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"Reasonable Expectations," Takings Law Analysis and Administrative Decisions in Light of *Rith v. United States*

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"REASONABLE EXPECTATIONS," TAKINGS LAW ANALYSIS AND ADMINISTRATIVE DECISIONS IN LIGHT OF *RITH V. UNITED STATES*

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I. THE BACKGROUND OF REGULATORY TAKINGS

The Fifth Amendment to the United States Constitution concludes with the words, "nor shall private property be taken for public use, without just compensation."[1] Federal takings law presents many interesting issues in light of the massive increase in governmental regulation since the founding of the United States in 1776. When the Fifth Amendment was adopted in 1789, the only cabinet posts were the Secretary of the Treasury, the Secretary of State, the Secretary of War, and the Attorney General.[2] Today, the federal government consists of over 14 departments and 65 independent agencies that regulate daily aspects of Americans' lives, ranging from water quality to nicotine content in cigarettes.[3] These departments and agencies are endowed with incredible powers that allow them make decisions that may diminish or destroy the economic value of private property.[4]

An example of this administrative power is the regulation of coal mining, which has always been a highly dangerous industry that produces many environmental side effects.[5] Early in the twenty-first century, many state governments attempted to pass regulations in hopes of lessening the negative aspects of coal mining, and early on the United States Supreme Court recognized that when government regulation went too far, it could result in a Fifth

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[1] U.S. CONST. amend. V.

[2] Detailed biographies of President Washington's first cabinet officials and a description of the executive branch in 1789 are available at http://www.americanpresident.org/kotrain/courses/ GW/GW_Domestic_Affairs.htm.

[3] A list of the departments and agencies of the United States government as of December, 2002, is available at http://www.gov.com.

[4] *See generally* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1019 (1992) (finding that a decision by the South Carolina Coastal Council to prohibit building on the plaintiff's property effected a taking since it completely wiped out the property's value as a residential lot).

[5] *See generally* ENERGY, ECONOMICS AND THE ENVIRONMENT: CASES AND MATERIALS 231–302 (Fred Bosselman et al. eds., 2000).

Amendment taking requiring compensation.[6] With the expansion of federal regulation of the coal industry in the 1930s and 40s, Fifth Amendment takings analysis also came to apply to the agencies of the federal government and their dealings with landowners.[7]

In May of 2001, the United States Court of Appeals for the Federal Circuit handed down a significant decision concerning regulatory takings by the federal government. *Rith Energy, Inc. v. United States*[8] was the culmination of a protracted battle nearly sixteen years in the making between Rith Energy Corporation and the Office of Surface Mining Reclamation and Enforcement of the United States Department of the Interior (OSM).[9] The litigation arose over the latter's refusal to certify Rith's plan to deal with the problem of acid mine drainage (AMD) at the site of two coal seams that the corporation had leased from the federal government.[10] In June 1985, Rith had purchased the right to mine coal on approximately 250 acres of land situated along the Sewanee and Richland coal seams in Tennessee for $33,500.[11] At the time it acquired the leases, Rith was aware that the mining would invade the rock strata situated above the Sewanee Conglomerate aquifer that provided drinking water to the local community.[12] In order to receive a mining permit, Rith was required to submit soil samples to demonstrate that the proposed surface mining plan would not disturb the aquifer through AMD runoff.[13] Rith's samples established that the danger of AMD from the mining operations on the

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[6]*See, e.g.*, Pennsylvania Coal v. Mahon, 260 U.S. 393, 415 (1922).

[7]For an overview of the expansion of federal oversight of the coal mining industry, *see generally* ENERGY, ECONOMICS AND THE ENVIRONMENT: CASES AND MATERIALS, *supra* note 5.

[8]Rith Energy, Inc. v. United States, 247 F.3d 1355 (Fed. Cir. 2001) [hereinafter *Rith III*].

[9]*Id.* at 1355.

[10]Rith Energy, Inc. v. United States, 44 Fed. Cl. 108, 111 n.3 (Fed. Cl.1999), *aff'd*, 247 F.3d 1355 (Fed. Cir. 2001) [hereinafter Rith I]. AMD is defined by federal regulations as "water with a pH of less than 6.0 and in which total acidity exceeds total alkalinity, discharged from an active, inactive or abandoned surface coal mine and reclamation operation or from an area affected by surface coal mining and reclamation operations." 30 C.F.R. § 701.5 (1998). AMD occurs when certain types of acidic soil are exposed to air and water. Once AMD begins, the chemical reaction that creates the toxic product becomes self-sustaining and can continue for years, even after all mining activity has ceased. AMD can adversely affect the quality of surface water by, *inter alia*, lowering its pH level, reducing its natural alkalinity, increasing its total hardness, and adding undesirable amounts of iron, manganese, aluminum, sulfates, and other elements and suspended materials. AMD also adversely affects groundwater by introducing contaminants and by changing pH levels, thereby threatening local residential drinking-water supplies. *Id.*

[11]*Rith III*, 247 F.3d at 1359.

[12]*Rith I*, 44 Fed. Cl. at 110.

[13]*Id.*

coal seams was minimal. Accordingly, OSM issued a five-year permit for Rith to mine the coal seams on January 3, 1986.[14]

On March 25, 1986, in response to requests by local area residents and a regional environmental group, OSM decided to resample the soil at Rith's operation and found that these new samples were approximately 250% more acidic than indicated by Rith's tests and that the neutralization capacity of the soil was near zero.[15] OSM suspended Rith's permit to mine the Sewanee seam on June 27, 1986, pending submission of a new plan for handling the highly acidic drainage.[16] In July 1986, during the re-permitting process, Rith received permission to begin mining the Richland seam because OSM believed that this could be accomplished without disturbing the Sewanee Conglomerate.[17] Rith continued to mine the Richland seam until OSM finally ordered the corporation to cease all mining operations in May 1987.[18] By the time OSM issued a cessation order, Rith had extracted a total of 35,655 tons of coal, which represented about 9.3% of approximately 385,000 tons of available coal existing within the boundaries of the two leases.[19]

After several unsuccessful administrative challenges to OSM's decision, Rith sued the United States in the Eastern District Court of Tennessee seeking a review of OSM's actions and contending that its property had been taken without compensation in violation of the Takings Clause of the Fifth Amendment.[20] Rith later dropped its appeal of the correctness of the OSM decision, and the District Court dismissed the claim with prejudice.[21] The District Court then transferred Rith's takings claim to the Court of Federal Claims in May 1992.[22] Following the granting of summary judgment for the government by the Court of Federal Claims, Rith appealed its takings claim to the Court of Appeals for the Federal Circuit.[23]

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[14] *Id.* at 111.
[15] *Id.*
[16] *Id.*
[17] *Rith I*, 44 Fed. Cl. at 110.
[18] *Id.*
[19] *Id.* at 111 n.4.
[20] *Rith III*, 247 F.3d at 1355.
[21] *Id.* at 1360.
[22] *Id.*
[23] *Id.* at 1361.

II. RITH I: RITH'S LEASE TO MINE THE SEWANEE AND RICHLAND COAL SEAMS DID NOT ENTITLE IT TO DO SO IN A MANNER THAT WOULD ENDANGER PUBLIC SAFETY

While the language of the "Takings Clause" of the Fifth Amendment has been interpreted to support compensation on a *per se* basis where actual physical invasion of a landowner's property by the government occurs, when the taking occurs as a result of government regulation, compensation is not always required.[24] In his comment discussing the *Rith* case for the Federal Circuit Bar Journal, James Reginald Benjamin, Jr. states that *Rith*,

> confirms that nuisance law is a viable option to employ in defending land-use regulations against a regulatory takings claim. It demonstrates the significance of utilizing common law, in conjunction with statutory law, for the purposes of (1) promoting the health, safety, and general welfare of the public; and (2) balancing the competing public interests between government and property owners.[25]

In *Keystone Bituminous Coal Ass'n v. Debenedicts*,[26] the United States Supreme Court stated that, "[l]ong ago it was recognized that 'all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community,'... and the Takings Clause did not transform that principle to one that requires compensation whenever the [government] asserts its power to enforce it."[27] That such restrictions are inherent in the title to property was a principle laid down by the United States Supreme Court in *Lucas v. South Carolina Coastal Council*.[28] In *Lucas*, the Court said that a state could avoid having to pay compensation for a taking if the nature of the owner's estate shows that the intended use was not part of the title to begin with.[29] The analysis of *Lucas v. South Carolina Coastal Council* was adopted by the Federal Circuit in its decision in *Love-*

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[24]*Lucas*, 505 U.S. at 1015.

[25]James Reginald Benjamin, Jr., Rith Energy v. United States *"The Best of Both Worlds;" Use of Common Law and Statutory Law Together in Applying the Nuisance Exception to Defend a Takings Claim*, 11 Fed. Circuit B.J. 855 (2001-2002).

[26]Keystone Bituminous Coal Ass'n v. Debenedicts, 480 U.S. 470, 491-92 (1987).

[27]*Id.*

[28]*Lucas*, 505 U.S. at 1003.

[29]*Id* at 1027.

ladies Harbor, Inc. v. United States,[30] which stated that so long as the application of a federal regulation would do no more than mirror a decision under state property law, no compensable taking would occur.[31]

OSM based its decision to deny Rith's permit on the 1977 Surface Mining Control and Reclamation Act (SMCRA),[32] which had the express objective of establishing "a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations."[33] Toward this end, OSM was charged with the task of regulating the surface coal mining industry and prohibiting mining operations that endanger public health and safety or harm the environment.[34] The specific provision of the Act that authorized OSM's actions stated that:

> any permitee is in violation of any requirement of this [Act], which condition, practice, or violation also 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 land, air, or water resources, the Secretary or his authorized representative shall immediately order a cessation of surface coal mining and reclamation operations or the portion thereof relevant to the condition, practice, or violation.[35]

Using the analysis of *Lucas* and *Loveladies Harbor, Inc.*, the Court of Claims stated that the central question in the *Rith I* case was whether Tennessee nuisance law would allow the issuance of an injunction restraining Rith from proceeding with surface mining that produced a high probability of AMD into the Sewanee Conglomerate aquifer.[36] The court held in the affirmative. Since the federal action by OSM did nothing more than mirror the result that would have been achieved under state nuisance law, the decision to proscribe mining did not effect a Fifth Amendment

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[30]Loveladies Harbor, Inc. v. United States, 28 F.3d 1171 (Fed. Cir.1994).

[31]*Id* at 1179.

[32]*Rith I*, 44 Fed. Cl. at 112 (citing Rith Energy, Inc., No. NX 89-1-PR at 26 (Dep't of Interior March 28, 1989)).

[33]30 U.S.C. § 1202(a) (2003).

[34]*Rith I*, 44 Fed. Cl. at 108.

[35]30 U.S.C. § 1271(2) (1994).

[36]*Rith I*, 44 Fed. Cl. at 114.

taking.[37] Rith made a motion for reconsideration of the decision by the Court of Claims on the grounds that the corporation had been issued a permit by Tennessee authorities and thus was not in violation of Tennessee nuisance law.[38] The court denied this motion stating, "Whether the enforcement of these regulations is accomplished by the state regulatory body or by the federal officials acting under the authority of SMCRA is not an issue relevant to the takings analysis."[39]

III. RITH III: THE GOVERNMENT'S REFUSAL TO GIVE RITH A PERMIT DID NOT COMPRISE A "TAKING" UNDER THE FIFTH AMENDMENT BECAUSE RITH'S INVESTMENT-BACKED EXPECTATIONS REQUIRED THAT IT OBTAIN A PERMIT

Rith appealed the decision in *Rith II* to the Court of Appeals for the Federal Circuit, restating the claim that OSM's decision to deny a mining permit for its leases had amounted to a Fifth Amendment taking.[40] Rith invited the court to revisit its earlier decision in *Del-Rio Drilling Programs, Inc. v. United States*,[41] which held that "a plaintiff could bring a takings claim without first challenging the lawfulness of the government's action, or establishing the scope of its property interest, in an administrative proceeding."[42] In effect, this was an attempt by Rith to sidestep the nuisance issue upon which the Court of Claims had based the earlier decision. Rith argued that by denying its permit to mine, OSM had effected a "categorical taking." In other words, the government regulation had deprived the property owners of "all economically viable use of the property.[43] The significance of this argument is that if the OSM decision did in fact effect a categorical taking, "analyzing whether or not compensation is due does not require an inquiry into whether the plaintiff had reasonable investment-backed expectations that were defeated by the regulatory measure that gave rise to the takings claim."[44] This would, in

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[37]*Id.* (citing Tennessee's Water Control Act of 1977, TENN. CODE ANN. §69-3-102 (2002)). Rith argued that since Tennessee had given them a permit to mine despite this Act, that the contrary decision by OSM did not mirror state nuisance law, and thus did constitute a compensable taking per the reasoning in *Lucas* and *Loveladies Harbour*.

[38]Rith Energy v. United States, 44 Fed. Cl. 366 (Fed.Cl.1999) [*hereinafter Rith II*].

[39]*Id.*

[40]*Rith III*, 247 F.3d at 1361-62.

[41]Del-Rio Drilling Programs, Inc. v. United States, 146 F.3d 1358 (Fed. Cir.1998).

[42]*Rith III*, 247 F.3d at 1365.

[43]Palm Beach Isles Assocs. v. United States, 231 F.3d 1354, 1357 (Fed. Cir. 2000).

[44]*Rith III*, 247 F.3d at 1362.

effect, have given Rith a nearly $5 million windfall since, as mentioned earlier, it had purchased the leases for only $33,500.

Rith stated that it expected to extract approximately 385,000 tons of coal from the entire 250-acre area, and thus, the denial of the mining permit had deprived Rith of the substantial profit that it had expected to reap under the leases.[45] However, the Court of Appeals found Rith's argument lacking since Rith had extracted approximately 35,700 tons of coal from the leased property before the government ordered it to cease operations and had realized a profit of approximately $14 per ton, or a total profit of $500,000.[46] Rith countered that the proper measure of its damages should be calculated as of September 1988, since it was on that date that OSM rejected its final toxic materials handling plan, thus, depriving it of any additional economic value.[47] However, such an analysis conflicts with the Supreme Court's holding in *Keystone Bituminous Coal Ass'n v. Debenedicts*:[48] "A claimant's parcel of property could not first be divided into what was taken and what was left for the purpose of demonstrating the taking of the former to be complete and hence compensable."[49]

Rith's proposed analysis is also in contrast with the Court of Appeals' opinion in *Florida Rock Indus., Inc. v. United* States, where the court stated that "[I]n determining whether a taking is categorical, the owner's opportunity to recoup its investment or better, subject to the regulation, cannot be ignored."[50] Following this line of reasoning, the Court of Appeals concluded that although Rith earned far less from the coal leases than it had expected, the fact that the company had achieved a profit of over $500,000 for its investors prevented OSM's regulatory restraints from being considered a categorical taking.[51]

Using the analysis adopted in *Palm Beach Isles Assocs. v. United States*,[52] the Court of Appeals proceeded to examine the

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[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] *Keystone Bituminous Coal Ass'n*, 480 U.S. at 470.

[49] *Id.* at 478-79.

[50] *Rith III*, 247 F.3d at 1363 (quoting Florida Rock Indus., Inc. v. United States, 791 F.2d 893, 905 (Fed. Cir.1986)).

[51] *Id.* at 1364.

[52] In *Palm Beach Isles Assocs.*, 231 F.3d 1354 (2000), the Court of Appeals quotes the so called *Penn. Central* test set out by the Supreme Court in *Penn. Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), to determine whether or not a regulatory taking had occurred. The factors are 1) whether there was a denial of economically valuable use of the property as a result of the regulation 2) whether there was investment backed expectations and 3) whether there was a proper balance between private rights and public need. *Palm Beach Isles*, 231 F.3d at 1358 (quoting *Penn. Central Transportation Co.*, 438 U.S. 104).

second prong of a non-categorical regulatory takings inquiry – whether Rith had a reasonable investment-backed expectation that it would not be subject to such restraints when it acquired the coal leases from the government.[53] The Court of Appeals observed that SMCRA had already been in effect for eight years at the time Rith purchased the leases from the federal government and that the leases had contained provisions warning Rith about the uncertainties of obtaining the mining permits that were necessary to remove the coal.[54] In effect, the court held Rith to a "should have known" standard by asserting that even if Rith could prove that it had no actual knowledge that it would not be able to obtain a permit to mine the site if AMD would result, it had constructive knowledge as a participant in the coal mining business.[55] Thus, Rith assumed the risk of economic loss for not thoroughly examining the property.[56]

In the end, the Court of Appeals for the Federal Circuit achieved the same result without revisiting the nuisance ruling of the Court of Claims. However, while stating that "[they] need not reach the question whether Rith's mining activities would have been prohibited by Tennessee nuisance law," the court hinted that had it chosen to do so it could have upheld the decision based on this line of reasoning.[57] The court went on to say:

> [SMCRA]'s provisions include environmental performance standards that directly address acid mine drainage and make clear that surface mining will not be permitted unless the permittee minimizes the 'disturbances to the prevailing hydrologic balance at the mine-site and in associated offsite areas and to the quality and quantity of water in surface and ground water systems ... by avoiding acid or other toxic mine drainage...'[58]

The court stated that, "Rith could not reasonably have expected that it would be free from regulatory oversight with regard

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[53] *Rith III*, 247 F.3d at 1364.
[54] *Id.* at 1364.
[55] *Id.*
[56] *Id.*
[57] *Id.* at 1362.
[58] *Id.* at 1364 (quoting 30 U.S.C. § 1265(b)(10)).

to the potential for acid mine drainage...."[59] Also, as the court had previously stated in *M&J Coal Co. v. United States*,[60] at the time Rith acquired its mining rights, "[i]t knew or should have known that it would not be able to mine in such a way as to endanger public health or safety and that any state authorization it may have received was subordinate to the national standards that were established by SMCRA and enforced by OSM."[61]

Why the Court of Appeals decided to ignore the nuisance issue and focus on Rith's "reasonable expectations" is unclear.[62] It could be that it was anticipating the Supreme Court's decision in *Palazzo v. Rhode Island*,[63] which was handed down two months after *Rith III*.[64] In *Palazzo*, Justice O'Connor writing for the five-justice majority reiterated that among the factors to be considered is the regulation's "interference with reasonable investment backed expectations."[65] Rith's main argument in its petition for rehearing is that after *Palazzo*, "[t]he mere fact that an owner bought after a regulatory scheme was passed cannot defeat a partial takings claim."[66] However, this was seen by the circuit court as reading too much into *Palazzo*: "In rejecting a 'blanket rule,' however, the Court did not suggest that the reasonable expectations of persons in a highly regulated industry are not relevant to determining whether particular regulatory action constitutes a taking."[67] Despite the court's focus on Rith's "reasonable investment backed expectations," in *Rith IV*, the Court of Appeals again seemed to leave the door open to the nuisance analysis used by the District Court in *Rith I* when it said:

> With respect to the nature of the governmental action, the revocation of the permit, as we sug-

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[59]*Rith III*, 247 F.3d at 1364.

[60]M&J Coal Co. v. United States, 47 F.3d 1148, 1154 (Fed. Cir. 1995).

[61]*Rith III*, 247 F.3d at 1364 (quoting M&J Coal Co. v. United States, 47 F.3d at 1154).

[62]Benjamin, *supra* note 25. Benjamin hypothesizes that perhaps the court wanted to answer the question of contractual obligations on the part of the federal government. "Once a vested right is procured by a landowner on the basis of government action, a contractual obligation is created between the government entity and that landowner, thereby affording the landowner the realization of a clear, protected legal interest. A contractual obligation cannot be wiped out without paying just compensation toward the landowner who reasonably relied on that contractual obligation." *Id.* at 884.

[63]Palazzo v. Rhode Island, 533 U.S. 606 (2001).

[64]See Rith v. United States, 270 F.3d 1347, 1350 (Fed. Cir. 2001) [hereinafter *Rith IV*].

[65]*Id.* at 1350-51 (quoting *Palazzo*, 533 U.S. at 606).

[66]*Rith IV*, 247 F.3d at 1350.

[67]*Id.* at 1350.

> gested earlier, was an exercise of the police power directed at protecting the safety, health, and welfare of the communities surrounding the Rith mine site by preventing harmful runoff. The exercise of the police power to address that kind of general public welfare concern is the type of government action that has typically been regarded as not requiring compensation for the burdens it imposes on private parties who are affected by the regulations.[68]

The importance of this language is that although the Federal Circuit chose to base its decision on an objective analysis of Rith's reasonable expectations when it purchased the coal lease from the federal government, potential litigators should not ignore the use of state nuisance law to stop mining that is potentially hazardous to the environment.

IV. TO THE EXTENT THAT RITH BASED ITS TAKINGS CLAIM ON THE DENIAL OF A PERMIT BY OSM, IT MUST FAIL, SINCE A PLAINTIFF CANNOT USE TAKINGS LAW TO SIDESTEP THE CONGRESSIONALLY MANDATED ADMINISTRATIVE REVIEW PROCEEDING

In reality, at the heart of *Rith III* was a collateral attack by the coal company on the lawfulness of OSM's rejection of its toxic materials handling plan; however, the Federal Circuit rejected this challenge saying that the issue was not properly before them.[69] Under Rith's theory, the taking occurred co-extensively with the allegedly incorrect decision by OSM to deny them a permit to mine the seams.[70] Attempting to use the court's analysis in *Del-Rio Drilling Programs, Inc. v. United States*[71] to challenge OSM's decision, Rith argued that it was entitled to a review of the administrative decision on the grounds that the decision itself resulted in the, taking and thus was properly at issue before the Federal Circuit.[72] While *Del-Rio* did state that a plaintiff need not be successful on the challenge to the administrative decision to succeed in a takings action, the plaintiff in that case was not merely seeking to

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[68] *Id.* at 1352.

[69] *Rith III*, 247 F.3d 1355, 1365 (Fed. Cir. 2001).

[70] Laguna Gatuna, Inc. v. United States, 50 Fed. Cl. 336, 342 (Fed.Cl. 2001)(citing *Rith III*, 247 F.3d at 1355)).

[71] Del-Rio Drilling Programs, Inc. v. United States, 146 F.3d 1358 (Fed. Cir. 1998).

[72] *See Rith III*, 247 F.3d at 1365-66.

challenge an administrative decision as Rith was attempting to do.[73] Instead, the plaintiff in *Del-Rio* was asserting that the government action was wrong regardless of the lawfulness of the administrative proceedings.[74] Rith, on the other hand, was trying to say that it should prevail on its takings claim precisely *because* the agency acted in violation of the statute or regulation.[75]

As previously mentioned, at the initiation of its original lawsuit in Tennessee District Court, Rith had filed a challenge to the administrative decision by OSM, but then moved for voluntary dismissal of the claim, which was granted with prejudice.[76] Having not litigated OSM's decision through the proper administrative channels specified by Congress in SMCRA, the Federal Circuit refused to allow Rith to renew this challenge through the subterfuge of a takings claim in the Court of Federal Claims.[77] The effect of this denial was to require that any takings argument made by Rith before the circuit accept the action by OSM as proper and lawful.[78] This in effect doomed any case for Rith since the Circuit Court noted that the company did not have a reasonable investment-backed expectation that it would be permitted to mine while producing acid mine discharge in violation of SMCRA. Therefore, Rith's takings claim had to fail.[79]

V. CONCLUSION

Perhaps the most important lesson to be taken away from the *Rith* case is that multiple avenues of reasoning exist that allow a court to arrive at a just decision in a regulatory takings case. As James Reginald Benjamin, Jr. remarked in his study of state nuisance law, the final decision by the Court of Appeals in *Rith III,* based on the "reasonable expectations" of the landowner, seems to represent a middle ground between the competing interests of the needs of the community as represented by the government, and the private property rights guaranteed by the Takings Clause of the Fifth Amendment.[80] First, the Court of Appeals impliedly recognized the common law nuisance doctrine as interpreted by *Lucas*[81]

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[73] *See* Del-Rio Drilling Programs, Inc., 146 F.3d at 1358.
[74] *Id.*
[75] *Rith III*, 247 F.3d at 1366.
[76] *Id.* at 1360.
[77] *Id.* at 1366.
[78] *Id.*
[79] *Id.*
[80] *See generally* Benjamin, *supra* note 25.
[81] *See* Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992).

when it stated that "reasonable expectations of landowners," or in Rith's case, a lessee, cannot include expectations that they will be able to exploit their land in a way that causes damage to their neighbors or the community at large.[82] This interpretation allowed the court to severely restrict the obvious attempt by Rith to obtain a windfall from the federal government through a takings claim when mining operations in an area would have presented a human hazard and a hazard to the environment.

Second, the court analyzed the takings claim from the date of the lease rather than the date of the alleged taking. Thus, the court took into account the substantial profits that Rith made on the coal that it was able to mine before it received the cessation order from OSM when determining whether the taking was categorical and, therefore, compensable.[83] This line of reasoning again protects the government and taxpayers from companies that may receive a windfall when government regulation diminishes their anticipated profit-margin.[84] In order to achieve this end, the court again looked at Rith's "reasonable expectations" and decided that an objectively reasonable coal operator in Rith's situation, as a member of the most regulated industry in the United States,[85] could not have believed they would be able to mine absent a satisfactory handling plan for acid mine drainage.[86] Therefore, at a minimum, Rith could be said to have had constructive knowledge that government regulations could injure its profits on the Sewanee lease job or destroy them altogether.[87] The court's "reasonable expectations" interpretation also remained safely within the bounds of *Palazzo*:[88] although the Supreme Court rejected a blanket rule negating takings claims when the plaintiff had constructive notice of an applicable regulatory scheme, the case did not say that upon notice, an analysis of the person's "reasonable expectations" was irrelevant.[89]

Finally, *Rith III* made it clear to potential plaintiffs that the Federal Circuit will view attempts to skirt congressionally mandated administrative review processes through the disguise of a regulatory takings claim with a jaundiced eye.[90] The Court of Ap-

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[82]*See generally Rith III*, 247 F.3d 1355, 1365-66 (Fed. Cir. 2001).
[83]*Id.* at 1360.
[84]*Id.*
[85]*See generally* Bosselman, *supra* note 5.
[86]*Rith III*, 247 F.3d at 1364.
[87]*Id.*
[88]Palazzo v. Rhode Island, 533 U.S. 606 (2001).
[89]*Rith IV*, 270 F.3d 1347, 1350 (Fed. Cir. 2001).
[90]*Rith III*, 247 F.3d at 1364.

peals stated that although a taking might arise independently of the regulatory action by the federal agency, if a plaintiff intends to use this as the basis for his complaint, he must follow all the proper appeals procedures before seeking a forum in federal court.[91]

Although negative effects on the coal industry or the litigation process for regulatory takings claims do not appear on the face of the holding in *Rith III*, one could hypothesize that the case might have long-term negative effects on the coal industry, particularly in the eastern United States. In the past fifty years, there has been a dramatic decrease in the number of coal mines in the eastern United States, while the exact opposite has been seen in the western states like Wyoming and Montana.[92] This is due to the easier accessibility of coal in this area through surface mining.[93] These deposits are located in mostly uninhabited areas where environmental concerns such as AMD are of little or no concern.[94] The situation is exactly the opposite in eastern Tennessee, eastern Kentucky, and West Virginia, where reserves are often located in close proximity to people, as was the case in *Rith*, and therefore, present a potential hazard to the communities if improperly mined.[95]

By saying that a company cannot have "reasonable expectations" to mine where their actions would potentially harm communities, *Rith III* undoubtedly makes it more expensive to develop toxic waste handling plans and diminishes the certainty in investment for companies like Rith. This could cause mining operations to move, thereby increasing unemployment in one of the poorest regions of the country[96] and allowing huge amounts of natural resources to go to waste.[97] It also begs the question of whether the government gets a windfall because it both leases the reserves and is the parent of the agency that decides to issue or deny permits in some instances.[98]

Although the lease in *Rith* was cheaply priced and con-

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[91] *Id.*

[92] Bosselman, *supra* note 5 (stating that as of 2000, Wyoming and Montana contain 14% and 25% of accessible U.S. coal reserves respectively).

[93] *Id.*

[94] *Id.*

[95] *Id.*

[96] *Id.* at 236.

[97] *Rith III*, 247 F.3d 1355, 1360 (Fed. Cir. 2001). As previously mentioned, Rith mined only 35,700 tons of the estimated 250,000 tons of minable coal in the Sewanee stream. It made a profit of $14 per ton on this coal. If factored out, this means that over $3 million worth of coal was left unmined.

[98] Bosselman, *supra* note 5 (stating that as of 2000, Wyoming and Montana contain 14% and 25% of accessible U.S. coal reserves respectively).

tained clauses about being subject to the approval of a mine permit, the question becomes whether the denial of a permit by OSM effectively gives the United States government a $3,000,000 windfall in unmined coal reserves that might be exploited at some time in the future. Most coal leases are for a limited number of years, therefore, it is reasonable to assume that *Rith III* will make mining companies more timid in their purchases of eastern coal leases as the denial of a permit effectively takes their right to profit from the coal covered by the lease. Furthermore, the Court of Appeals' requirement that a company go through lengthy and expensive administrative appeals before having access to judicial courts gives little incentive to purchase such risky investments.[99]

As an alternative, perhaps those who wish to enter the coal business in the eastern United States should view *Rith III* as a word of warning from the Court of Appeals. If the government offers a profitable coal lease and the price seems too good to be true, investors should thoroughly research the potential environmental ramifications of mining the site before signing on the dotted line. There is a strong chance that they will never be permitted to break ground, and if this turns out to be the case, there will be no compensation for the regulatory action.

[99] *Rith III*, 247 F.3d at 135-66.