

## **MINING: Ruling on Rith 'takings' case left intact**

**By Tim Breen, Greenwire associate editor**

A federal appeals court last week declined to rehear a "takings" case in light of an intermediate Supreme Court ruling, keeping in place the decision that an energy company cannot be compensated for economic losses by the federal government because an agency revoked its coal mining permit (see the 5/3 *Greenwire*). In May, in the *Rith Energy Inc. v. United States* decision left intact, the U.S. Court of Appeals for the Federal Circuit said Rith had already turned a profit on the mining it was permitted to do, so the revocation couldn't very well be a categorical taking of property.

Neither action by the court does much to clarify when a "takings" lawsuit is appropriate or winnable, however, legal experts agree. And since the June *Palazzolo* case did much the same, lawsuits contending the federal government effectively seized property and owes money for it can be expected to continue, they say.

Rith hoped to get the federal circuit court to consider its case again with an eye to the *Palazzolo v. Rhode Island* decision. In that case, the Supreme Court ruled that purchasing property after a regulation is enacted does not necessarily preclude the owner from being compensated when he is blocked from developing the land, and that compensation may be due even if the regulation does not result in a total confiscation of property (on the latter point, the high court remanded the case back to the Rhode Island Supreme Court).

The circuit court denied the rehearing request last Monday and later offered a 10-page explanation. It said on the categorical takings issue that "*Palazzolo* is distinctly unhelpful to Rith." The court explained that the Supreme Court had actually found *Palazzolo* had not suffered total confiscation at the hands of Rhode Island wetlands regulations -- his property may have been worth more than \$3 million without the regulations, but it was still worth \$200,000 with them, not "a token interest" that left the land "economically idle."

Rith mined 35,700 tons of coal at a profit of \$14 per ton, for a total gain of \$500,000 on its \$33,500 investment on two leases in Tennessee. But then the Interior Department's Office of Surface Mining cracked down, revoking the permits on the grounds Rith's applications did not accurately reflect the danger posed to groundwater from its operations, and finding itself that the danger was fairly high. Rith maintained it had only been allowed to extract 9 percent of the coal available and that the 91 percent off-limits was very close to being a total taking. The court maintained, however, that the 9 percent was still better than the 6 percent left *Palazzolo*. "The diminution in the value of the coal lease therefore does not, by itself, establish a categorical taking," it said.

On the other hand, the panel agreed the Supreme Court found there could be no blanket rule against making compensation claims just because property was bought after enactment of economically harmful regulations. (The relevant mining regulations in *Rith* were enacted in 1977, whereas the company bought its leases in 1985.) Still, the "reasonable expectations of persons in a highly regulated industry" remain relevant, it said. "A party in Rith's position necessarily understands that it can expect the regulatory regime to impose some restraints on its right to mine coal under a coal lease," the panel said, adding the leases themselves told Rith getting mining permits might be problematic and the low price paid for the leases also indicated there might be problems.

"The likelihood of regulatory restraint is especially high with regard to possible adverse environmental effects, such as potentially harmful runoff from the mining operations, which have long been regarded as proper subjects for the exercise of the state's police power," the court added. In sum, the Supreme Court in *Palazzolo* made room for challenges irrespective of the dates on regulations, but it still clung to the importance of "reasonable investment-backed expectations," and the circuit court was not being inconsistent with either, it explained.

Rith also argued it had been singled out when its permits were revoked, that its actions posed no particular danger to groundwater and OSM was under political pressure when it acted. But administrative and judicial proceedings on the permit denial found Rith's mine did have a "high propensity" to produce acid drainage, and Rith's abatement plan would not properly reclaim the site or prevent hydrologic damage, the court noted. More importantly, that matter was being pressed in the wrong venue, it said: Takings cases assume the underlying governmental action was lawful and only hang on whether compensation is due, whereas legality of permit denials can only be taken up in the earlier stages.

Acting on behalf of the National Mining Association, Defenders of Property Rights filed an *amicus curiae* brief with the federal circuit court asking it to rule in favor of Rith. As it turned out, the court did interpret *Palazzolo's* view on "notice" -- whether possibly economically harmful regulations were known about -- correctly, leaving Rith able to bring its takings claim even though regulations predated its lease purchase, said Defenders' Nancie Marzulla. But Rith doesn't clarify the matter and provide the "bright line" many have been looking for as to when "takings" cases are appropriate, she said, instead making things "more of a muddle."

For Defenders and Rith, the case has become "utterly divorced from the underlying facts" and focused on corollary matters, Marzulla said. What the courts should be looking at is whether the federal government illegally intruded itself into a state matter: Tennessee was delegated authority to run its Clean Water Act program by the Environmental Protection Agency, and Rith could not have expected the federal government to turn around and effectively "undelegate" in this instance. Indeed, OSM acted, citing the 1977 Surface Mining Control and Reclamation Act, whereas EPA acting in terms of the clean water law would be more understandable, if still illegal, Marzulla indicated. Thus, Rith did have reasonable investment-backed expectations that it could mine its leases since Tennessee's application of CWA said it could.

**Glenn Sugameli, who filed an *amicus* brief on behalf of the government for the National Wildlife Federation (he is now with the Earthjustice Legal Defense Fund), said otherwise, specifically that the 1977 law was the relevant one, is the "floor" applied by the federal government to all states, and was found to be clearly violated by the courts in *Rith*. Moreover, as the circuit court also noted, the issue of permit legality is not germane to a takings proceeding, he said.**

**Sugameli took as especially encouraging the court's determination that suspension of Rith's permits for environmental reasons amounts to a police action in the name of public safety, and such conduct traditionally has not required compensation. The federal circuit court is relatively conservative and pro-property rights, and it ruled unanimously en banc not to rehear *Rith*, indicating takings cases still have uphill battles, he suggested.**

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