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COURT OF APPEALS OVERTURNS CONTROVERSIAL COAL MINING DECISION

(*Bragg v. Robertson*)

In a major victory for the Washington Legal Foundation (WLF), coal miners, and the coal industry, the United States Court of Appeals for the Fourth Circuit in Richmond, Virginia, overturned a federal district court decision last week that would have effectively banned not only all mountaintop coal mining, but also any other activity that would have even minimal environmental impacts in West Virginia.

The court based its decision on WLF's arguments that under the Eleventh Amendment, the State of West Virginia enjoys immunity from suits in federal court by its citizens unless that immunity is waived. The court also found that this suit did not come under any exceptions to this rule as enunciated by the Supreme Court in its 1908 *Ex parte Young* decision. The court of appeals concluded that if the plaintiffs wanted to challenge the legality of certain aspects of mountaintop coal mining, suit must be filed in state, not federal court.

Mountaintop coal mining involves blasting the surface of the mountain to expose the coal seams. After the coal is mined, the area is restored to its original contours. However, excess rock and dirt are carefully placed between the mountain in valley fills that necessarily involve minor disturbance to some intermittent and perennial streams. West Virginia's Director of Environmental Protection has interpreted its buffer zone rule regulating activity within 100 feet of streams in a way to allow such valley fills as long as water quality and other environmental values are protected.

Under the federal Surface Mining Control and Reclamation Act (SMCRA), West Virginia has been given exclusive jurisdiction to regulate mining activities under its state law. A Memorandum of Understanding (MOU) signed in the fall of 1999 by the Director, EPA, the U.S. Army Corps of Engineers, and the Department of Interior, acknowledged that valley fills are permitted as long as the impacts are minimized. Nevertheless, the district court ruled that *any* impact on *any* part of the stream is not permitted under West Virginia's buffer zone rule.

On appeal, the federal agencies abruptly switched their position on valley fills in a letter dated April 17, 2000 to the Director, agreeing with the district court and revoking the MOU. WLF argued in its brief filed on behalf of itself and the Allied Educational Foundation, that the district court lacked jurisdiction to even hear the case in the first place because 1) the citizen suit provision of SMCRA invoked by the plaintiffs only applies to *federal* law, not to the *state* buffer zone regulation, and 2) the Eleventh Amendment provides the states with immunity against citizen suits in federal courts seeking to enforce state law as opposed to federal law.

In ruling for WLF on the Eleventh Amendment issue, the court relied on recent Supreme Court jurisprudence in this area that bars citizens from suing their own state in federal court. Under SMCRA, state laws can be modeled after the federal mining law. But the fact remains that state law, not federal law, governs the mining activity. If the federal government believes that a state is not enforcing its own law in an appropriate manner, it can revoke that state's primacy status and enforce the federal mining law directly. However, until that action is taken, state law controls.

The unanimous opinion was written by Judge Niemeyer, and joined by Judges Luttig and Williams. The plaintiffs can either petition the court for a rehearing or seek review in the U.S. Supreme Court. WLF will continue to monitor the case for further legal proceedings.

This victory for WLF is also likely to have an effect on "citizen suit" enforcement actions involving other environmental laws where states are given primary authority to enforce state laws modeled after their federal counterpart.

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