

BEFORE THE RECLAMATION COMMISSION

FRED T. LOVE,

Appellant,

-vs-

DIVISION OF MINERAL RESOURCES
MANAGEMENT,

Appellee,

and

OXFORD MINING COMPANY, LLC,

Intervenor.

Case No. RC-10-011

Review of Chief's Decision;
Permit D-2272 (Oxford Mining)

**ORDER OF THE COMMISSION
DENYING APPELLANT'S
MOTION FOR REHEARING
AND DENYING APPELLANT'S
MOTION TO ADMIT
ADDITIONAL EVIDENCE**

Appearances: Trent Dougherty, Counsel for Appellant Fred T. Love; George Horvath, Molly Corey, Megan DeLisi, Tara Paciorek, Assistant Attorneys General, Counsel for Appellee Division of Mineral Resources Management; Michael B. Gardner, Mark S. Stemm, Counsel for Intervenor Oxford Mining Company, LLC.

Date Issued: August 4, 2011

BACKGROUND

This matter originally came before the Reclamation Commission upon appeal by Mr. Fred T. Love from a decision by the Division of Mineral Resources Management ["DMRM"], relating to mining and reclamation activities conducted on property owned by Mr. Love, and mined pursuant to Oxford Mining Company's ["Oxford's"] coal mining and reclamation permit D-2272.

On October 6, 2010, a site view was conducted by the Commission. This case, then, came on for hearing before the Reclamation Commission on March 2, 3, 16 & 17, 2011. At hearing, Mr. Love was unrepresented by counsel.

On June 3, 2011, the Commission rendered its decision in this appeal, **affirming** the Division's decision regarding the reclamation concerns raised by Mr. Love.

On June 21, 2011, Mr. Love (now represented by counsel) filed a Motion for Rehearing and a Motion to Admit Additional Evidence in this matter.

THE LAW

The Reclamation Commission's Rules of Procedure allow for reconsideration of Commission decisions and for the admission of additional evidence under specified conditions. In this regard, O.A.C. §1513-3-11(C) provides:

Motions for reconsideration of any decision of the commission shall be made in writing within ten days after the issuance of the commission's decision. A motion for reconsideration shall state with particularity the grounds on which it is based. The filing of a motion for reconsideration does not extend the time for filing a notice of appeal in the appellate court.

O.A.C. §1513-3-11(D) provides:

The commission may grant a motion for the admission of additional evidence when satisfied that such additional evidence is newly discovered and could not with reasonable diligence have been ascertained prior to the proceeding before the commission.

O.A.C. §1513-3-16(K) provides:

At any time after hearing and prior to the issuance of a decision, the commission may on its own motion, or in its discretion upon a showing of good cause, reopen the appeal for further proceedings.

Notably, O.R.C. §1513.14 and O.A.C. §1513-3-22, provide for, and describe the process for, the filing of appeals from Commission decisions to the appropriate appellate courts.

THE RELEVANT FACTS

(The following facts are taken from the Commission's June 3, 2011 decision in appeal RC-10-011, and from the filings of the parties relative to Appellant's Motion for Rehearing and Motion to Admit Additional Evidence.)

1. On August 17, 2010, Appellant Fred T. Love, without benefit of counsel, filed with the Reclamation Commission, a Notice of Appeal from a decision by the DMRM, relating to mining and reclamation activities conducted on the Love property. The Love property was mined by Oxford under the authority of coal mining and reclamation permit D-2272, and is now in the process of being reclaimed.

2. On October 6, 2010, a site view was conducted by the Commission in appeal RC-10-011. The Commission, and the parties, visited the Love property, and observed the features and areas at issue in appeal RC-10-011.

3. On October 19, 2010, Rick Griffin, a soil scientist for the Natural Resource Conservation Service ["NCRS"], at the invitation of Mr. Love, conducted a site visit at the Love property. During this visit, Mr. Griffin collected at least four soil samples from areas that had been affected by Oxford under permit D-2272.

4. Following the site view, Mr. Love indicated that he would not be ready for a hearing in November 2010, as had been discussed at the site view. Mr. Love's appeal to the Reclamation Commission was, therefore, set for hearing on February 2 & 3, 2011. On January 5, 2011 and January 18, 2011, Mr. Love requested continuances of the February hearing dates. This matter was, ultimately, continued and rescheduled for hearing in March 2011. The hearing in appeal RC-10-011 was conducted on March 2, 3, 16 & 17, 2011.

5. Mr. Love appeared at hearing without counsel. Mr. Love gave testimony, and introduced exhibits on his own behalf. Prior to hearing, and at hearing, Mr. Love was informed that the Commission possesses subpoena powers, and that the Commission would subpoena, and compel the attendance of, any witnesses that Mr. Love believed could give testimony in support of his appeal. Mr. Love did not call any witnesses, but freely examined all witnesses called by the DMRM and Oxford.

6. In his notice of appeal, and at the merit hearing, Mr. Love raised the issue of whether Oxford's resoiling operations (including topsoil replacement) on his property had been properly accomplished, and whether the soil conditions on his property would adequately support the property's post-mining land use of "fish & wildlife habitat." The "fish & wildlife habitat" post-mining land use requires the planting of trees or shrubs, and also requires that a specific number of the planted trees survive for a specified period of time after planting. To achieve tree survivability, the resoiling of a reclaimed area with an identified post-mining land use of "fish & wildlife habitat" must be undertaken in a manner that will promote tree growth and survival.

7. On June 3, 2011, the Commission issued its decision in appeal RC-10-011. This decision was sent to Mr. Love by certified mail, and was received by Mr. Love on June 4, 2011. The Commission's 22 page decision evaluated all presented evidence relative to the resoiling practices utilized on the Love property. Regarding resoiling (and topsoil handling) the Commission specifically found:

The Commission **CONCLUDES** that Oxford resoiled the permit D-2272 area consistent with Ohio law and the terms of permit D-2272. The site preparation methods employed by Oxford were consistent with accepted methodology, where trees will be planted on reclaimed ground.

(Commission Decision, at page 22.)

8. On June 9, 2011, NRCS soil scientist, Rick Griffin, sent a Report to Mr. Love, which Mr. Griffin specifically described as "informational only." This Report set forth the results of the soil samples taken on October 19, 2010. The Griffin Report stated in part:

In many areas over the site, the vegetation was sparse A few planted trees were seen. The rock fragment percentage on the surface in many locations was very high, between 5 to 30%. The high percentage of rock fragments on the surface and throughout the soil profile may impede plant growth.

9. Mr. Love received the Griffin Report sometime between June 9 and 14, 2011. On June 14, 2011, Mr. Love asked Thomas Sewell, Assistant State Conservationist for NRCS, to mail the Griffin Report to Linda Osterman, Hearing Officer for the Reclamation Commission. A note from Mr. Sewell accompanied the Griffin Report sent to Ms. Osterman, and stated:

Mr. Love requested this office to send you a copy of our soil scientist site visit report.

If you have any question, please contact me.

The Griffin Report, with Mr. Sewell's note, was received at the Commission's Office on June 17, 2011.

10. On June 21, 2011, Mr. Love, through counsel, filed a Motion for Rehearing, a Motion to Admit Additional Evidence, and a Memorandum in Support thereof. Appellant's motions asked the Commission to reconsider its June 3, 2011 decision, and/or reopen this appeal for the submission of the Griffin Report as "newly-discovered" evidence. Appellant argued that the Griffin Report draws into question the Commission's determination that the topsoil handling and resoiling practices utilized on the Love property were adequate and consistent with law. Intervenor Oxford Mining and Appellee DMRM filed responses to Appellant's Motions on June 30, 2011 and July 1, 2011, respectively.

DISCUSSION

Commission Rule §1513-3-11(C) allows parties to seek reconsideration of Commission decisions. A motion for reconsideration must be filed within ten days of the issuance of a Commission decision. The Commission issued its decision in appeal RC-10-011 on June 3, 2011. Appellant's Motion, asking that the Commission reconsider its June 3, 2011 decision, was filed on June 21, 2011. Appellant's Motion was filed outside the reconsideration deadlines set forth in O.A.C. §1513-3-11(C). Therefore, to the extent that Appellant is requesting reconsideration of the Commission's June 3, 2011 decision, Appellant's Motion is untimely and will not be considered by the Commission.

The Appellant also asks the Commission to reopen this proceeding to take additional evidence, to wit the Griffin Report. Commission Rule §1513-3-16(K) allows the Commission to reopen its proceedings, but specifically applies to the time period prior to the issuance of a Commission decision. Here, the Appellant's Motion was filed after the Commission rendered its decision in RC-10-011, so the provisions of O.A.C. §1513-3-16(K) do not support the reopening of this matter.

However, Appellant also relies upon Commission Rule §1513-3-11(D), which rule allows the Commission to:

.... grant a motion for the admission of additional evidence when satisfied that such additional evidence is newly discovered and could not with reasonable diligence have been ascertained prior to the proceeding before the commission.

O.A.C. §1513-3-11(D) does not set forth any time limits for requesting the admission of additional evidence and does not specify whether such a motion must be made prior to the rendering of a final decision. Although unusual, the Commission does have some precedent for allowing the submission of "newly-discovered" evidence after the rendering of a final decision. (See Crown City Mining, Inc. vs. Division, RBR-9-89-123 (Rec. Com., January 10, 1990).)

In order for evidence to be submitted as "newly-discovered," the moving party must establish certain items. The moving party shoulders the burden of demonstrating: (1) that the evidence was "newly-discovered" (as opposed to "newly-created"), (2) that the movant exercised due diligence in attempting to discover the evidence at issue, and (3) that the evidence is material, and would likely lead to a different result. (See Diversified Benefit Plans Agency, Inc. et al. v. Buryee (1995), 101 Ohio App.3d 495, 655 N.E.2d 1353; Holden v. Ohio Bureau of Motor Vehicles (1990), 67 Ohio App.3d 531, 587 N.E.2d 880.)

In this matter, the Griffin Report does not qualify as "new-discovered" evidence. The Griffin Report was created after the issuance of the Commission's June 3, 2011 decision. Also, regarding the Appellant's diligence in discovering the Griffin Report, Appellant could have requested a continuance of the Commission's hearing, citing the lack of this awaited Report. Moreover, the Appellant could have subpoenaed Mr. Griffin and his Report to the hearing dates in March 2011. Most importantly, it does not appear that Mr. Griffin's Report would have presented to the Commission any material evidence with the potential to change the Commission's ultimate decision in appeal RC-10-011. Mr. Griffin's Report notes the presence of rocks in the upper strata of the resoiling material on the Love property. However, evidence adduced at hearing, including testimony of Mr. Hiscar (the only witness identified as an expert in reforestation), does not contradict that rocks would be present on the surface of Mr. Love's property. Rather, the evidence established that the presence of some rocks within the upper strata is consistent with the ripping of resoiled material, and is intentionally accomplished to loosen the soil and promote the survivability of trees.

While the Commission has not reopened this hearing for the submission of the Griffin Report, the Commission has read the Report as an attachment to the Appellant's Motion. It does not appear that the information contained in the Griffin Report would change the outcome of this appeal.

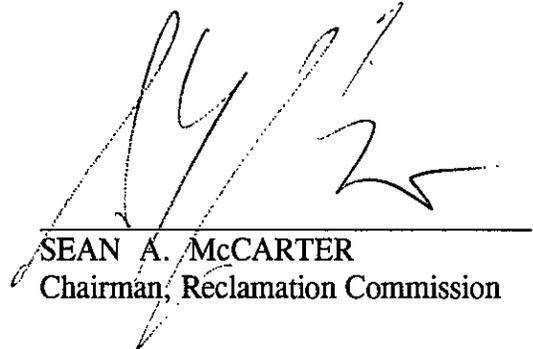
Significantly, the Love property is still covered by bond, and will be evaluated in the future. These future evaluations will address whether tree survivability on the Love property is appropriate in light of the property's post-mining land use. Thus, there still exists opportunities for Mr. Love to contest the success of reclamation on his property. And, the Division's future decisions on reclamation success will be appealable to the Reclamation Commission.

The Commission **FINDS** that all parties to this matter were afforded a full and fair hearing, which included the opportunity to produce any relevant documentary or testimonial evidence. The Appellant has missed the deadline for requesting that the Commission reconsider its June 3, 2011 decision. Also, the Appellant has not demonstrated that the Griffin Report qualifies as "newly-discovered" evidence, which may be considered by the Commission pursuant to O.A.C. §1513-3-11(D).

ORDER

Based upon the foregoing, the Commission hereby **DENIES** Appellant's Motion for Rehearing and **DENIES** the Appellant's Motion to Admit Additional Evidence. The Commission's decision of June 3, 2011 stands.

8/4/11
DATE ISSUED


SEAN A. McCARTER
Chairman, Reclamation Commission

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