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## NEW CONTROLS OVER SURFACE MINING

President Carter's signing of the Surface Mining Control and Reclamation Act of 1977, marked the end of six years of legislative debate and three Presidential vetoes. Coal industry opponents of the Act argued that existing state regulations can meet environmental goals. They see additional federal interference as unnecessary and as a potential for widespread rule and regulation abuse.

The coal industry took its case to the Federal District Courts in five states: Illinois, Iowa, Ohio, Virginia and West Virginia. They sought to enjoin the activities of the newly-created Office of Surface Mining (OSM) which issues performance standards for the mines and enforces violations. The Iowa court upheld the Act's constitutionality, but the Western District Court of Virginia ordered an injunction barring enforcement activities by OSM. The Supreme Court stayed the injunction in March 1980 and agreed to hear the case.

The provisions attacked as unconstitutional by the Virginia District Court judge are:

1. Section 515(d) and (e), 30 U.S.C. § 1265 (Supp. II 1979), which requires that land be restored to the approximate original contour.

2. Section 522, 30 U.S.C. § 1272 (Supp. II 1979), which requires designating certain lands as unsuitable for surface mining and prohibits mining within 300 feet of an occupied dwelling or 100 feet of a public road. Both sections were rejected as violating Fifth Amendment prohibition of seizures of private property without just compensation. Another reason for the injunction was that the sections were "so burdensome on the Commonwealth of Virginia as to threaten its economy." The federal government's legitimate preemptive power under the Commerce Clause must be balanced with the state's inherent land use planning power. The Tenth Amendment prevented the federal government from usurping the traditional state's power.

3. Sections 518, 521(a) (1), (2) and (3), and 525 provide OSM enforcement remedies against violators. These civil penalties were declared unconstitutional because they deprived the mine operators of procedural due process guaranteed by the Fifth Amendment.

Virginia is hit hardest by the Act because 95 percent of its coal reserves are found on "steep slopes," with more than 20 degrees of slope. There are very restrictive requirements for mining in a "steep slope" area. In contrast, Eastern Kentucky has 75% steep slopes mining areas, West Virginia 70 percent, Colorado 10 percent, Pennsylvania 6 percent, Ohio 1 percent and Midwest 0 percent. Meeting the stiffer requirements will cost about \$7 to \$13 per ton of coal. Coal now sells for about \$25 per ton to utilities and \$45 per ton to the steel industry.

While industry is waiting for a final judicial decision on the current Act, it is supporting legislative amendments to make it more flexible. Amendments have passed the Senate which provide that a State enforcement program shall be approved by OSM if it is consistent with the federal law, but not necessarily with OSM's regulations. The regulations are criticized as too much like a "cookbook" where only certain reclamation techniques can be used even though other techniques, less expensive to the mine operator, can produce the same environmental effect.

The Senate-passed amendment has hit a brick wall in the House built by Congressman Morris Udall (D-Arizona), primary author of the Act and chairman of the committee that reviews mining legislation. Virginia Senator John Warner tried to circumvent Udall's committee by attaching the amendment as a rider on the synthetic fuels bill. He withdrew the amendment when an Ohio Senator threatened a filibuster.

Meanwhile, OSM still is trying to prod reluctant states into compliance with the Act. The Director of OSM has stated the major economic troubles of mine operators is not related to the Act, but to problems transporting the coal from the difficult terrain and labor unrest. He was supposedly told by persons in southwest Virginia that "if operators were making the money they were five years ago when business was good they would have no problems complying with the federal law."

Whatever the reasons for the mine operators' economic woes, in southwest Virginia the capital expenditures needed to start a mine are escalating rapidly and forcing many small operators out of business. While the mine owners are fighting the battle against the present Act and regulations, they may be buried by the capital requirements and eventually sell out to some large "energy cartel" which is the wave of the future.

B.B.G.

Two research papers on the Surface Mining Control and Reclamation Act are available. The titles and ordering instructions are below.

Part 1. Constitutional Issues of the Surface Mining Control and Reclamation Act: Discussion of the Tenth Amendment and Fifth Amendment "Taking" Clause (Focuses upon the *Virginia Surface Mining Case*).

Part 2. Environmental Protection Standards of SMCRA and the Virginia Coal Operators (Focuses upon Section 515 of the Act).

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