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MINING OPERATIONS, STRIP—AREA OF LAND—SO USED AS TO CONSTITUTE IT AN "AREA OF LAND AFFECTED"—TERM USED IN SECTION 1513.01 RC—SUBSEQUENT STRIP MINING OPERATIONS BY SAME OPERATOR INVOLVING DEPOSIT OF SPOIL BANKS OR ADDITIONAL SPOIL BANKS CAN NOT BE DEEMED TO CHANGE STATUS NOR TO HAVE AGAIN "AFFECTED" AREA.

SYLLABUS:

Where an area of land in the course of strip mining operations has been so used as to constitute it an "area of land affected" within the definition of such term as set out in Section 1513.01, Revised Code, subsequent strip mining operations by the same operator merely involving the deposit of spoil banks, or additional spoil banks, thereon cannot be deemed to change such status nor to have again "affected" such area.

Columbus, Ohio, December 13, 1954

Hon. A. L. Sorensen, Director, Department of Agriculture
Columbus, Ohio

Dear Sir:

Your request for my opinion reads as follows:

"In the administration of the strip mine law Section 1513.01 to 1513.18, inclusive, Revised Code of Ohio, the following three questions have presented themselves, and I trust that you can give me an opinion on each of them in the very near future.

"My first question is in regard to the report and certified map as required by Section 1513.09, Revised Code of Ohio, which reads in part as follows:

'Such report shall have attached to it a map certified by a surveyor registered under the laws of this state showing the boundary lines of the area of land affected by the operation within the period of time covered by such report and the number of acres comprising such area, and the access to such area from the nearest public highway.'

"The Chief of the Division of Reclamation has been requiring the operators to show the entire area of land affected by each year's operation regardless of whether or not it had been previously affected by strip mining. In your opinion is he requiring the correct area to be shown on these maps?

"The second question concerns the adjustment of the $10.00 per acre fee as is provided for in Section 1513.09 and 1513.10, Revised Code of Ohio. The Chief of the Division of Reclamation has been adjusting this $10.00 per acre fee based on the operator's maps which show the entire area affected each year. The operator is charged at the rate of $10.00 per acre for each acre affected by his current operation as shown on his map and annual report, even though some of the area had been previously affected by strip mining, and the $10.00 per acre fee paid.

"My third question is relative to the adjustment of the bond on deposit to guarantee the reclamation at the rate of $190.00 for each acre affected (Section 1513.09 and 1513.10, Revised Code of Ohio). In strip mining it is a common experience for the spoils of the succeeding operation to overcast a part of the preceding operation. After the map of the second operation has been furnished and the necessary bond is on deposit, the Chief of the Division of Reclamation has been releasing the bond for that part of the first operation shown by this map as having been overcast with the spoil of the second operation. The reason for this is to avoid having two bonds on deposit for the same area. This procedure also establishes the surface area which the operator or operators are required to reclaim (Section 1513.16, Revised Code of Ohio). My question is whether or not this procedure used by the Chief of the Division of Reclamation is correct."

Reference to the title of the original enactment of the Ohio "strip mining law" and an examination of the several provisions in Chapter 1513, Revised Code, is sufficient to establish the proposition that the primary purpose of this legislation is to provide for the reclamation of land which has been subjected to strip mining operations so as to injure its future usefulness from the viewpoint of conservation of natural resources. What constitutes such an "injury" that the statute requires to be repaired

through the process of reclamation is indicated by the following definition in Section 1513.01, Revised Code:

> "* * * (D) 'Area of land affected' means the area of land from which overburden has been removed, or upon which a spoil bank exists, or both. * * *."

Certain of the terms used in this definition are themselves defined in the same section, as is the term "strip mining." These definitions are as follows:

> "* * * (A) 'Strip mining' means all or any part of the process followed in the production of coal from a natural coal deposit whereby the coal may be extracted after removing the overburden therefrom.
>
> "(B) 'Overburden' means all of the earth and other materials which lie above a natural deposit of coal, and also means such earth and other materials after removal from their natural state in the process of strip mining.
>
> "(C) 'Spoil bank' means a deposit of removed overburden * * *."

The basic question which I understand to be presented by your inquiry is whether land which has once been "affected" can be deemed to have been "affected" again by the same operator prior to its reclamation. I confine this opinion to the acts of one operator upon an area of land, since the matter of two different operators raises other questions which are not now before me.

This question becomes one of some importance due to the requirement in the law of an annual license of strip mining operators, with the application for which the operator is required: (1) to estimate the number of acres of land which his operations in the license year will "affect;" (2) to pay a license fee in an amount including ten dollars for each acre included in such estimate; and (3) to deposit a surety bond or other security in an amount, not less than one thousand dollars, which is equal to one hundred ninety dollars per acre in such estimate, such bond being cconditioned on the faithful performance by the licensee of all of the duties imposed upon him under the act, the principal such duty being, of course, the eventual reclamation of the land such licensee has actually affected.

Some of the difficulties involved in resolving the basic question I have stated above can best be illustrated by reference to the physical status of

land involved in (1) the final operations of one license year and (2) the initial operations of the immediately succeeding license year.

The initial cut in a beginning operation in a particular area will affect land in both of the ways designated in the statutory definition, i.e., by removing overburden from its natural emplacement, and by establishing a spoil bank with the overburden thus removed from one location to another, such spoil bank in such initial operation being established *above overburden in its natural state.* This latter portion of land is thus "affected" even though no actual mining has been done on it in the sense of removing minerals from it.

In the ordinary case, however, where operations have been substantially continuous throughout the license year, the *final* cut made in a particular license year will involve (1) the removal of overburden from its natural emplacement in area "A," and (2) the deposit of such overburden in a spoil bank in area "B," which latter area may include either (a) a cut into which no removed overburden was previously deposited, (b) a cut already wholly or partially refilled with removed overburden, (c) an area previously not affected in any way except by the deposit of removed overburden, or (d) any combination of these.

As to both areas "A" and "B" it is quite clear that (1) they have been affected within the meaning of the statute, (2) a fee has been paid for a license to "affect" them, and (3) a surety bond has been deposited to insure that the licensee reclaims them in accordance with law. Accordingly, it would seem that at this point, as to both such areas, the full protection contemplated by the law has been provided so far as the licensee is concerned, and that, come what may, such reclamation will actually be accomplished, either by the licensee as provided in Section 1513.16, Revised Code, or by the chief of the division by the expenditure of funds accruing from forfeited bond deposits as provided in Section 1513.18, Revised Code.

Coming now to the *initial* operations of the licensee in the immediately succeeding license year, it will be seen that in extending the stripping operation from the point where operations were terminated in the preceding license year, the making of the initial cut will (1) affect lands by the removal of overburden from areas not previously affected, and hence to be included in the operator's report filed pursuant to Section 1513.09, Revised Code, and (2) will place the overburden thus removed in areas

to a large extent, and possibly entirely so, already affected by the prior year's operations. We thus have the question of whether these areas are again affected.

One may readily concede that such lands may, following such operation, now be affected in a different way than they were previously; but the fact remains that their legal status has not changed, that is to say, they were affected before the operation, and they are still affected *after* the operation. In either situation the law requires them to be reclaimed, and the bond deposited prior to the first operation still provides the assurance that such reclamation will be accomplished; and the primary purpose of the act is thus achieved without requiring the deposit of a second bond and the release of the first as suggested in your inquiry.

Moreover, I find nothing in the act to suggest that reclamation following such second operation would be a more difficult or expensive operation so that there is no reason in this regard to require an additional bond; and in any event even if a second bond is required and the first is released there is actually no increase in the security provided.

Finally it does not seem possible to me, as a matter of law, to recognize varying degrees to which land may be affected. Should this be attempted it will be seen that in every operation in which succeeding shovelfuls of overburden are deposited, one over the other, on a spoil bank, each succeeding shovelful would, under such theory, increase the degree to which the same land is affected and so would "affect" such land many times in a single day. This, of course, is absurd, but it is the logical result of the view that land which has once been affected, and is not yet reclaimed, can be again affected within the statutory definition.

Accordingly, because the statute does not recognize varying degrees to which land can be affected by strip mining operations, because it makes no reference to "re-affecting" land, and because the primary purpose of the strip mining law is accomplished by the deposit of a bond in connection with the operations by which lands initially become affected, I am impelled to the conclusion that where particular lands have been placed, by strip mining operation, in the category of an "area of land affected," subsequent operations thereon by the same operator cannot be deemed to change such status nor to have again "affected' such lands.

From this it follows that in making up the map for submission with the operator's report as required by Section 1513.09, Revised Code, for

the purpose of "showing * * * the number of acres comprising such area" of land affected, there should be excluded such areas as had been affected, by the same operator prior to the period covered by such report and as to which a bond to assure reclamation has been deposited as provided in Section 1513.08, Revised Code, even though additional spoil has been deposited on such lands during the period covered by such report.

This is not to say, of course, that it would be improper to show on such map those areas affected in prior years and on which additional spoil banks are deposited in the period covered by such report; but such areas cannot be considered in computing the number of acres affected in the current period.

It is understood that the inclusion of such previously affected areas on the map thus prepared would provide the division with valuable information in that it would reflect changes effected since the submission of prior maps of the same area. Moreover, such inclusion may well be necessary to identify the lands currently affected with the "sufficient certainty" required in division (C) of Section 1513.09, Revised Code. Such being the case it would appear that a requirement of such inclusion, for such limited purposes, could be made the subject of a regulation promulgated as provided in Section 1513.04, Revised Code.

Your second question involves the application of the following provisions in Sections 1513.09, and 1513.10, Revised Code:

Section 1513.09:

> "* * * In the event such report shows that the number of acres of land comprising the area of land affected is larger than the number of acres estimated in the application for the license authorizing such operation, such report shall be accompanied by an additional surety bond or cash or United States government securities in such amount as is equal to the amount of one hundred ninety dollars multiplied by that number which is equal to the difference between the number of acres in the area of land affected as shown by such report and as estimated in said application; and in such event such report shall also be accompanied by an additional license fee in such amount as is equal to the amount of ten dollars multiplied by that number which is equal to the difference between the number of acres in the area of land affected as shown by such report and as estimated in said application. The deposit of such additional surety bond or cash or securities shall be upon the same terms as the terms of the deposit of the surety bond or cash or securities

which were deposited by the operator at the time of the issuance of the license authorizing the operation covered by said report. The chief shall immediately deliver such additional cash or other securities to the treasurer of state, to be held by him upon the same terms as the terms under which he holds cash or other securities under section 1513.08 of the Revised Code."

Section 1513.10:

"* * * In the event such report shows that the number of acres of land comprising the area of land affected is smaller than the number of acres estimated in the application for the license authorizing the operation covered by such report, the operator shall be entitled to a refund of license fees paid by him at the time of his filing of his application for such license. Such refund shall be in such amount as is equal to the amount of ten dollars multiplied by that number which is equal to the difference between the number of acres in the area of land affected as shown by such report and as estimated in said application. Such refund shall be paid by the treasurer of state out of funds in the state treasury appropriated for such purposes, only upon warrant drawn by the auditor of state upon order of the chief."

Because in both these provisions an adjustment of the license fee is based on the "number of acres of land comprising the area of land affected," and because we have concluded above that land which has once become affected cannot be deemed to have been affected within the meaning of the statute by subsequent operations, it follows that in making these adjustments land which was affected by the same operator prior to the period covered by the report should not be included as land affected during such period.

As to your third question the conclusions herein reached as to the definition of the term "area of land affected" indicate the propriety of retaining such lands are are deposited in connection with operations by which particular land becomes affected, and to the correctness of the view that the replacement of such bonds by bonds executed in connection with subsequent operations of the same operator and involving the same land is unnecessary.

Accordingly, in answer to your inquiry, it is my opinion that where an area of land in the course of strip mining operations has been so used as to constitute it an "area of land affected" within the definition of such term as set out in Section 1513.01, Revised Code, subsequent strip min-

ing operations by the same operator merely involving the deposit of spoil banks, or additional spoil banks, thereon cannot be deemed to change such status nor to have again "affected" such area.

Respectfully,
C. WILLIAM O'NEILL
Attorney General