No. 01-1100

In the Supreme Court of the United States

EASTERN MINERALS INTERNATIONAL, INC., ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in holding that the Office of Surface Mining Reclamation and Enforcement did not unreasonably delay action in processing petitioners' permit application.

2. Whether, in a regulatory takings case, the holder of a mining leasehold interest may recover compensation for a period after it has voluntarily allowed the lease to expire.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 271 F.3d 1090. The opinions of the Court of Federal Claims (Pet. App. 16a-31a, 32a-50a) are reported at 36 Fed. Cl. 541 and 39 Fed. Cl. 621.

JURISDICTION

The judgment of the court of appeals was entered on November 19, 2001. The petition for a writ of certiorari was filed on January 25, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. 1201 *et seq.*, was intended, *inter alia*, to "establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations." 30 U.S.C. 1202(a). To achieve its goals, the Act relies on "a program of cooperative federalism that allows the States, within limits established by federal minimum standards, to enact and administer their own regulatory programs, structured to meet their own particular needs." *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 289 (1981). If a State covered by the Act fails to propose or implement a satisfactory program, the Act requires the Secretary of the Interior to promulgate and implement a federal regulatory program for that State that is designed to meet its particular needs. 30 U.S.C. 1254. Within the federal government, implementation of SMCRA is entrusted to the Office of Surface Mining Reclamation and Enforcement (OSM), an agency located within the Department of the Interior. 30 U.S.C. 1211 (1994 & Supp. V 1999).

Section 506 of SMCRA provides that no person may engage in surface coal mining operations without a permit from the appropriate regulatory authority. 30 U.S.C. 1256. The permitting program requires an applicant to provide detailed information about the possible environmental consequences of the proposed mine, as well as assurances that damage to the site will be substantially repaired after mining has come to an end. See, *e.g.*, 30 U.S.C. 1257, 1260, 1265. An applicant with outstanding environmental violations is barred from receiving a permit until OSM receives assurances that the violations have been cured or that they are

being cured to the satisfaction of the pertinent regulatory agency. 30 U.S.C. 1260(c). In addition, SMCRA completely bars mining within 300 feet of any public park, see 30 U.S.C. 1272(e)(5), as well as in locations beyond 300 feet where the mining activities would adversely affect a public park, unless the agency with jurisdiction over the park approves the mining plan. See 30 U.S.C. 1272(e)(3).

2. The property at issue in this case is adjacent to Fall Creek Falls State Park in southeastern Tennessee, Pet. App. 4a, which was described by a Tennessee official in trial testimony as "probably the focal point of our State Park System," C.A. App. 264. Petitioners Wilson W. Wyatt, Sr., and Anne Wyatt purchased the property in 1953. Pet. App. 16a. They sold the property in 1979 to Cane Co., Ltd. (Cane), but retained a 3.5% royalty interest in the minerals. *Id.* at 4a, 16a-17a. The day following that sale, petitioner Eastern Minerals International, Inc. (EMI), entered into a lease with Cane that allowed EMI to mine coal on the property in question. *Id.* at 4a, 17a; C.A. App. 506-516. The lease ran until February 28, 1991, and allowed EMI to renew for up to four additional ten-year periods, provided it gave Cane 180 days' notice prior to the lease's expiration. Pet. App. 5a, 17a; C.A. App. 512-513. EMI was in financial difficulties for nearly the entire period of the lease: it borrowed a total of $300,000 from Wilson Wyatt, Sr., none of which was ever repaid, and it paid no rent to Cane after early 1980. *Id.* at 113-114.[1]

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[1] EMI was also in nearly constant debt to its consultant, MCI Consulting Engineers, Inc. (MCI); on several occasions MCI stopped or threatened to stop work for EMI because of its past due account. See C.A. App. 119, 124, 136, 252, 522-523, 524-525, 527-528, 572-573, 603-604. EMI was also in arrears to other contractors and equipment providers, see, *e.g.*, *id.* at 600, and its insurance was

In 1980, the State of Tennessee issued EMI a one-year permit under its interim regulatory program,[2] giving the company permission to disturb a small portion of the property. Pet. App. 5a, 17a. EMI excavated a box cut at the edge of the property, slightly more than 300 feet from the boundary of the Fall Creek Falls State Park. *Id.* at 5a.[3] On June 18, 1981, four months after the permit expired, EMI applied for and received a second one-year permit from the appropriate state agency. *Ibid.* That permit lapsed as well, and EMI applied for a third permit, this time under the State's newly-approved permanent SMCRA program. *Ibid.* The State rejected that application in 1984 based on EMI's failure adequately to address noise, water quality, and subsidence issues, as well as past violations by EMI's sole shareholder, petitioner Milton Bernos. *Id.* at 5a & n.3.

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canceled for nonpayment of premiums, see *id.* at 137, 607-608. Those significant financial difficulties cast serious doubt on whether EMI could successfully have implemented its mining plan even if an OSM permit had been granted.

[2] During the initial regulatory phase under SMCRA, States could issue surface mining permits, but only in compliance with interim federal standards. Following approval by OSM, States could adopt permanent permitting programs, subject to federal oversight. Pet. App. 3a-4a.

[3] EMI chose that location (which was just outside the 300 foot radius within which mining is absolutely barred, see 30 U.S.C. 1272(e)(5)) even though a consultant recommended that "the present planned location of the box cut entries should be changed to a more central location in relation to the property boundaries and the underlying reserves." C.A. App. 505. The consultant explained that "[n]ot only should operating economics result, but the process of permit granting should be both eased and speeded up." *Ibid.*

3. Later in 1984, OSM revoked Tennessee's regulatory authority under SMCRA and assumed control of the program. Pet. App. 6a. In October 1984, EMI applied to OSM for a five-year permit to extract approximately 4600 acres of coal from the location of the box cut near the state park. *Ibid.*; C.A. App. 557. After EMI corrected certain administrative defects, its application was deemed administratively complete and ready for technical review on March 15, 1985. *Id.* at 560; see Pet. App. 6a. On May 30, 1985, OSM issued EMI a technical deficiency letter (TDL) that outlined various concerns about the possible environmental impacts of the proposed mining activities and requested additional information about those effects. *Id.* at 6a; C.A. App. 577-580. EMI's response "included little of the information requested by OSM." Pet. App. 6a. "On December 12, 1985, OSM issued another TDL requiring specific information to satisfy the hydrologic and environmental impact requirements of the Act." *Ibid.* In response, EMI applied for financial assistance from the Small Operator Assistance Program (SOAP) to perform studies to collect the requested information. *Id.* at 7a-8a, 13a-14a.[4]

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[4] SOAP could not have provided technical assistance with respect to many of the concerns identified in the May 1985 and December 1985 TDLs, including the potential impacts of mining on water quality, hunting and fishing activities, and noise levels in the state park. See 30 U.S.C. 1257(c); 30 C.F.R. Pt. 795; C.A. App. 577-580, 609-615. And the possibility of SOAP funding in no way relieved EMI of the responsibility for demonstrating that the requirements of SMCRA had been met. See 30 U.S.C. 1257(b), 1260(b); C.A. App. 33, 295. At the time of EMI's application, moreover, SOAP funding was available only to operators who intended to mine less than 100,000 tons of coal per year. 30 C.F.R. 795.6 (1987). Although EMI stated in its SOAP application that it intended to mine less than 100,000 tons of coal per year, C.A. App.

In July 1986, OSM denied EMI's permit application, finding that the mine would adversely impact the park by causing excessive noise and possible adverse hydrological consequences. Pet. App. 7a. EMI appealed to an administrative law judge (ALJ), who asked the parties to work together to develop the information needed for OSM's hydrological assessment. *Ibid.* "On February 1, 1988, OSM submitted a revised TDL to EMI outlining the information it still required." *Ibid.* EMI again failed to provide the requested information and instead reapplied for SOAP funding. *Ibid.*

In August 1990, EMI chose not to exercise its option to renew its lease on the property, and the lease expired on February 28, 1991. Pet. App. 7a-8a. EMI nevertheless continued to request issuance of the permit, without informing OSM that it no longer held an interest in the property and therefore had no right to mine the land. See *id.* at 8a, 11a. On April 13, 1994, after continued efforts to obtain information from EMI proved unsuccessful, OSM denied EMI's permit application. *Id.* at 8a.

4. On December 29, 1994, petitioners filed suit in the United States Court of Federal Claims (CFC), alleging that "extraordinary delay" by OSM had caused a permanent taking of petitioners' leasehold interests. Pet. App. 8a. After a trial, the CFC held that petitioners EMI, Wilson W. Wyatt, Sr., and Anne D. Wyatt had suffered a compensable permanent taking. *Id.* at 16a-31a.[5]

617, other documents reflect the company's intent to mine an average of more than 600,000 tons per year, see *id.* at 520, 557.

[5] The CFC dismissed the claims of the other petitioners for various jurisdictional reasons. See Pet. App. 21a-23a.

The CFC stated that "[e]xtraordinary government delay may result in a constructive permit denial," and that a claimant may "satisfy the economic impact prong [of takings analysis] where a delay is truly extraordinary." Pet. App. 26a. The court found that "[t]he Government delayed consideration of [petitioners'] permit application for an extraordinary length of time." *Id.* at 28a. The CFC also held that OSM's delay had interfered with petitioners' reasonable investment-backed expectations because "[e]vidence at trial showed that [petitioners] were not unreasonable in expecting that the subject land contained coal and that coal exploration would be profitable. [Petitioners'] investment in the box cut and other activities with the expectation of gaining profit was reasonable." *Id.* at 29a-30a. The court ultimately awarded $9,961,393 to petitioner EMI and $3,743,766 to the Wyatt petitioners. *Id.* at 51a.

5. The court of appeals reversed. Pet. App. 1a-15a.

a. The court of appeals first held that, even if EMI could establish a valid takings claim, it would be entitled to compensation only for the period before February 28, 1991, the date that it voluntarily allowed its leasehold interest to expire. Pet. App. 9a-11a. As of that date, the court explained, "EMI possessed no valid property interest from which it could assert a takings claim." *Id.* at 10a. The court acknowledged that "the futility exception may sometimes excuse a property owner from submitting multiple applications when the manner in which the first application was rejected makes it clear that no project will be approved." *Ibid.* (internal quotation marks omitted). The court held, however, that "the futility exception can never excuse the prerequisite that there exist a valid property interest for all takings cases." *Ibid.* The court concluded:

> If EMI had renewed its lease, it may have been able to assert a permanent taking of its leasehold interest to mine the Cane property. However, we cannot allow the voluntary relinquishment of a property interest to transform a temporary taking into a permanent taking. Moreover, although EMI continued to pursue the permit application, it never informed OSM that it had relinquished its leasehold interest. Had OSM been aware of this fact, it would have been required to deny immediately the permit application because EMI no longer had a right of access to mine the property. For this reason, EMI cannot legally assert a permanent takings claim subsequent to February 28, 1991.

Id. at 10a-11a.

b. With respect to the period before February 28, 1991, the court of appeals stated that in some circumstances "a taking may occur by reason of 'extraordinary delay in governmental decisionmaking.'" Pet. App. 12a (quoting *Tabb Lakes, Ltd.* v. *United States*, 10 F.3d 796, 803 (Fed. Cir. 1993)). The court cautioned, however, that "delay is inherent in complex regulatory permitting schemes," *ibid.*, and that "[g]overnmental agencies that implement complex permitting schemes should be afforded significant deference in determining what additional information is required to satisfy statutorily imposed obligations," *id.* at 12a-13a. The court also observed that "delay in the permitting process may be attributable to the applicant as well as the government." *Id.* at 13a.

After a detailed review of the interaction between EMI and OSM, Pet. App. 13a-14a, the court of appeals concluded that up to February 28, 1991, "the record does not support a finding that there was 'extra-

ordinary' government delay," *id.* at 14a. The court reiterated that it "must afford OSM significant deference in determining the extent of information necessary for a complete hydrogeologic report." *Id.* at 14a-15a. The court also found that "much of the delay through 1991 was caused by the failure of EMI to respond to OSM's requests for information, and the appellate process before the ALJ," and it observed that "the trial court's finding of bad faith delay on the part of OSM throughout the entire permitting process is inadequately supported." *Id.* at 15a. The court concluded that petitioners had "failed to establish the requisite showing of extraordinary government delay to constitute a temporary taking prior to February 28, 1991. Any finding by the trial court to the contrary is clearly erroneous." *Ibid.*

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or of any other court of appeals. Nor does the petition raise any question of widespread or recurring significance. Further review is not warranted.

A. Although the court of appeals recognized that "a taking may occur by reason of extraordinary delay in governmental decisionmaking," Pet. App. 12a (internal quotation marks omitted), it found that petitioners had failed to establish the existence of any extraordinary delay during the period before February 28, 1991, when petitioner EMI voluntarily allowed its leasehold interest to expire. Petitioners contend that the court of appeals, in reaching that conclusion, applied an incorrect standard of review to the CFC's factual findings (Pet. 17-19), and that the court of appeals "has legiti-

mized dilatory tactics" on the part of OSM (Pet. 20). Those claims lack merit.

The court of appeals began its analysis by explaining that "[i]n reviewing the judgments of the [CFC], this court examines findings of fact for clear error and reviews legal conclusions completely and independently. Whether or not a taking has occurred is a question of law based on factual underpinnings." Pet. App. 9a (citations omitted). Petitioners do not and cannot dispute that articulation of the governing standard of review. The court of appeals' disagreement with the CFC centered not on the trial court's findings of historical facts, but on the legal significance of various aspects of the trial record—and, in particular, on the reasonableness of OSM's requests for additional information that the agency deemed relevant in considering EMI's permit application. In any event, the court's ultimate conclusion was that petitioners had "failed to establish the requisite showing of extraordinary government delay to constitute a temporary taking prior to February 28, 1991. *Any finding by the trial court to the contrary is clearly erroneous*." *Id.* at 15a (emphasis added).

The court of appeals reached that conclusion based on careful examination of the course of dealings between EMI and OSM. See Pet. App. 13a-14a. The court also recognized that "[g]overnmental agencies that implement complex permitting schemes should be afforded significant deference in determining what additional information is required to satisfy statutorily imposed obligations," *id.* at 12a-13a—a principle that petitioners do not contest. Petitioners simply challenge the court of appeals' application of settled legal principles to the record in this case. That factbound challenge does not warrant this Court's review.

Petitioners also contend (Pet. 16) that in resolving the question of extraordinary delay, the court of appeals "completely ignored the issue of unfair agency procedures." The court of appeals recognized, however, that "[t]he length of the delay is not necessarily the primary factor to be considered when determining whether there is extraordinary government delay," and it observed that a reviewing court "must examine the nature of the permitting process as well as the reason for any delay." Pet. App. 12a. Although the court of appeals did not recite the phrase "repetitive or unfair land-use procedures," Pet. 15 (quoting *Palazzolo* v. *Rhode Island*, 533 U.S. 606, 620 (2001)), its opinion clearly reflects the court's conclusion that the procedures employed here were reasonable in light of the issues to be resolved and the difficulties in securing EMI's cooperation. See Pet. App. 13a-15a.

Finally, petitioners suggest (Pet. 20) that the eight-year interval between EMI's 1982 permit application and EMI's decision to allow its leasehold interest to expire is sufficient in and of itself to establish that OSM's delay was "extraordinary" and that the agency has employed "dilatory tactics."[6] That argument is

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[6] Petitioners' assertion (Pet. 16-17) that EMI's 1982 application was for a "permit renewal" under 30 U.S.C. 1256 is incorrect. Section 1256(d)(3) provides that "[a]pplication for a permit renewal shall be made at least one hundred and twenty days prior to the expiration of the valid permit." EMI's second one-year permit had already expired on September 13, 1982, when it applied for its third permit on October 10, 1982. C.A. App. 1183. The United States submitted interrogatory responses in this litigation stating that in 1982 petitioner Bernos had applied on behalf of EMI for a "renewal" of the earlier permit. See *id.* at 1425, 1434. Contrary to petitioners' suggestion (Pet. 17 n.9), however, the government's acknowledgment that Bernos had captioned the 1982 application as one for a "renewal" does not constitute a concession by the govern-

without merit. In the first place, EMI's 1982 application was submitted to the state agency that was then responsible for administering the SMCRA program in Tennessee, and that agency denied the application in 1984. Later in 1984, OSM revoked Tennessee's authority to administer SMCRA in the State, and EMI then submitted an application to OSM in October 1984. OSM acted on that application in July 1986, and EMI then appealed to an ALJ. EMI still had not, however, submitted all of the relevant data, and the ALJ oversaw an arrangement to address that problem. See pp. 4-6, *supra*. Those affirmative steps to address defects in EMI's submissions do not constitute unreasonable delay.

In any event, nothing in this Court's decisions suggests that delay of a particular duration effects a taking per se, without regard to the complexity of the permitting agency's task and the degree to which the applicant itself contributes to the delay. Cf. *Palazzolo*, 533 U.S. at 636 (O'Connor, J., concurring) ("The temptation [in takings cases] to adopt what amount to *per se* rules in either direction must be resisted."). Such a rule is unsupported by precedent and would create perverse incentives for permit applicants to prolong land-use agencies' decisionmaking processes (*e.g.*, by responding to requests for necessary information in a dilatory or incomplete manner) in order to subject the government to takings liability.

B. Neither of the final agency actions regarding the propriety of mining on the subject property—*i.e.*, OSM's initial denial of EM's permit application in 1986 and the subsequent denial in 1994—could have provided

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ment that the application was in fact for a "permit renewal" within the meaning of Section 1256.

the basis for petitioners' taking claims. Petitioners' suit was filed more than six years after the 1986 permit denial, and any claim based on that agency action would have been barred by the applicable statute of limitations. See 28 U.S.C. 2501. Petitioners could not have asserted a takings claim based on the 1994 permit denial because petitioner EMI no longer held an interest in the property at that time, see Pet. App. 7a-8a, and the claims of the other petitioners are derivative of EMI's, see note 7, *infra*. Petitioners were therefore forced to rely on a theory of "extraordinary delay." Petitioners contend (Pet. 13-14) that OSM had reached a definite decision not to grant a permit, and that their pending application had therefore become futile, before their right to renew the lease expired. But while the CFC appeared to adopt that view, see Pet. App. 28a, 36a-37a, the court of appeals held that "the trial court's finding of bad faith delay on the part of OSM throughout the entire permitting process is inadequately supported." *Id.* at 15a.

In Part III.A. of its opinion, the court of appeals held that any taking EMI might have suffered would have been temporary rather than permanent in character. Pet. App. 9a-11a. The court explained that "EMI voluntarily chose not to renew its leasehold interest in August of 1990. Thus, as of February 28, 1991, EMI possessed no valid property interest from which it could assert a takings claim." *Id.* at 10a. The court concluded that it "[could not] allow the voluntary relinquishment of a property interest to transform a temporary taking into a permanent taking." *Ibid.* Relying principally on *United States* v. *Petty Motor Co.*, 327 U.S. 372 (1946), petitioners contend that "if there was a taking of [EMI's] Leasehold interest by August 31, 1990, [EMI] was entitled to compensation for its remaining lease

term *and the right to renew*." Pet. 12 (emphasis added). That argument is misconceived.

In *Petty Motor Co.*, the government exercised its power of eminent domain in November 1942 to oust a private tenant in order to allow the government to occupy and use real property for its own purposes. 327 U.S. at 374. At that time, "[t]he Petty Motor Company held a lease which expired October 31, 1943, with an option for an additional year." *Id.* at 375. The Court held that in computing the just compensation owed to the tenant, "[t]he value of the remainder of the term of the [tenant's] lease includes the value of the right to a renewal for a year, if such right continues under Utah law, as well as the value of the period ending October 31, 1943." *Id.* at 380-381. In the present case, however, the expiration of EMI's lease resulted not from a government condemnation action, but from EMI's *voluntary* relinquishment of its interest in the property. Petitioners cite no case that has applied *Petty Motor Co.* to award compensation for restrictions on the use of property that the claimant has voluntarily abandoned.

In any event, Part III.A. of the court of appeals' opinion (Pet. App. 9a-11a) is not essential to the court's disposition of the case. The determination whether EMI's voluntary relinquishment of its leasehold interest bars petitioners from establishing a permanent taking would be relevant only in determining the *amount* of compensation to which petitioners would be entitled *if* they could prove that a compensable taking occurred before the lease expired. Under any plausible theory of the case, EMI must prove that a taking occurred while the lease was in effect in order to obtain a just compensation award. Petitioners do not contest that proposition; they simply assert that "*if there was a*

taking of [EMI's] Leasehold interest by August 31, 1990, [EMI] was entitled to compensation for its remaining lease term and the right to renew." Pet. 12 (emphasis added).[7] Because the court of appeals correctly held that petitioners had not established that a taking occurred before February 28, 1991, and because that holding raises no legal issue of general importance warranting this Court's review, the court of appeals' conclusion that petitioners would not in any event be entitled to compensation beyond that date has no practical effect on the judgment in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 2002

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[7] Petitioners contend that the court of appeals failed adequately to explain its determination that the claims of the Wyatt petitioners should be dismissed, and they suggest that some of those petitioners could obtain compensation as a result of the final denial of EMI's permit application in 1994. See Pet. 14-15. The property that the Wyatt petitioners allege was taken, however, consisted entirely of their share of the royalties that might have been earned if EMI had been permitted to mine the land. The Wyatt petitioners' takings claims are therefore wholly derivative of EMI's and fail for the reasons stated in the court of appeals' opinion.