

## **New Mexico Supreme Court Reinstates Regulatory Takings Claim against State Agencies Based on Mining Act Reclamation Program**

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After the passage of New Mexico's tough mine reclamation law, the 1993 Mining Act (1978 NMSA §§ 69-36-1, *et seq.*), Challenge Mining Company (Challenge) filed a lawsuit in which it asserted that the regulatory program under the Act effectively deprived Challenge of the ability to bring its mining facility back into operation from long-standing standby status. The trial court originally dismissed the case on ripeness grounds, the court finding that Challenge's difficulties pre-dated the regulatory regime. The court of appeals subsequently affirmed, but based its holding solely on sovereign immunity grounds. *See Manning v. Min. & Minerals Div. of the Energy, Minerals & Natural Res. Dept.*, 2004-NMCA-052, 135 N.M. 487, 90 P.3d 506. The New Mexico Supreme Court recently reversed and remanded for further proceedings. *Manning v. Min. & Minerals Div. of the N.M. Energy, Minerals & Natural Res. Dept.*, No. 28,500, 2006-NMSC-027, 2006 WL 1787124 (N.M. June 1, 2006).

In reinstating the claim, a majority of the court determined that the Takings Clause of the Fifth Amendment is self-executing as applied to the states, and that it "trumps" a state's sovereign immunity shield regardless of whether the state is exercising eminent domain power or regulating the use of land. The State of New Mexico had attempted to distinguish between those two forms of takings, arguing that while just compensation is allowed in the former, the State is entitled to sovereign immunity in the latter. The court rejected the State's posture as a "radical position that creates a paradox." According to the court: "A regulatory taking can be just as devastating to property rights as a taking by eminent domain, and the right of a landowner to compensation is just as central to the promise of the Bill of Rights in either instance."

In breathing new life into Challenge's claim, the court noted that it was not passing on the merits of that claim. Rather, it was concerned with the "broader question of whether [one] may even assert such a claim in state court." Whether Challenge will ultimately prevail on the merits of the case may not be known for several years. The *Manning* decision, however, combined with fact that no significant new or renewed mining operation has been permitted in New Mexico since the 1993 Mining Act was passed, may embolden others with mining interests in New Mexico to advance comparable regulatory takings challenges.