrative review of it.

QUESTION: Indirect, though. You have to pay the penalty before you get the review.

MR. BUSCEMI: You have to pay the penalty only if you wish to seek review of the amount of penalty.

QUESTION: This is the procedural due process issue?

MR. BUSCEMI: That is correct.

QUESTION: Is there any precedent for that particular procedure?

MR. BUSCEMI: Well, I don't know if there's precedent for the particular procedure of paying a civil penalty under, you know, one of these --

QUESTION: Before you get here.

MR. BUSCEMI: -- but there's certainly a deprivation of property before a hearing.

QUESTION: Seizing property?

MR. BUSCEMI: Yes. And I think this is --

QUESTION: Seizing crops, for example.

MR. BUSCEMI: This is -- exactly. I think this is analogous to to that.

QUESTION: But there's always some reason for an immediate seizure of the property. There's no particular reason for making the defendant pay his fine in advance, is there? Just the security, that you're sure you get the money, but that's not exactly --

MR. BUSCEMI: Exactly.

QUESTION: A very powerful argument, is it? I mean, you're generally dealing with solvent people here.

MR. BUSCEMI: Well, Mr. Justice Stevens, I think that when the Congress had found that under the Mine Safety and Health Act there was a substantial difficulty in collecting civil penalties from mine operators, and I think that that's what pushed Congress into enacting the statute. I think that the Secretary in interpreting and applying the statute has found that generally speaking mine operators who are willing to seek administrative review at all are mine operators who are willing to pay the penalties, if administrative review ultimately results in their being found liable.

QUESTION: Well, they have to be willing in order to seek administrative review. That is the point.

MR. BUSCEMI: Well, I don't think -- see, that's the point, Mr. Justice Stewart, that's not true. They can seek administrative review and obtain a full review of the fact of the violation as the Secretary has been applying the Act without paying any money in. That's the point that I want to make.

QUESTION: No, but they lose -- they can't quarrel about the amount.

MR. BUSCEMI: Well, that's true, but my point is that the reason the Secretary has permitted this and has not

interpreted -- a large part of the reason the Secretary has not insisted on payment under 518, even to obtain review of the fact of the violation, is that the biggest problem that the Secretaries of Interior and Labor have had under these statutes in mine operation was more the process altogether and not mine operators who come in seeking administrative review and then try to refuse to pay. I mean, that is -- by experience that's not been the problem.

QUESTION: You didn't fine anybody, though.

QUESTION: Is there an analogy to a supersedeas bond in a regular trial court civil damages action where you can appeal, but you have to post a bond in order to prevent a levy on your property if you have lost as a defendant?

MR. BUSCEMI: Well, I think that is analogous, Mr. Justice Rehnquist. Here we have an interest-bearing account. It's not as though the use of the money is being --

QUESTION: So it would be analogous if you had to post a bond before you could file your answer. In other words, you've got to --

MR. BUSCEMI: It's not as if they're losing the use of the money during that time.

QUESTION: But you haven't had the -- as Justice Stevens suggests, you haven't had the full hearing and then tried to appeal.

MR. BUSCEMI: Well, that's true; that's true. I reserve the remainder of my time for rebuttal.

MR. CHIEF JUSTICE BURGER: Mr. Kelly.

ORAL ARGUMENT OF G. DANIEL KELLY, JR., ESQ.,

ON BEHALF OF THE APPELLEES

QUESTION: Mr. Kelly, at some convenient point in your argument will you address the question of what remedies if any individual landowners would have, assuming the Government wins this case? And assuming also an individual landowner can prove that all beneficial use of his property has been denied him by the enforcement of this statute? You address it at your convenience. I just don't want it overlooked.

MR. KELLY: Mr. Justice Powell, I will do that at the end.

Chief Justice Burger, and may it please the Court:

I believe the Government has articulated the main difference between the Indiana case and the Virginia case, and that is that we encompass some 21 different or additional subsections of the statute, and before getting into the Tenth Amendment issue or the federalism issue I would like to go into some further explanation of the various sections of the statute that are involved under the Tenth Amendment as well as the Commerce Clause.

We have divided those into four basic groups,

and the first group would be the prime farmland provisions. And I don't think at this point that there is any doubt about the effect of the prime farmland provisions.

The effects of the prime farmland provisions, quite simply, are that at the conclusion of taking the coal out of the ground you've got to put everything back in, in three separate layers, and that land has to be farmed, minimally, for five years. And as the district court in the Star Coal Company case in Ohio found -- or in Iowa found, it may even take 20 years of farming to get that land back to the point of equivalent levels of yield under high levels of management.

That term, high levels of management, as an aside here, is found in the Act. "High levels of management" were used by the Secretary. I don't think there's any doubt about where it comes from. But in any event, prime farmland provisions were intended by Congress to require a farming use and allowed no other uses, no other variances. It was expressed by at least three Senators on the floor of the Senate at the time it was introduced. As a matter of fact, it was expressed in the terms, we don't want any state bureaucrat to have the discretion to allow some other land use. And that's how it was expressed. And that's how it was put in the Act, and that is the way it's going to be enforced either by the Federal Government or by the states under the threat of the

Federal Government.

Now, the Government has said that this is the regulation of private activity. But it seems to me that the thrust goes far beyond private activity. It goes directly into land use. And I think that under the Tenth Amendment issue, at least, the initial question that must be decided is, what is land use planning and activity insofar as the state is concerned and in relationship to National League of Cities, that's been heretofore decided? And to me, I think National League of Cities was the beginning, at least, of defining what is an area of sovereignty in which the Federal Government cannot intrude that's going to be held to the states? And it also started to state what it's not going to be.

And quite candidly with the Court, I don't think I can say that land use planning is wholly a governmental service, if you will, but I can certainly say it is not simply the regulation of private activities relating directly to Commerce.

QUESTION: National League of Cities depended upon the fact that the subjects of the regulation were themselves states, did it not? Is it the contention of Indiana here that Indiana or its subsidiary municipal corporations own prime farmland?

MR. KELLY: Mr. Justice Rehnquist, far be it from me to say precisely what was said in there, but I think there

were two things that were important to the Court in NLC. I think the first thing that was important was that there was a direct command speaking to the state. I think the second thing that was important was what it spoke about, and maybe what it spoke about was more important than that it actually did speak to the state. And I think land use planning, if we are to make a comparison to the second tier, if you will, of National League of Cities, I think it's much more akin to that than anything else. I think land use planning and control involves matters that transcend mere economics and commerce. It goes to the very heart of what a community's going to be like. And I think this Court has said it on many different occasions, land use planning is an instrument to create a quality of life and a character within a community.

Now, if this power -- of the states, if you will; it's used to do that -- it seems to me is equal to the services that were relied upon, at least in part, in National League of Cities to get the Court to where it got.

Now, to carry it one step further, I think within the Tenth Amendment there is room -- and I think it is in the intent, if you will, of the framers -- that the states not only were to be a government to give governmental services. The states -- if a state is going to be a government, it has to have something more than the right to have employees to

run police departments and schools and hospitals. A state, I believe, must have some independent sphere of governance.

I can't say that that is precisely what National League of Cities said, but I think, if our constitutional framework is to make any sense whatsoever, if the states are to govern, if they're to have some degree of independence, there must be then some independent sphere of government, or governance, if you will.

I think the only real question remaining after National League of Cities would be, how is that to be defined, where are we to go with that? And I think that once an area like land use planning comes before the Court and it has the attributes that land use planning does, and that is that it concerns matters that are so peculiar to each given community they can only be determined by looking at a wide diversity of climate, geography, geology, preferences, and character. And when you are required to come to different policies based on these peculiar matters that are so central locally, I think that may well qualify as an independent sphere of governance.

I think as Chief Justice Burger's question at the outset, as to what does the Tenth Amendment mean, I think it has to mean that there is some sphere of governance left to the states. And I think part of that has to be land use planning and control. And I think once that issue and question is resolved, I think the next problem is, where do we

go from there? Because we admit, in the State of Indiana, and the coal companies admit, that there is in fact areas, possibly, where land use planning might become tangentially involved. We cannot take the position that it is always separate and apart from the power of the Federal Government.

And we would propose that if this is a central right, if you will, under the first ten Amendments, that the Court simply go into the weighing and balancing process that it has gone into in making these types of determinations in other Amendment cases.

QUESTION: Mr. Kelly, let me push you with a question on it. Supposing we had the problem of nuclear waste disposal, could the Federal Government regulate the kinds of land in which the nuclear waste may be deposited, and so forth? You can't dump it in a lake, or something like that?

MR. KELLY: Well, I would certainly think that to the extent that nuclear waste had a potential for an interstate spillover effect, from one state to another, that this might be an area where the federal interest might indeed be permanent.

QUESTION: Well, supposing Congress found in the coal area that there's an interstate spillover? The facts aren't very persuasive, I realize; you've done a very good job on that. But supposing they had found that they wanted to have a certain amount of minimum land preserved for

agricultural uses? And that would have an interstate spill-over because the agricultural market is essentially an interstate market.

MR. KELLY: Well, I think even if there is a compelling national interest here, at least under the Fourteenth Amendment cases where you have a suspect class, there is still the next level of inquiry, and that is, is there a less intrusive means of doing this? In other words, just finding a paramount national interest in the sense of the Fourteenth Amendment cases, as I would understand it, is not sufficient. The Court would then have to focus on the nature and the means that the Federal Government did use.

QUESTION: In other words, your land use planning exception, or land use control, is something that the Federal Government can invade only when there is no less intrusive means of doing it? It's that kind of -- rather than an absolute line?

MR. KELLY: I think so, Mr. Justice; yes. Definitely. I don't think there are any absolute lines, and I think that's why I'm suggesting that the Court may want to go into a Fourteenth Amendment type of analysis. I think it does this in other Commerce Clause situations where the Federal Government has not stepped in with regulations and a state has stepped in and is regulated, in order to determine whether or not that's an undue burden on interstate commerce.

The Court looks to the policy that the state is pursuing when it does come into that area, and it balances whether or not the benefits of the state policy are out of proportion or in proportion to the burdens on interstate commerce that are created by it. So I don't think the test that we're suggesting is anything that's unfamiliar to this Court in the past, and in fact, I think it's very consistent with it.

And insofar as weighing these facts, I would like to go for a minute to the specific facts of the effects on the State of Indiana with regard to the prime farmland provisions. I think -- and I don't think there's any doubt about where they came from -- I think the prime farmland provisions came from land use policies, a land use conflict, if you will, in the State of Illinois. I think you can trace right through the Senate history.

And over there the State of Illinois has an abundance of underground mineable reserves. Eighty percent of their coal reserves are mineable by the underground method. Indiana to date -- less than one percent of our actual coal is mined by the underground method. We cannot mine coal in Indiana by the underground method. We do not have the conflict between surface mine and prime farmland that's present in the State of Illinois. And the State of Illinois dealt with this problem. Although Senator Stevenson said he didn't like the state bureaucrat having the discretion to do what

they were going to do in Illinois -- that is to say, whether to use this prime farmland or not, Indiana doesn't have that problem. But we have six counties in southern Indiana whose whole way of life is wrapped up with coal mining. It has come to life in the last ten years because of coal mining.

We have one county down there, 50 percent of its tax revenues are directly related to surface coal mining. That is related to land use. That is how integral land use is to the character and quality of a community. It stands based upon dictates from far away, people, Senators, who have no idea what's going on in southern Indiana. They would no more recognize a high wall in a four-foot seam of coal than contour mining, and they really wouldn't know what it's all about. But they do in southern Indiana, they deal with the problem.

In fact, prior to the 1977 surface mining, our two-way water quality study showed that surface mining in the State of Indiana was not -- and I repeat, not contributing to the interstate spillover.

QUESTION: Well, in past years there's been a good deal of surface mining in the State of Illinois.

MR. KELLY: There certainly has, Your Honor. There has, but insofar as surface mining in Illinois is concerned, only about 50 percent of their coal is produced by surface mining. Fifty percent is produced by underground mining.

QUESTION: Well, of course, statistically that doesn't mean anything. They may have a lot more coal than Indiana has.

MR. KELLY: I use that for the split, Your Honor, in terms of the fact that 50 percent of their present production is mined by underground coal, the underground method. In Indiana less than one percent is mined by the underground method.

QUESTION: And I say those statistics don't really mean very much unless they're taken in the context of the total production in each state. Go ahead.

MR. KELLY: I think also attention needs to be focused upon Section 522 and the attempt by the Federal Government to force the states to zone land as unsuitable for surface mining. I have a very, very difficult time conceiving of any relationship whatsoever of the zoning of land as being unsuitable for surface mining and its connection to interstate commerce. Try as I might, I find it inconceivable that there is any connection whatsoever.

Insofar as 522(e) and -(4) are concerned, they don't deal with surface mining of coal. They deal with surface mining operations. We, the industry, can't even drive a truck, if you will, within 300 feet of a cemetery. Now what is the relationship to interstate commerce? Chief Justice Burger asked about life. Counsel went to Darby.

But the justification in Darby was not the life. It had to do with the unfair method of competition that the Court found. It found a justifiable effect on interstate commerce to protect tangentially the life.

There is no tangential or even indirect effect on commerce that's protected by anything within Section 522. And insofar as the approximate original contour provision is concerned, with respect to the Commerce Clause, we cannot find, I could not find, the district court could not find anything within the entire history of this Act before the Senate that would relate approximate original contour to any adverse effect on interstate commerce, even if we went to water pollution.

All of the justification, all of the justification mentioned by the Senate, the House, went to water pollution on steep slopes and mountain tops. It didn't have a thing to do with water pollution on flat land. And in Indiana we have areas that are not flat but they aren't steep slope. And because of the approximate original contour, insofar as land use is concerned, we couldn't go out and build an airport on that after we mined it. Approximate original contour would restrict the land use of that, at least until after revegetation is completed. Either under the Commerce Clause or under the Tenth Amendment, the original contour falls, either way.

With respect to the Fifth Amendment -- unless the

Court would have any questions at this point on either the Commerce Clause arguments or the Tenth Amendment, I'll proceed to the Fifth.

Coming down to the Fifth Amendment, I think the first question I'd like to deal with, and that is the Tucker Act. In the case at bar, it is not at all certain that the Federal Government is going to be the government that is using or regulated by the prime farmland provisions, nor is it certain that they're going to be the regulatory agency under 522, so how can it be said that the Tucker Act is going to be an adequate remedy? It may not even be the Federal Government. It may be the State of Indiana.

And insofar as the question of the timeliness of the remedy is concerned, I would suggest to the Court that if the states who I believe and as the Indiana Legislature so found -- which is entitled to some degree of presumption of rationality -- it is being coerced into enacting these provisions -- I think this Court would, ought to be concerned with whether this is going to be a taking and the state's going to have to pay for it. How can the states evaluate whether or not they want to enact 522 or the prime farmland provisions when they don't know whether it's going to cost them $1 or $50 million?

So, I would suggest to the Court that there is strong public policy behind proceedings with a decision of

the taking issues, because the states are sitting back -- some of them have enacted statutes; they're submitting programs; they need to know. And if it is a taking, and a wrongful taking, they may not want to have those provisions be a part of their program because they may not be able to afford it.

Insofar as the high level of management is concerned, again --

QUESTION: Mr. Kelly, would you help me a little more on the taking issue? What do you contend constitutes a taking? Is it being required to restore the land to its original use, or is it prohibiting mining in cases where you could never restore it to original use?

MR. KELLY: Only insofar as prohibiting mining in the Indiana case. We challenged, and the district court found with respect to the prime farmland that it presents an unconstitutional taking because of the high level of management potential that we have to meet in restoring, and the fact that we could not get a permit to do that because we couldn't prove we could do it. So therefore we couldn't mine the coal.

QUESTION: Does that apply to all of the surface mining, or just the certain parcels of land, or how widespread is this defect in the statute?

MR. KELLY: Insofar as surface mining in Indiana is concerned, we have -- and I think it's in Exhibit Three,

Mr. Justice Stevens, sets forth the nature of the surface mineable reserves and the extent of the prime farmland. Now, that shows it to be fairly extensive.

QUESTION: Is all the darkened part of that exhibit prime farmland?

MR. KELLY: All of the dark green is 75 percent prime farmland and the yellow is 25 percent prime farmland.

QUESTION: In the balance of the state that's not shaded at all, is there no coal there? There's coal in other parts of the -- ?

MR. KELLY: There is no coal.

QUESTION: There's no coal.

MR. KELLY: And I think that is something that's quite obvious in terms of the lack of the land use concept in Indiana. We have a map in here that shows where the prime farmland is throughout the state, and we also have a map that shows where it is overlying the coal, and I think the illustration is quite dramatic in terms of the lack of the conflict between prime farmland. The highest quality and the best prime farmland, anyone from the State of Indiana knows, is up north. And even what the Federal Government has labeled as prime farmland down there, there isn't a farmer in the State of Indiana that would call that prime farmland.

Prime farmland up north is $4,500 an acre. You can't find $4,500-an-acre prime farmland in southern Indiana.

The six counties that account for 80 percent of the production of coal account for four percent of the production of agricultural products. There is no conflict down there.

But in any event, I've digressed a little bit away from the taking, Mr. Justice Stevens, but I think the remedies question, insofar as Mr. Justice Powell has asked, I think I've addressed myself to that insofar as the Tucker Act is concerned. Did that adequately respond to your inquiry at the outset?

QUESTION: It may be as adequate as anybody can inform me today, but I really don't understand what opportunities property owners will have if they can prove later, assuming the Government wins, that they can prove later that they have no beneficial interest left in their property as a result of this Act.

MR. KELLY: I think that issue will --

QUESTION: Maybe the Solicitor General should address that in the few minutes remaining to him.

MR. KELLY: I think I can only make one statement in that regard, and that is that most coal companies in Indiana own or lease only the coal. They may have surface rights, and in other situations they may have an interest in the coal as well as own the surface rights. Now, if I understand the Court's cases to date, ranging from Penn Central to the Mahon case, I don't think the Court has ever decided

that a sheer or mere destruction of the coal is not a taking if you still own the surface. And I would think there would be a very serious policy issue insofar as making that decision in this case would be concerned.

QUESTION: And I suppose, if a plaintiff claims that his property has been taken by the government without compensation, and if the government is the Federal Government, as it is here, he can under the Tucker Act go into the Court of Claims and make that claim, and claim for compensation for the taking of his property, can't he, at any time?

MR. KELLY: Well, Mr. Justice Stewart, if the Federal Government is doing it. But in this case --

QUESTION: Well, that becomes an issue in the case.

MR. KELLY: It could be. But I -- the Government doesn't want to concede that they have the remedy.

QUESTION: Well, certainly, you have a constitutional right to be compensated for property that is taken from you by the Federal Government.

MR. KELLY: Well, that's certainly true, Mr. Justice Stewart.

QUESTION: And I would think that it wouldn't take too ingenious a lawyer to file such a complaint.

MR. KELLY: No, that's true. But I think there is an irreparable harm beyond that. Let us say there isn't a taking, and we go ahead and buy this land. Don't we have

irreparable harm because we bought the land, put the investment in, and if an 80 percent reduction of our $12 million isn't enough to get us to a taking, we certainly have suffered irreparable harm. And the Tucker Act isn't going to help us because there wasn't a taking. But we've been irreparably harmed because we've put our money in and we've lost 80 percent of $12 million, let us say. Isn't that irreparable harm? Isn't that sufficient for a court to go ahead and make a declaratory judgment at this point to save us, the industry, if you will, from losing 80 percent of the cost of what we're going to put our money in? Aren't we entitled to know if it's going to be a taking? Do we have to gamble?

QUESTION: I suppose if you presume the statute is constitutional, you shouldn't buy the land unless you think you can make some money mining it, bearing the cost of restoring it to its original condition. You can make that decision before you spend the $12 million.

MR. KELLY: My only answer to that would be, Your Honor, if nine Members of this Court sometimes don't agree on what is a taking, how can our clients as businessmen really have --

QUESTION: But you're complaining if, even if there's no taking, you say it should be unconstitutional, which is a little different argument than that --

MR. KELLY: No, I don't think it ought to be

unconstitutional, even if there's no taking, Mr. Justice Stevens. I think we're entitled to the remedy of a declaratory judgment at this point as to whether it is or it isn't, because if it's not a taking and we don't have the right to get our money back, we don't want to put our money into prime farmland, under prime farmland, when we can't mine the coal.

QUESTION: Well, supposing that with respect to 90 percent of the mineable land in Indiana, it can be restored and maybe five or ten percent cannot be. Is that a reason for holding the whole statute unconstitutional, or for giving a remedy in the five or ten percent of the cases?

MR. KELLY: I guess that's -- I guess I would state it at this point that the statute would be unconstitutional because the states at this point need to know that.

QUESTION: Well, don't you have to -- before you mine, you want to get, you have to have a permit to open up the mine. You have to demonstrate that you have the capability of restoring --

MR. KELLY: The technological capability, yes, Your Honor.

QUESTION: Yes. Suppose that you go in and you say, I want a permit to mine, but I'll demonstrate to you that I have no -- that this, I just can't do it, and if the government denies you a permit, what it's saying to you is that you cannot mine your coal.

MR. KELLY: That's true.

QUESTION: At least at that point you've been deprived of your mineral interest, you would say, I guess?

MR. KELLY: Right. That's true.

QUESTION: Have you done this with any particular piece of property?

MR. KELLY: Insofar as the property is concerned, at this point, our clients have not and in all probability that is due to the grandfather clause that is present. The grandfather clause will probably come to an end insofar as --

QUESTION: Well, you're doing the mining -- so far you've been able to mine under the grandfather clause?

MR. KELLY: That's true, and there's a lot of litigation over the extent and the meaning of the grandfather clause, so that there is some type of preexisting property right that is protected, but it's coming to a head very quickly. Thank you, Mr. Chief Justice.

ORAL ARGUMENT OF PETER BUSCEMI, ESQ.,

ON BEHALF OF THE APPELLANTS -- REBUTTAL

QUESTION: Mr. Buscemi, do you agree that the Tucker Act will be available to a private landowner who claims a taking?

MR. BUSCEMI: I certainly agree, Mr. Justice Powell, that a private landowner who claims a taking can bring a Tucker Act suit in the Court of Claims. Now, whether the

Court of Claims will find that the Tucker Act jurisdiction was intended to permit recovery on the basis of a regulatory statute like this, or as Mr. Justice Rehnquist called earlier, inverse condemnation, I'm not certain. I don't know whether the Tucker Act jurisdiction has ever been invoked in a case like that and has resulted in a monetary recovery.

As I say, in the Eastport Shipping case that we've cited, the Court of Claims, I think, expressed some misgivings about that. I don't know what the court would do if it were faced with the question, but I think that Mr. Justice White's question to opposing counsel just now indicates what the Government would see as the way in which this kind of issue can be appropriately resolved, and that is if an individual mine operator or prospective mine operator or landowner applies for a permit to mine a certain kind of land, and he maintains that he just does not have the capability to restore it to its equivalent levels of yield --

QUESTION: Or he does his best to prove to the Government and the Government says, you've failed to prove it, no permit.

MR. BUSCEMI: Or he does his best and the Government says he failed.

QUESTION: But in deciding this case, should we assume that there may be an opportunity to litigate in the event a private owner thinks his property has been taken?

MR. BUSCEMI: I think, Mr. Justice Powell, that you can certainly assume that one of two things available to a private owner, if he can establish that his property has been taken: you can assume either that there is a Court of Claims remedy under the Tucker Act for money damages, or that at least with respect to a particular piece of property, that there is a district court equitable remedy available in the form of an injunction under the statute as applied to that statute, and that's the problem that we encounter in this case.

QUESTION: Well, what happens in that case if he doesn't want an injunction, he wants damages?

MR. BUSCEMI: Well, I think that right now, at least, we're confronted with plaintiffs who would be very happy with an injunction. That's exactly what they want.

QUESTION: Because then they can mine the coal?

MR. BUSCEMI: That's right. And that's presumably all that they want. So I think that that's how we would envision the thing working.

QUESTION: Do you concede that if there are, say, in 95 percent of the cases the statute works fine, but five percent of the cases they can prove they couldn't restore the land to the original condition. Do you concede that that would establish a taking?

MR. BUSCEMI: Absolutely not. But --

QUESTION: But -- so you'd say, they don't have

a remedy either?

MR. BUSCEMI: Well, I would say that they would not win on the merits, but Mr. Justice Powell's question, I thought, was what do they do and how do they go about it.

QUESTION: Why wouldn't they win on the merits, if they could prove that in five percent of the cases it would just be impossible to restore this land. And the court just says, well, we agree with you, but Mr. Buscemi here says that wouldn't be a taking.

MR. BUSCEMI: Well, I think that that statement is correct under this Court's decisions. I think that it would not be a taking.

QUESTION: And why wouldn't it be?

MR. BUSCEMI: Well, because I think that part of Mr. Justice Powell's hypothetical was that no other beneficial use would be available. I'm not so sure that that would be the case, if they --

QUESTION: Well, then it can go on being used as farmland?

MR. BUSCEMI: Well, under those circumstances I would think that the Court would not find a taking.

QUESTION: Well, it makes their mineral interest unusable.

MR. BUSCEMI: Well, the New York Landmark statute made the thirty-foot house above Grand Central Station

unusable too, but the Court sustained that. And I think that that is typical of the Court's approach in these taking questions. It has looked at the entire bundle of of --

QUESTION: Well, I take it, then, you would say that if the Federal Government had just passed a law that said, there will be no more strip mining in Indiana -- well, there will be no more strip mining under any prime farmlands no matter what, with just a flat prohibition, the land remains quite usable as prime farmland. You would just say that's not a taking?

MR. BUSCEMI: I think that that would not be a taking; yes.

QUESTION: Even if it's justifiable under the Commerce Clause?

MR. BUSCEMI: The Commerce Clause question, as I say, I will give essentially the same answer that I gave you earlier, and that is that Congress would have to find that that was a reasonable measure under the Commerce Clause. But I think that my answer is that under the circumstances, and what we already have seen in the legislative record, that probably would be defended under the Commerce Clause. After all, the very task force report that plaintiffs rely on and the district court relied on has established that 21 million acres of prime farmland is subject to surface mining. And right now, of course, as it turns out, the problem has not

gotten to that dimension yet. We only have approximately 21-, 22,000 acres a year that are being mined. But I think that the -- I'm sorry, did I say twenty -- ? It's seven million acres, which is an area larger than the State of Delaware. I think that's a substantial figure and I think that Congress could rely on it under the Commerce Clause.

QUESTION: But some of these coal companies don't own the farmland as farmland. They just own the minerals under it, and certainly any such legislation as described hypothetically by my brother White would take all of their property, wouldn't it?

MR. BUSCEMI: That's true, and that's the situation that was presented to the Court in Pennsylvania Coal v. Mahon. And if the Court had a situation like that and if the Court further found that there was just no other way for the mine operator, prospective mine operator to make use of his property, then a taking might be found there. I'm not -- I just don't know.

QUESTION: And avoid an injunction issue if there were an adequate remedy at law?

MR. BUSCEMI: That would depend on the adequacy of the remedy at law.

QUESTION: Well, compensation would be adequate, wouldn't it?

MR. BUSCEMI: In that event compensation would be

adequate. My hesitation is only because I do not know of any Court of Claims case that has compensated a landowner for federal action of this regulatory nature. If the compensation were available, there would be no equitable relief.

QUESTION: Mr. Buscemi, in Virginia, in southwest Virginia where there are only steep hills but no farmland or very little farmland, the district judge in the Virginia case found that in many instances the land had no value whatever under the administration of this Act, so that could conceivably be different from land in another state where an individual or a company owned both the surface and the mineral rights. He could continue to farm that land.

MR. BUSCEMI: That's correct. The Virginia situation --

QUESTION: In Virginia you could own a mountainside that had no utility in the world other than to strip mine.

MR. BUSCEMI: That's correct. The Virginia situation may well present different geographical characteristics but I should also point out, Mr. Justice Powell, that the district court also found that if some of that land was leveled off into benches, it went up to $300,000 an acre. So, I mean, there's a little bit of inconsistency there.

QUESTION: I've seen a few mountaintops taken off, but not many.

MR. BUSCEMI: Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

(Whereupon, at 3:01 o'clock p.m., the case in the above-described matter was submitted.)

CERTIFICATE

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No. 80-231

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

V.

INDIANA ET AL.

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

BY: Lill T. Gibson