Haden’s 1999 coal ruling took many by surprise

BY RUDY ABRAMSON
For the Sunday Gazette-Mail

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In the coal business, lawsuits are as common as roof falls and black lung disease. They’re part of doing business.

At first blush, the West Virginia coal industry took the lawsuit styled Bragg v. Robertson as just another nuisance, more trouble-making by misty-eyed tree huggers and coalfield malcontents egged on by liberal agitators, the press and a few lawyers. Named for a combative young woman from Pigeon Creek in Mingo County and a colonel of the U.S. Army Corps of Engineers, the suit filed in July 1998 was notable mainly because it was so obviously quixotic. In effect, it was a bid to stop mountaintop removal, the most efficient and most profitable (not to mention the most destructive) coal mining technology ever seen in Appalachia.

But rather than suing the coal companies, the plaintiffs in Bragg v. Robertson had gone after the West Virginia Department of Environmental Protection and the U.S. Army Corps of Engineers, accusing the agencies of failing to enforce state and federal regulations. Though the industry was the real target, it was so long and so thoroughly inured to lawsuits that nobody was rattled.

It was of some interest, though, that the plaintiffs - the West Virginia Highlands Conservancy, Patricia Bragg and nine other residents of the coalfields - had a more than ordinary team of lawyers. Besides Joseph M. Lovett, a Charleston youngster handling his first case, and long-time environmental lawyers Patrick McGinley and Suzanne Weise, they had the services of the national public interest law firm, Trial Lawyers for Public Justice, which had financial wherewithal not ordinarily available to coalfield plaintiffs.

The good news, or so thought the lawyers for the state and federal government defendants, was that the case would be heard by Charles H. Haden II, chief judge of the U.S. District Court in Charleston.

The 61-year-old Haden was West Virginia born, bred, and educated. A Republican, he had served in the Legislature and the governor’s Cabinet, and he had never lived beyond West Virginia’s borders. His friends knew him as a man with a love of history, a passionate devotion to his home state, and a reverence for the law. But after more than two decades on the federal bench, he was thought of as a “strict constructionist,” and coal industry executives and lobbyists, some of whom referred to him as “Chuck,” found his assignment to the case reassuring. Environmentalists, on the other hand, would have preferred to take their chances with one of Haden’s Southern West Virginia colleagues. But when Cindy Rank, chairwoman of the Highland Conservancy’s mining committee, discussed her concerns with one of Haden’s longtime friends, she was told, “this may be the best shot you will ever get.”

Four years after the filing of Bragg, the West Virginia struggle over mountaintop removal continues. The judge whom the coal industry considered dependable and sympathetic has become a hero to the state’s coal industry critics and the central figure in the bitterest environmental debate in the state’s history.

Not since the late U.S. District Judge Frank Johnson desegregated Alabama buses and schools and opened state voting booths to African-Americans in the 1950s and ’60s has a federal judge confronted the political and economic powers of his native state more conspicuously.

In October 1999, 15 months after Bragg v. Robertson sought to prevent the state and federal governments from approving a 3,000-
acre mountaintop removal project that would have buried about four miles of streams in hollows at Blair, Haden ruled that the rock and dirt stripped off mountain tops to expose coal seams could not be dumped into perennial or intermittent streams in the hollows below.

Coming after many of the suit’s major issues had been settled, the ruling hit the industry like a mine roof collapse. Then-Gov. Cecil Underwood, a former coal company executive, called it a potential death sentence for coal mining and froze state spending.

The majority of West Virginia coal still comes from underground mines, but mountaintop removal has become the prevalent mode of surface mining. Many critics of the industry now believe its grand strategy is to depopulate the Southern West Virginia coalfields, where valuable low sulfur deposits are accessible from mountain and ridge tops. The development of gigantic earth-moving machinery during the '60s and '70s has made it feasible to remove entire mountain tops, stripping away the rock and soil covering successive layers of coal. Rather than recovering 50 percent of seam as do old-fashioned shaft mines, mountaintop mines using drag lines, power shovels, and bulldozers get nearly 100 percent of each seam attacked from above. In the process, millions of tons of rock and dirt are pushed and dumped over the side into adjacent hollows.

In 1995, the Highland Conservancy’s Cindy Rank was already warning that hundreds of miles of streams had been buried, with the full knowledge of state environmental regulators.

Two years later, U.S. News & World Report published an expose predicting that half the mountain peaks across a swath of Southern West Virginia would be gone in 20 years. Photographs published with the article created a sensation. The pictures led James Weekley, a disabled miner whose home sat in a hollow below the proposed Spruce Mine, to seek help from Joe Lovett.

Arch Coal Company had by then mined on a ridge above Blair for six years, reducing peaks by hundreds of feet. The dust, blasting, and night-and-day noise from the Dal-Tex mine had driven away most of the community’s residents and businesses, some after accepting settlements and promising to leave the area.

With the seams exhausted in the Dal-Tex Mine, Arch planned to move across the hollow and open Spruce Mine on the adjacent ridge, where it expected to remove $2 billion worth of coal over about 15 years.

Haden’s ruling blocked approval of the new mine and set off an uproar that reached the floor of the U.S. Senate and possibly tipped the 2000 West Virginia election, to George W. Bush. Sen. Robert C. Byrd, D-W.Va., tried to overturn the decision. Like Underwood, Byrd warned darkly of an end to the West Virginia coal industry. Others likened Haden to Hitler, denouncing him from the steps of the state capital and harassing him with convoys of coal trucks circling the federal courthouse with air horns blaring.

Eventually, his decision was overturned by the U.S. Fourth Circuit Court of Appeals, on grounds that the Eleventh Amendment prevented the West Virginia plaintiffs from using federal courts to force state enforcement of mining regulations.

In other words, the case had been beyond Haden’s jurisdiction, the court said. The issue, the Fourth Circuit said, belonged in state courts. The ruling from the famously conservative appellate panel was appealed.

In January of this year, Bragg v. Robertson finally came to an end when the U.S. Supreme Court, without comment, declined to review it, opening the way for approval of new mountaintop removal projects, including the giant Spruce Mine, which was already under a new review.

But the Supreme Court’s refusal to consider Bragg was not to be the last word. The substantive issues raised by the case remained unresolved, and even as Bragg was unsuccessfully seeking a hearing before the high court, the mountaintop removal fight had come to Haden once more. Just across the Big Sandy River in eastern Kentucky, Martin County Coal Corp. planned a mine that would dump rock and dirt in the headwaters of 27 hollows and cover about six miles of streams. The state’s largest environmental organization, Kentuckians for the Commonwealth, sued to prevent the Corps of Engineers from granting the permit required by the Federal Clean Water Act. But rather than filing its case in U.S. District Court in Kentucky, KFTC, represented by the same Joe Lovett of Bragg v. Robertson fame, filed in Hun-
tington, home of the Corps’ district headquarters.

The case was assigned to Haden.

Lawyers for the Corps of Engineers predictably filed a motion to move it to Kentucky. Haden dismissed it.

A rising star in Republican politics

In the late 1960s and early 1970s, “Chuck” Haden was regarded as a future star of Republican politics in West Virginia. Elected to the House of Delegates when he was just 26, he was named the outstanding freshman member of the Legislature at the end of his term two years later. In 1968, he was the Republican nominee for attorney general.

Although he was not well known beyond Morgantown and Monongalia County when the campaign began, he collected more votes than any other GOP candidate except six-term U.S. Rep. Arch Moore Jr., who was elected governor. Democratic as well as Republican strategists viewed Haden as the GOP’s hottest commodity other than the new governor himself. The editorial page of the liberal-leaning Charleston Gazette showered him with praise, and Moore rewarded him with the most important post in the Cabinet, Commissioner of Taxation.

It was a heady time for Republicans in West Virginia. Although the state had been a Democratic stronghold since the coalfields were unionized in the 1930s, it still had a small and sturdy establishment of traditional mountain Republicans, and it was exemplified by the Hadens of Morgantown. They were not wealthy, but they were prosperous, upper-middle class, and moderate. Chuck Haden’s grandfather, Joseph Haden, had arrived in Morgantown from Pennsylvania early in the century and founded the Morgantown Glass Company. The industry was booming in western Pennsylvania and Northern West Virginia, and Morgantown was one of the nation’s capitals of handmade glass. Two of Joseph Haden’s three sons joined him in the business and produced stemware and crystal that graced elegant dining rooms across the country.

His third son, Charles, became a lawyer and ran his own practice for more than half a century in his hometown. In the early ’60s, Charles’ son, Chuck - Charles H. Haden II - newly admitted to the West Virginia Bar after graduation from West Virginia University Law School, was briefly an associate before striking out on his own.

A host of cousins in Haden’s generation also proceeded through West Virginia University and into business and professional careers, most of them remaining in Northern West Virginia and becoming as successful and dependably Republican as their fathers.

In his four years as the Moore administration’s Tax Commissioner, Haden proved adept at working with a Democratic majority in the Legislature, was sensitive to growing consumer and environmental constituencies, and sometimes politically incorrect. When he hired J. Davitt McAteer, a young lawyer with strong ties to Democrats and to organized labor, to do a study on possible taxation of coal reserves, he was called on the carpet by Gov. Moore and forced to dismiss McAteer before he ever reported to work.

But Haden’s political options were limited. A new West Virginia law permitted a governor to serve two successive terms, and in 1972 Moore once again led the Republican ticket, eventually winning reelection by defeating Secretary of State John D. Rockefeller IV, who campaigned on a promise to stop strip mining in the state. Haden again sought the party’s nomination for attorney general and, early on, there was a considerable presumption that he was headed for a rematch with Chauncey Browning Jr., the Democrat who had defeated him in 1968.

For a second time, he received the endorsement of The Charleston Gazette, which was not inclined to embrace Republican candidates. “Haden is one of a crop of forward-looking young men in both parties who have come forward at a time when they have been most needed to restore sagging faith in state government,” the newspaper said, praising Haden for “earnestness and honesty” and a “concern for the people which transcends concern for the party.”

But in a primary race later regarded as a fluke, Haden was soundly defeated by Monongalia County prosecutor Joseph Laurita Jr. Laurita had been seriously injured when a bomb exploded in his automobile, and he positioned himself as a fearless crime-fighter, suggesting that the bomb had been placed in his car by the Mafia, though no evidence was ever developed to support that.

Some party leaders who still
considered Haden a future gubernatorial or U.S. Senate candidate urged him to run for state treasurer in the general election. No GOP candidate had entered the primary and the office was about to be handed to Democrats uncontested. Haden declined, seemingly willing to close his political career.

Before the year was out, however, Moore appointed him to fill a vacancy on the West Virginia Supreme Court of Appeals. In 1974, he was elected to a full term and became chief justice, becoming the first Republican elected to the court in more than half a century. He served only a year of his term when President Gerald Ford nominated him to the federal bench. Haden would always be remembered in West Virginia political circles as an “Arch Moore Republican,” meaning that he was guided by pragmatism more than dogma and party orthodoxy.

(Moore, his political patron, would win a third term as governor in the 1980s, but the reputation he had established during his two terms in the ’70s would fade away after he went to prison on an extortion and mail fraud conviction.)

At the age of 38, Haden had found his home as a judge. Sitting first in the Northern District in Parkersburg, he built a reputation for holding court for extraordinary hours, handing down tough sentences, and maintaining unbending standards of decorum. To hear cases across the district, he traveled often and traveled light. He would show up for a trial and announce to lawyers: “This is a two-shirt case.” That meant he had packed two white shirts and intended to conclude the proceedings by the time they needed laundering.

In 1982, Haden became chief judge in the court’s Southern District in Charleston. By the time the uproar over the mountaintop removal case made him a household name in 1998, he was one of the senior chief judges in the country’s federal courts. Chief Justice William Rhenquist would soon name him chairman of the executive committee of the Judicial Conference of the United States, a panel of judges that oversees administrative matters of the federal judicial system. Because he had already been chief judge when Congress passed a law limiting the service of chief judges to seven years, he was exempt from the term limitation and friends predicted he would remain Southern West Virginia’s chief district judge until he is required to take senior status at the age of 70 - in 2007.

Seniority did not mellow him. Outside the courtroom, he was still the affable Chuck Haden who had served in the Legislature and run for attorney general. In the courtroom, he was something quite different. He once slapped a heavy fine on a Vietnam war hero busted for drug possession. He fined a former justice of the State Supreme Court $1,000 for unacceptable behavior in the courtroom, and he ordered another lawyer to return a $40,000 fee to a rape victim because he considered it excessive. “Off the bench, he is just Charles Haden,” said Forest J. Bowman, a West Virginia University law professor who has known the judge for 40 years, “but when he puts on the robe and steps into his role as judge, he is very conscious and protective of his position and demanding of respect for the court.”

One of his most important coal industry decisions was a 1992 ruling that companies retain retirement commitments to miners, even if they sell off their coal properties and quit mining. But before and after that he had also handed down decisions favorable to coal. Environmentalists took no comfort when the mountaintop removal case was assigned to him. Though he had registered as an Independent after his appointment to the federal bench, his wife, Priscilla, had remained active in Republican politics, serving on the school board, running for the Legislature, and taking a leadership role in the 1988 presidential campaign of George H. W. Bush.

While it was not widely known in the state, Haden’s brother, Robert, also a lawyer, is president of a Morgantown-based coal company, which operates strip mines and underground mines in east Tennessee. The Bragg v. Robertson decision, says Robert, “took a huge amount of courage, and I am absolutely certain that my brother was convinced that he was following the law and the evidence.”

Another controversial ruling on mining operations - with the battle over mountaintop removal mining permits still swirling, Haden has turned up yet another case regarded ominously by coal men, given their experience with the judge since 1998. After environmentalists sued state and federal regulators over reclamation of 245 abandoned strip mine sites, Haden found that inaction by the U.S. Office of Surface Mining had contributed to “thousands of acres of unreclaimed strip-mined land, un-
treated polluted water, and millions [potentially billions] of dollars of state liabilities,” and, more than that, to “a climate of lawlessness.”

Because appellate courts had held he had exceeded his jurisdiction in Bragg v. Robertson, he was forced to dismiss the West Virginia Department of Environmental Protection from the reclamation suit. But he ordered the federal Office of Surface Mining to give him regular reports on its steps to force state action on mine reclamation estimated to cost as much as $2.6 billion.

Under pressure from the federal bench, West Virginia Gov. Bob Wise and the Legislature agreed to increase the state reclamation tax from three cents to 14 cents per ton.

In Washington, OSM officials refused to say whether the additional tax would enable the state to comply with federal reclamation requirements, and in January of this year, the West Virginia Highlands Conservancy asked Haden to answer the question and perhaps order an outright federal takeover of strip mine reclamation in the state.

Abramson’s Patterson-funded research into the coal kingdom resulted in a contract with the University of Kentucky Press for a book on Harry Caudill. Caudill’s 1963 book, “Night Comes to the Cumberlands,” was a catalyst in creating the Appalachian Regional Commission and the War on Poverty.