

Takings/Mineral Rights Lessee: Court of Federal Claims Addresses U.S. Environmental Protection Agency Withdrawal of 404 Permit



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The Court of Federal Claims addressed in a May 29th opinion a Fifth Amendment Takings Claim associated with the United States Environmental Protection Agency's withdrawal of a Clean Water Act 404 permit that had been issued to a mineral lessee. See *United Affiliates Corporation and Mingo Logan Coal LLC v. US*, 2019 WL 2276703.

The takings claim involves both an alleged categorical and regulatory taking.

United Affiliates Corporation ("United") owns the surface and most of the mineral rights within a mining region of West Virginia known as Spruce. It entered into a long-term lease agreement with Mingo Logan Coal LLC ("Mingo"), that allowed Mingo to operate a surface coal mine on their property. United was entitled to royalties based on the amount of coal mined.

As part of their mining operations, Mingo removes excess rock and dirt from the surface, which is called "spoil," to gain access to the subsurface coal. The spoil is then returned to the mined area, repurposed for separate development projects, or placed in areas adjacent to the excavation site. These areas are called "hollows." They occasionally contain waters of the United States (as defined by the Clean Water Act).

Pursuant to Sec. 404 of the Clean Water Act of 33 U.S.C. § 1251, the disposal of spoil in a hollow containing waters of the United States requires a 404 permit from the United States Environmental Protection Agency ("EPA"). The hollow where Mingo sought to dispose of its spoil had two streams running through it – Pigeonroost Branch and Oldhouse Branch. The streams are classified by EPA as waters of the United States. In accordance with the statute, Mingo applied for a permit in 1997.

In 2007 EPA approved Mingo's application and granted a permit. Mingo alleges the company subsequently spent millions of dollars preparing the land to begin the mining operations.

The Obama Administration in 2009 implemented a policy shift seeking to tighten regulations on coal mining. Pursuant to this policy shift, the EPA updated their Sec. 404 permit application and review process. These changes subjected applicants to a set of stricter standards.

Due to the implementation of new standards, EPA became concerned with Mingo's operations. On January 13, 2011, it revoked Mingo's permit. Mingo alleges this revocation was the first time in history EPA ever rescinded an already-issued Sec. 404 permit.

Mingo challenged the EPA's decision to rescind its permit by arguing that this action was in violation of the Administrative Procedures Act due to it being "arbitrary and capricious." However, the District Court found for EPA. It concluded EPA's withdrawal was "reasonable, supported by the record, and based on considerations within the agency's purview." See *Mingo Logan Coal Co. Inc. v. EPA*, 70 F.Supp.3d 151, 154 (D.D.C. 2014), *aff'd sub nom. Mingo Logan Coal Co. Inc. v. EPA*, 829 F.Supp.3d 710, 154 (D.C. Cir. 2016).

On January 13, 2017, Mingo and United filed a 2-count complaint against the United States in the United States Court of Federal Claims. The Complaint alleged that EPA's permit rescission was both a categorical and a regulatory taking of their property that constituted a violation of the Fifth Amendment's Takings Clause.

The Government moved to dismiss their claims. It asserted that Mingo and United did not have a compensable property interest and their categorical takings claim was not supported by precedent.

The Court first evaluated United and Mingo's property interests. It found that the permit acted as an assertion of Mingo's property ownership over the hollows wherein spoil would be deposited, and thus, pursuant to the lease agreement, United too held a property interest. The Court reasoned that in submitting their Sec. 404 application, 33 C.F.R. § 325.1 required Mingo to affirm its ownership interest in the hollows. Section 325.1, states, in part:

. . . the signature of the applicant or the agent will be an affirmation that the applicant possesses or will possess the requisite property interest to undertake the activity proposed in the application.

The Court next assessed whether the categorical takings claim was viable. It was not and granted dismissal of the claim. A categorical takings claim occurs when the regulations compel the property owner to suffer a physical invasion of its property, or prohibit all economically beneficial or productive use.

Mingo and United failed to allege either of the two. Instead it proposed that while their claim is not a "categorical taking" as the term is defined, it is an attempt to draw a rule regarding the impact of reliance on Government representations and recovery on a takings claim.

The Court disagreed, and held that for a categorical takings claim, you must allege that you suffered a physical invasion of your property or that your property has been deprived of all economically beneficial or productive use. Accordingly, the categorical takings claim was denied.

The Court next evaluated whether the regulatory takings claim could survive dismissal. While property may be regulated to a certain extent, it will be recognized as a regulatory taking if regulations go too far. The Court applied a fact-based inquiry, where they considered the character of the government action, the economic impact of the action on the claimant, and the effects of the governmental action on the reasonable investment-backed expectations of the claimants.

Mingo and United asserted that the revocation of their permit was both unprecedented and unforeseeable. This allegedly resulted in foreclosing them from using their land for coal mining operations and deprived them "of tens of millions of dollars in economically beneficial or productive use of value of the property."

The Court held that because Mingo and United alleged that the Sec. 404 permit withdrawal deprived them from using their property for coal mining, they have adequately pleaded a regulatory takings claim.

A copy of the decision can be downloaded [here](#).