

BEFORE THE RECLAMATION COMMISSION

BUCKEYE INDUSTRIAL MINING CO.,	:	Case Nos. RC-08-017
	:	RC-08-018
Appellant,	:	RC-08-019
	:	RC-08-020
-vs-	:	RC-08-021
	:	RC-08-022
	:	
DIVISION OF MINERAL RESOURCES	:	Review of Chief Decision (re: acreage fees);
MANAGEMENT,	:	Permits D-2197, D-1123, D-2003, D-2062,
	:	D-2162 and D-2268
Appellee.	:	
	:	
	:	<u>FINDINGS, CONCLUSIONS</u>
	:	<u>& ORDER OF THE</u>
	:	<u>COMMISSION</u>

Date Issued: February 3, 2010

Appearances: Shane A. Farolino, Kelly J. Espy, Counsel for Appellant Buckeye Industrial Mining Company; Molly Corey, Assistant Attorney General, Counsel for Appellee Division of Mineral Resources Management.

BACKGROUND

These matters came before the Reclamation Commission upon appeal by Buckeye Industrial Mining Co. ["Buckeye Industrial" or "Buckeye"] from a decision of the Division Chief, relating to the refund of excess acreage fees on six separate mining permits.

On April 30, 2009, Appellee Division of Mineral Resources Management ["Division"] filed a Motion to Dismiss these appeals, alleging that the Commission lacked jurisdiction to hear and decide the issues raised in these matters. On July 9, 2009, the Commission issued an Order denying the Division's Motion, and finding that these matters should proceed to be decided upon their merits.

The parties hereto have stipulated and agreed that these appeals do not present issues of fact. Therefore, the Commission called for briefs upon the legal issues presented. Briefs were filed by both parties, with the last filing occurring on October 28, 2009. On November 19, 2009, these matters came on for oral argument before five members of the Reclamation Commission.

FINDINGS OF FACT

1. Historically, and prior to April 6, 2007, the Division collected a permit fee from applicants for new mining permits and applicants for permit renewals, pursuant to the version of O.R.C. §1513.07(B)(1) then in effect. The amount of the fee was based upon an applicant's estimate of the number of acres to be affected under the permit, at a rate of \$75.00 per estimated acre. This money was deposited into an account known as the "Reclamation Fee Fund."¹ Upon the filing of a final map and report, indicating that mining had concluded, an operator was given a refund of any excess fees paid, where the number of acres actually affected by mining was less than the estimated acreage for which the fee was paid, pursuant to O.R.C. §1513.10 (repealed on April 6, 2007).

2. On January 4, 2007, the Ohio Legislature passed H.B. 443, with an effective date of April 6, 2007. H.B. 443 repealed the permit fee collection provision of O.R.C. §1513.02(B)(1) and the excess fee refund provision of O.R.C. §1513.10. Under H.B. 443, the "Reclamation Fee Fund," created under O.R.C. §1513.10, was also abolished.

¹ O.R.C. §1513.10 (now repealed) provided, as regards the "Reclamation Fee Fund," as follows:

Refunds shall be paid out of the reclamation fee fund, which is hereby created in the state treasury. The treasurer of state shall place forty thousand dollars from the fees collected under section 1513.07 of the Revised Code in the fund. As moneys are spent from the fund, the treasurer of state shall credit to the fund the amount that is needed to keep the balance of the fund at forty thousand dollars. The remainder of the fees collected under section 1513.07 of the Revised Code shall be deposited with the treasurer of state to the credit of the coal mining administration and reclamation reserve fund created in section 1513.181 of the Revised Code.

3. Prior to the passage of H.B. 443, Buckeye held several mining permits, including the following eight permits: D-928, D-2184, D-2197, D-1123, D-2003, D-2062, D-2162 and D-2268. For each of these permits, Buckeye had paid acreage fees, based upon Buckeye's estimate of the number of acres to be affected under these various permits. For all of these permits, Buckeye has filed final maps and reports, indicating the conclusion of mining. For two of these permits, D-928 and D-2184, Buckeye filed the final maps and reports prior to April 6, 2007 (the date upon which the provisions of H.B. 443 became effective). For six of these permits, D-2197, D-1123, D-2003, D-2062, D-2162 and D-2268, Buckeye filed the final maps and reports after April 6, 2007. For each of these six permits, Buckeye contends that the number of acres actually affected by mining is less than the estimated acreage for which a fee was paid. There is no dispute of fact between the parties on this issue.

4. In January 2008, Buckeye approached the Division and requested the refund of excess acreage fees for the eight identified mining permits.

5. On June 9, 2008, the Division Chief issued a decision regarding Buckeye's eligibility for refunds of the acreage fees associated with the eight identified permits. Regarding permits D-928 and D-2184, the Chief concluded:

The Division of Mineral Resources has completed an evaluation of the documentation submitted regarding refunds of acreage fees on permits D-928 and D-2184 and has determined that the criteria stipulated in Section 1513.10 of the Ohio Revised Code was met prior to April 6, 2007, the effective date of the repeal of Section 1513.10. Complete and approvable final maps were submitted by Buckeye Industrial Mining Company on both permit D-928 and permit D-2184 prior to April 6, 2007, indicating that the number of acres in the area of land affected and verified by the Division is less than the number of acres of land for which the operator paid a permit fee. Therefore, the Division is refunding acreage fees for 299.8 acres on permit D-928 in the amount of \$22,485 and 71.6 acres on permit D-2184 in the amount of \$5,370, pursuant to Section 1513.10.

The Division has refunded the excess acreage fees submitted for permit D-928 and permit D-2184, because the approvable final maps and reports were submitted prior to April 6, 2007 for these two permits.

6. The Chief's June 9, 2008 decision also addressed excess acreage fees associated with permits D-2197, D-1123, D-2003, D-2062, D-2162 and D-2268, and stated:

The Department's legal counsel has advised the Division that permit holders, who had failed to provide the Division with final, "approvable" reports by April 6, 2007, are not entitled to a refund under present Ohio law. The Division has determined no complete and approvable final maps were submitted on other permits issued to Buckeye Industrial Mining Company prior to April 6, 2007.

Regarding the above-identified six permits, none of these permits had reached their permit expiration dates by April 6, 2007. Also, final maps and reports, indicating the conclusion of mining, had not been submitted for these six permits by April 6, 2007. In accordance with the Chief's findings, Buckeye Industrial's request for refunds of excess acreage fees associated with permits D-2197, D-1123, D-2003, D-2062, D-2162 and D-2268 was denied.

7. On June 24, 2008, Buckeye Industrial appealed the Chief's June 9, 2008 decision to the Reclamation Commission. The appeals are designated as: appeal # RC-08-017 (permit D-2197), appeal # RC-08-018 (permit D-1123), appeal # RC-08-019 (permit D-2003), appeal # RC-08-020 (permit D-2062), appeal # RC-08-020 (permit D-2062), appeal # RC-08-021 (permit D-2162) and appeal # RC-08-022 (permit D-2268).

8. In July of 2009, Buckeye Industrial resumed mining on the permit D-1123 area (the subject of appeal # RC-08-018).

DISCUSSION

Coal mining within the State of Ohio, must be conducted pursuant to a validly issued mining and reclamation permit. *See O.R.C. §1513.07(A)(1); §36, Article II, Ohio Constitution.* Such permits are issued by the Division of Mineral Resources Management, and regulated under the provisions of Ohio Revised Code Chapter 1513. Permits are generally issued for a five-year term and are, thereafter, renewable for five-year periods. *See O.R.C. §1513.07(A)(2); O.R.C. §1513.07(A)(4).*

Prior to April 6, 2007, former O.R.C. §1513.07(B)(1) directed that each application for a coal mining and reclamation permit, or application for the renewal of an existing permit, be accompanied by a permit fee. This fee was calculated at:

... seventy-five dollars multiplied by the number of acres, estimated in the application, that will comprise the area of land to be affected within the permit or renewal period

O.R.C. §1513.07(B)(1) (repealed 2007).

Prior to April 6, 2007, the acreage fees collected upon application for, or renewal of, a permit were deposited into the former "Reclamation Fee Fund." This fund was created under former O.R.C. §1513.10. Moneys deposited into the "Reclamation Fee Fund" were utilized by the Division as a source for refunds of excess acreage fees and to administer and enforce Ohio Revised Code Chapter 1513.

At the completion of mining, an operator is required to file a final map and report, indicating the total number of acres actually affected during mining. *See O.A.C. §1501:13-4-07.* Prior to April 6, 2007, former O.R.C. §1513.10 allowed for the refund of excess acreage fees, according to the following terms:

If, at the end of a coal mining operation's permit or renewal period, the number of acres of land affected by the operation proves to be smaller than the number of acres of land for which the operator paid a permit fee for the operation under section 1513.07 of the Revised Code, the operator is entitled to a refund of the excess permit fee. The refund shall be in an amount equal to the amount paid per acre as a permit fee multiplied by the difference between the number of acres in the area of land affected as verified by the division of mineral resources management and the number of acres of land for which the operator paid a permit fee.

O.R.C. §1513.10 (repealed April 6, 2007).

The Division used the final map and report, filed upon the termination of mining, to verify the number of acres actually affected by mining during the term of the permit. The Division would then issue a refund of any excess acreage fees under the provisions of former O.R.C. §1513.10.

On January 4, 2007, the House Bill 443 was passed, with an effective date of April 6, 2007. This bill contained several changes to Ohio's mining and reclamation laws, including the repeal of O.R.C. §1513.07(B)(1) (requiring the payment of per-acre permit fees) and the repeal of O.R.C. §1513.10 (providing for a refund of excess fees and creating the "Reclamation Fee Fund").

The immediate appeals involve six mining permits issued prior to April 6, 2007, for which Buckeye Industrial had paid permit acreage fees, based upon Buckeye's estimate of how many acres would be affected during mining. For the six permits at issue, final maps and reports, indicating the conclusion of mining, were filed. However, the final maps and reports were filed after the repeal of O.R.C. §1513.10 (after April 6, 2007).

Despite the repeal of the refund provision of O.R.C. §1513.10, and the abolishment of the "Reclamation Fee Fund" from which refunds were paid, Buckeye Industrial contends that it is entitled to a refund of excess acreage fees for these six permits. Buckeye Industrial further contends that the failure of the Division to provide such refunds constitutes an improper retroactive application of law. The Division contends that, unless final maps and reports were submitted prior to April 6, 2007, the repeal of O.R.C. §1513.10 operates to eliminate a right to a refund of any excess acreage fees filed with the Division.

The issue presented in this appeal turns upon a determination of when an operator's right to a refund of excess acreage fees accrued, or was "vested."

O.R.C. §1.48, addresses statutory construction of Ohio laws, and provides:

... a statute is presumed to be prospective in its operation unless expressly made retrospective.

O.R.C. §1.48 does not apply to the appeals at hand. First, O.R.C. §1.48 anticipates construction of the operation of a statute. In these matters, as O.R.C. §1513.10 has been repealed, there is no existing statute to construe. Furthermore, the rules of statutory construction only apply when a statute is considered vague or unclear. *See Weiss v. Public Utilities Commission of Ohio, 90 Ohio St. 3d 15, 2000 Ohio 5, 734 N.E.2d 775 (2000)*. Here, there is nothing vague about the repeal of either O.R.C. §1513.07(B)(1) or O.R.C. §1513.10.

Moreover, even if O.R.C. §1.48 were to apply to these appeals, there has been no showing that the Division is improperly applying laws in a retroactive manner.² The repeal of O.R.C. §1513.10 became effective on April 6, 2007. For any permit, for which the right to a refund had "vested" prior to April 6, 2007, the Division has indicated that refunds were, or will be, awarded.

After the repeal of O.R.C. §1513.10 on April 6, 2007, there is no mechanism by which the right to a refund may "vest." The Division's decision not to apply the now-repealed provisions of O.R.C. §1513.10 after April 6, 2007, establishes that the repeal of O.R.C. §1513.10 is being applied in a prospective manner. To this end, the Division has stated that, after April 6, 2007, and into the future, the Division will not refund acreage fees, consistent with the repeal of O.R.C. §1513.10.

O.R.C. §1.58, known as the "general saving law," provides in part:

The ... repeal of a statute does not, except as otherwise provided by statute, affect any validation, cure, right, privilege, obligation, or liability previously acquired, accrued, accorded, or incurred thereunder.

In order to apply this provision of Ohio law, the Commission must determine when the right to a refund of excess acreage accrued under the now-repealed provisions of O.R.C. §1513.10.

First, it should be noted, that there is no vested right in an existing statute, which precludes its amendment or repeal. See State ex rel. Bouse Jr. v. Cickelli, 165 Ohio St. 191 (1956); City of Moraine v. Board of County Commissioners of Montgomery County, Ohio, 1980 WL 352541 (Ohio App. 2 Dist.). Thus, a statute, or a provision of law, such as the refund feature of O.R.C. §1513.10, may be repealed.

² A retrospective, or retroactive, statute is a statute that takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past. See State v. Consilio, 114 Ohio St.3d 295-297, 2007-Ohio-4163 (2007); Ohio Jur. 3d, Constitutional Law §475.

However, no one has a vested right in having the law remain the same over time. If by "rely[ing] on existing law in arranging his affairs, [a citizen] were made secure against any change in legal rules, the whole body of our law would be ossified forever." *State ex re; Horvath v. State Teachers Retirement Board* (1998), 83 Ohio St.3d 67, 72 697 N.E.2d 644, citing Fuller, the Morality of Law (1964) 60. We distinguish vested "rights" from a mere "privilege" conferred by statute "which could be exercised so long as the statute remained in effect." *State ex rel. Core v. Green* (1953), 160 Ohio St. 175, 181, 51 O.O. 442, 115 N.E.2d 157...

City of East Liverpool v. Columbiana County Budget Commission, 114 Ohio St.3d 133, 140, 870 N.E.2d 705, 714 (2007).

The question of whether the repeal of O.R.C. §1513.10 violates O.R.C. §1.58, cannot be answered without an examination into when Buckeye Industrial's right to a refund of excess acreage fees accrued or was vested.

Buckeye Industrial suggests that the right to a refund of excess acreage fees was vested upon the payment of the fees, as the payment was made with the expectation that a refund for acres not actually affected by mining would be available. However, the clear and unambiguous language of former O.R.C. §1513.10 specifically addressed the event, which would trigger the vesting of the right to a refund:

If, at the end of a coal mining operation's permit or renewal period, the number of acres of land affected by the operation proves to be smaller than the number of acres of land for which the operator paid a permit fee for the operation under section 1513.07 of the Revised Code, the operator is entitled to a refund of the excess permit fee.

(Emphasis added.)

In creating the opportunity for a refund, O.R.C. §1513.10 required that certain conditions be met before the opportunity for a refund was available. First, the operation had to be at the end of the permit, renewal or mining³ period. Second, the operator had to establish that the number of acres of land affected by the mining operation was smaller than the number of acres for which a permit fee had been paid. And third, this information had to be verified by the Division. Thus, under the language of former O.R.C. §1513.10, entitlement to a refund of excess acreage fees did not accrue until the final map and report, establishing that mining had concluded, and providing verifiable acreage information, were filed.

Pursuant to the language of former O.R.C. §1513.10, the date of submission of a final map and report is critical to a determination of whether an operator is entitled to a refund. *See State v. LaSalle, 96 Ohio St.3d178, 772 N.E.2d 1172, ¶¶ 19-20 (2002).*

In order for the right to a refund to be protected under O.R.C. §1.58, that right would need to "vest" and exist, prior to the repeal of O.R.C. §1513.10. Such is not the case with the six permits under review in these appeals, as final maps and reports were not submitted for these six permits until after the repeal of O.R.C. §1513.10 on April 6, 2007.

Notably, Buckeye Industrial's January 2008 request for refunds, included two permits for which final maps and reports were filed prior to April 6, 2007. Although the final maps and reports were filed for these two permits prior to the repeal of O.R.C. §1513.10, the Division had neglected to award a refund of excess acreage fees by April 6, 2007. With regards to these two permits, the Division acknowledged that the right to a refund had vested prior to the repeal of O.R.C. §1513.10, and acreage fee refunds were awarded for these two permits.

³ The Division has stated in Brief that, if mining concluded prior to the end of the five-year permit term, or renewal term, and a final map and report were filed, under former O.R.C. §1513.10, the Division would issue refunds based upon the submission of the final map and report, indicating the conclusion of mining.

It is also notable that the language requiring payment of the estimated acreage fee is found in a completely separate section of the law than the language providing an opportunity for refund of excess fees. Former O.R.C. §1513.07(B)(1) directed an applicant for a permit, or permit renewal, to submit the estimated acreage fee, but did not contain any language addressing an eventual refund of excess fees. Had the refund language appeared in the same section of law as the payment language, Buckeye Industrial's argument would be more persuasive. However, the refund language was contained in former O.R.C. §1513.10, a separate and discrete section of Chapter 1513.

Moreover, as the payment language and the refund language are contained in separate sections of Chapter 1513, had the legislature intended for refunds to continue after April 6, 2007, the legislature could easily have repealed the payment requirement contained in O.R.C. §1513.07(B)(1), and left the refund language of O.R.C. §1513.10 in place. The legislature did not take this action, nor did the legislature set forth any "grandfathering language" to address those permits for which excess acreage fees were paid prior to the repeal of O.R.C. §1513.10.

Significantly, in its Brief, Buckeye Industrial suggests that the refund provisions of former O.R.C. §1513.10 should apply not only to the six permits at issue in these appeals, but likewise to any other permits held by Buckeye Industrial, or by any other mine operators in the State of Ohio, where estimated permit acreage fees were paid under former O.R.C. §1513.07(B)(1). This would encompass all existing mining permits issued prior to April 6, 2007, and would include numerous permitted areas.

Through this argument, Buckeye is suggesting that the repeal of O.R.C. §1513.10 should apply only to permits issued after April 6, 2007. Buckeye is, in effect, asking this Commission to carve out a significant exception to the repeal of O.R.C. §1513.10. Such a noteworthy exception, had it been anticipated by the legislature, would certainly have been addressed by the legislature through clear and explicit statutory language, such as a "grandfather clause." It has been long established that, "a right given by statute is taken away by the repeal of the statute, unless the legislature otherwise declares." *State ex rel. Shafer v. Trustees of Washington Twp., Paulding Cty, Ohio, 24 Ohio St. 603, 607 (1874)*. Here, there is no declaration by the legislature that the repeal of O.R.C. §1513.10 should fail to apply to such a specific, and large, group of operators.

The Ohio Legislature has repealed the ability of a mine operator to seek a refund of excess acreage fees. Moreover, as the Division's authority to issue refunds was created pursuant to statute, the repeal of O.R.C. §1513.10 extinguished the Division's statutory authority to issue such refunds for permits, which did not qualify for refund as of April 6, 2007.

CONCLUSIONS OF LAW

1. The ultimate burden of persuasion in this matter is upon the Appellant Buckeye Industrial Mining Company to establish that the Division's refusal to refund excess acreage fees, as articulated in the Chief's decision of June 9, 2008, was inconsistent with law. *See O.R.C. §1513.13(B); O.A.C. §1513-3-16(B)(3)*. This review standard is a deferential standard, which presumes that the Division's actions are valid. *Buckeye Forest Council, Inc. v. Division of Mineral Resources Management, 172 Ohio App. 3d 440, 445, 2007 Ohio 965, p. 13 (2007)*.

2. Former O.R.C. §1513.10 provided for a refund of excess acreage fees, paid pursuant to former O.R.C. §1513.07(B)(1). On April 6, 2007, O.R.C. §1513.10 was repealed by the Ohio Legislature.

3. After April 6, 2007, the right to a refund of excess acreage fees was eliminated, unless the right to such refund had accrued, or was vested, prior to April 6, 2007.

4. Under former O.R.C. §1513.10, the right to a refund of excess acreage fees accrued, or was vested, upon the filing of a final map and report, indicating the conclusion of mining, and establishing the acreage mined as compared with the estimated acres for which a permit fee was paid.

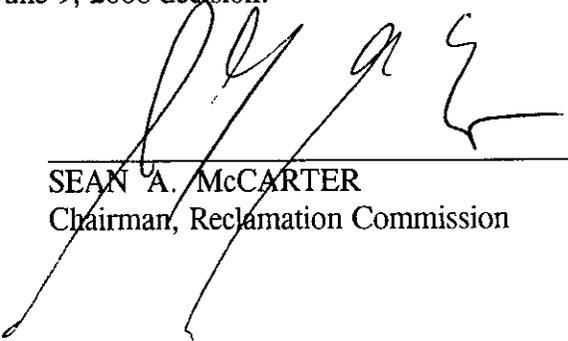
5. The Division's refusal to refund excess acreage fees for permits on which a final map and report were not submitted prior to April 6, 2007, is not an improper retroactive application of law and is not inconsistent with law.

6. The Division's refusal to refund excess acreage fees for Buckeye Industrial's permits D-2197, D-1123, D-2003, D-2062, D-2162 and D-2268, as articulated in the Chief's decision of June 9, 2008, was not inconsistent with law.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Commission hereby **AFFIRMS** the Chief's June 9, 2008 decision.

2/3/10
DATE ISSUED


SEAN A. McCARTER
Chairman, Reclamation Commission

INSTRUCTIONS FOR APPEAL

This decision may be appealed to the Court of Appeals, within thirty days of its issuance, in accordance with Ohio Revised Code §1513.14 and Ohio Administrative Code §1513-3-22. If requested, copies of these sections of the law will be provided to you from the Reclamation Commission at no cost.

DISTRIBUTION:

Shane A. Farolino, Kelly J. Espy, Via FAX [330-376-4577] & Certified Mail #: 91 7108 2133 3936 6684 7731
Molly Corey, Mark G. Bonaventura, Via FAX [614-268-8871] & Inter-Office Certified Mail #: 6551