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WATER POLLUTION—ABANDONED MINES—JURISDICTION
OF WATER POLLUTION CONTROL BOARD—RECLAMATION
—§§6111.04, 3767.01, 3767.02, 1513.16, 4153.39 to 4153.99 R.C.

SYLLABUS:

1. Neither the Ohio statutes nor case decisions contain a legal definition as to what is an abandoned mine, but there is no reason to suppose that the term should encompass anything other than its usual connotation.

2. When Section 6111.04, Revised Code, with certain exceptions, declares the act of polluting any of the waters of the state to be a public nuisance, is read in connection with Sections 3767.01 and 3767.02, Revised Code, it is apparent that both the owner and lessee of the leased premises are guilty of maintaining a nuisance and both are responsible for the abatement thereof.

3. When a nuisance is created on leased premises by a lessee under an existing lease, the owner of the land is solely responsible for its abatement after the expiration of the lease.

4. Discharge of mine drainage constitutes an industrial waste over which the water pollution control board has jurisdiction as provided in Section 6111.04, Revised Code.

5. When discharges and drainage from abandoned mines pollute any waters of the state, such condition is the responsibility of any of the various state agencies having jurisdiction over the pollution of waters.

6. Sections 4153.39 to 4153.99, inclusive, Revised Code, regarding the process of abandoning a mining operation prescribe no requirements in the form of terminal activities which have an effect on water pollution.

7. Section 1513.16, Revised Code, imposes reclamation duties on strip mine operators which have a direct effect on water pollution.

Columbus, Ohio, January 8, 1959

Dr. Ralph E. Dwork, Chairman, Water Pollution Control Board,
Columbus, Ohio

Dear Sir:

Your request for my opinion raises the following questions:

“What is an abandoned mine? Does Ohio have a legal definition?

“Who is responsible for the discharge of wastes and drainage from abandoned mines? Is it the owner, the lessee of the mineral rights, or the two jointly?

“Does discharge of mine drainage constitute a waste discharge over which the water pollution control agency has jurisdiction?”

“Under what conditions would control of discharges from abandoned mines be a state responsibility?”

“What requirements does Ohio have regarding the process of abandoning a mining operation? What is required in the form of terminal activities which have effect on water pollution such as backfilling, reclamation, etc.? Is this covered by permit requirement for operation or other procedure?”

Subsequent correspondence regarding the second question of your original request reads as follows:

“The second question was designed to obtain enlightenment on who would be responsible for curbing discharge of acid waters from a so-called abandoned mine.

“We conceived a possible situation as follows: A mining company obtained mineral (coal) subsurface rights from a land owner. Coal is removed to the point where the value of the mineral rights has been exhausted and the mining company has no further interest in the operation. But acid discharge resulting from the operation continues and thus causes pollution of a stream. These questions then arise:

1. Is the mining company (the lessee) to be held responsible for curbing this discharge although the operation has been abandoned?

2. Is the owner of the land from whom the subsurface mineral rights were obtained the responsible party, inasmuch as the workings have been abandoned by the lessee?

“We might even have a situation where the lessee has gone out of business. If acid is coming from the old mine workings and causing pollution, is the abatement thereof an obligation of the owner of the land above this old working?”

In regard to your first question pertaining to the legal definition of an abandoned mine, while Sections 4153.39 to 4153.99, inclusive, Revised Code, contain regulations directed to the abandonment of mines, and Chapter 1513., Revised Code, includes regulations relating to the termination of strip mining activities, they contain no definition of the term, nor are there any Ohio decisions defining it. However, there is no reason to suppose that the word “abandon” should encompass anything other than its usual connotation. *Webster's New International Dictionary*,

Second Edition, defines “abandon” to be the relinquishment or giving up with intent of never again resuming or claiming one’s rights or interests in a particular thing. The act of abandoning a mine, therefore, would be the cessation or discontinuance of mining operations within or at such mine with the intent of relinquishing all rights in the mine.

Your second question involves the law of nuisance and concerns the responsibility, as between a lessor and lessee, to abate a nuisance caused by the act of the lessee while operating under the mining lease.

There is no question that a nuisance exists when discharges from an abandoned mine cause water pollution. Section 6111.04, Revised Code, declares:

“No person shall cause pollution as defined in division (A) of section 6111.01 of the Revised Code of any waters of the state, or place or cause to be placed any sewage, industrial waste, or other wastes in a location where they cause pollution of any waters of the state. Any such action is hereby declared to be a *public nuisance*, except in such cases where the water pollution control board has issued a valid and unexpired permit, or renewal thereof, as provided in sections 6111.01 to 6111.08, inclusive of the Revised Code. * * *” (Emphasis added)

It is assumed that no permit to discharge wastes from the abandoned mine has been obtained, so this exception is not here pertinent. However, Section 6111.04, Revised Code, does contain the following exception:

“This section does not apply to:

“(A) Any industrial wastes or acid mine drainage until the board, after a hearing, determines that practical means for the removal of the polluting properties of such wastes or drainage are known;”

Therefore, when there is no known practical means to eliminate certain industrial wastes or acid mine drainage, this statute would not be applicable.

Any answer to your question as to who is the responsible party to curb the nuisance, must be prefaced by the above-noted exception, but, assuming methods are available to remedy the pollution, your attention is invited to Section 3767.02, Revised Code, which reads as follows:

“Any person who uses, occupies, establishes, or conducts a nuisance, or aids or abets therein, *and* the *owner*, agent, or *lessee* of *any interest* in any such nuisance together with the persons

employed in or in control of any such nuisance by any such owner, agent, or lessee is guilty of maintaining a nuisance and *shall be enjoined* as provided in sections 3767.03 to 3767.06, inclusive, of the Revised Code.” (Emphasis added)

Section 3767.01, Revised Code, reads in part as follows:

“As used in *all* sections of the Revised Code relating to nuisances:

“* * *

“(C) ‘Nuisance’ means that which is defined and *declared by statute* to be such * * *.” (Emphasis added)

Therefore, when Sections 3767.01 and 3767.02, Revised Code, are read in connection with Section 6111.04, Revised Code, it is apparent that both lessor and lessee are guilty of maintaining a nuisance and are subject to injunction when the lease is still operative.

However, in the fact situation you present, the lessee has abandoned the mining operation. In this instance, the lessor as owner of the land upon which the nuisance exists is responsible for its abatement under the above statutes.

Whether or not the lessee is responsible along with the lessor depends upon whether the lessee’s act of abandoning the mining operation was in the eyes of the law sufficient to terminate the lease. A mining lease can be terminated by abandonment. *Welty v. Wise*, 5 N. P., 50. The act of abandonment requires a specific intent to abandon and cases hold this is a question of fact. 27 Ohio Jurisprudence, p. 67. Therefore, if the lease was terminated by abandonment or if it expired by its own terms, the lessor as successor in title would alone be responsible for the abatement of the existing nuisance. This conclusion becomes apparent for the reason that when the lease is actually terminated, either by expiration or definite abandonment, the lessee could not enter the premises for the purpose of abating a nuisance without becoming a trespasser.

This does not mean that the lessee can escape liability by abandonment, for the lessee might still be liable in damage to the owner of the property for the expense which he is forced to incur in abating the nuisance.

While there are no Ohio decisions in point, it is a universal rule of law that the successor in title to land upon which a nuisance exists is liable for its abatement provided notice is given to him of its existence. 39 *Amer-*

ican Jurisprudence, 320. This includes a lessor upon expiration of a lease. 4 *Thompson on Real Property*, Section 1582, p. 73.

While your request conceives the situation where the mining rights are obtained under a lease agreement, it is pertinent here to discuss other devices by which mining rights may be acquired and the resulting liability in so far as the abatement of a nuisance is concerned.

A person who owns real estate absolutely may sell and convey any part of it. 17 Ohio Jurisprudence, 210. Therefore the ownership in fee of land may be severed so that one individual may own the surface or upper stratum and another the underlying strata of the same land. *Chartiers Oil Company, v. Curtiss*, 14 C. C. (N.S.), 593, affirmed without opinion, 88 Ohio St., 594; *Jividen, v. New Pittsburg Coal Co.*, 45 Ohio App., 294. In this situation, if the owner of the subsurface creates a nuisance through the operation of a mine, he alone would be responsible for its abatement.

Another method by which mining rights may be acquired is by the outright purchase of the minerals. This conveyance operates to give the purchaser a fee simple estate in the minerals which terminates when the mine has been exhausted. *Moore v. Indian Camp Coal Co.*, 75 Ohio St., 943; *Stambaugh, v. Smith*, 23 Ohio St., 584. Under these circumstances, until the owner of the mineral rights has exhausted his estate, both the owner of the land and the owner of the minerals would be subject to injunction under Section 3767.02, Revised Code, when a nuisance is created by the mining operation. After the minerals have been removed and the estate in the minerals has been terminated, the landowner would be solely responsible for the abatement of the nuisance caused by the abandoned mine.

A further way in which mining rights may be obtained is by the granting of a license to mine. A license is a mere incorporeal interest in land acquired through the land owner's permission which is revocable at the pleasure of the licensor. 27 Ohio Jurisprudence, 55. Therefore, if a nuisance is created by the licensee when the license is still operative, the licensee is liable for its abatement along with the licensor under Section 3767.02, Revised Code. When the license is terminated, the land owner alone is liable for the abatement of the nuisance.

It should be noted that this opinion deals solely with the responsibility to *abate* a nuisance created by the act of a lessee in possession under an existing lease. The question as to the liability for *damages* caused by the nuisance is not presented by your request.

In answer to your inquiry regarding the jurisdiction of the water pollution control board over mine drainage, you are directed to Section 6111.02, Revised Code, which provides for the establishment of a water pollution control board and Section 6111.03, Revised Code, which enumerates the various powers of said board. Division (G) of this section provides in part that the board shall have power :

“To issue, modify, or revoke orders, subject to Section 6111.04 of the Revised Code, after a public hearing, (1) prohibiting or abating discharge of sewage, industrial waste, or other wastes into the waters of the state; * * *”

Section 6111.01, Revised Code, provides :

“* * *

“(C) ‘Industrial waste’ means any liquid, gaseous, or solid waste substance resulting from any process of industry, manufacture, trade, or business, or from the development, processing, or recovery of any natural resource, together with such sewage as is present, which pollutes the waters of this state.”

Opinion No. 385, Opinions of the Attorney General for 1939, p. 473, was directed to the question as to whether coal mine drainage was included within the term “industrial waste” as defined in Section 1240-1, General Code, now Section 3701.19, Revised Code. This section is worded:

“* * * ‘industrial waste’ means a water-carried or a liquid waste resulting from any process of industry, manufacture, trade, or business, or development of any natural resource. * * *”

While the definitions of the term “industrial waste” as quoted in the two sections are not identical, both contain similar wording with Section 6111.01, Revised Code, having even a broader application. It was ruled in this opinion that coal mine drainage was included within the term “industrial waste” and in that ruling I concur. I conclude therefore, that such drainage is included within the term “industrial waste” as used in Section 6111.03, Revised Code, and that the water pollution control board has jurisdiction over such waste drainage when this is discharged into any waters of the state.

As to the conditions under which control of discharges from abandoned mines would be a state responsibility, it should be noted that Article II, Section 36, Ohio Constitution declares that :

“Laws may be passed * * * to provide for the regulation of methods of mining * * *.”

Such legislation has been enacted in the area of strip mining. Section 1513.16, Revised Code, relating to the reclamation of strip-mined land, imposes duties on strip mine operators which have an effect on water pollution. The responsibility of supervising the reclamation is vested in the chief of the division of reclamation.

However, while Chapter 4151., Revised Code, provides for the administration of mining laws by the division of mines and Sections 4153.39 to 4153.99, inclusive, Revised Code, relate to the abandonment of mines, this legislation does not provide for the control of drainage and discharges from abandoned mines. Therefore, when such drainage causes pollution of waters which is under the jurisdiction of some other state agency, this agency would be responsible for investigating the condition. Under these circumstances, the water pollution control board would have jurisdiction as prescribed in Chapter 6111., Revised Code. Likewise the Ohio Valley Water Sanitation Commission could take action as provided by Chapter 6113., Revised Code, when such drainage is discharged into the Ohio River. The department of health also has authority under Chapter 3701., Revised Code, to initiate proceedings to correct conditions created by the pollution of waters.

Your attention is invited to Opinion No. 2504, Opinions of the Attorney General for 1958, p. 472, issued August 8, 1958, in which this office recently had occasion to consider the procedure to be followed to eliminate water pollution.

We come now to your final inquiry pertaining to the requirements imposed in the abandoning of a mining operation under Ohio statutes. As noted previously, Sections 4153.39 to 4153.99, inclusive, Revised Code, deal specifically with the abandonment of mines.

Section 4153.39, Revised Code, prescribes the precautions to be taken when a working mine approaches a completed working or an abandoned mine.

Section 4153.40, Revised Code, requires the effective closing or fencing of all openings to mines abandoned after June 3, 1941, to prevent the inadvertent entrance of persons and animals therein.

Section 4153.41, Revised Code, provides for the sealing off of abandoned workings after obtaining the approval of the deputy mine inspector and the chief of the division of mines.

Section 4153.42, Revised Code, requires the making of a map of an abandoned working and the filing thereof in the office of the county recorder of the county where such mine is located and with the chief of the division of mines and Section 4153.45, Revised Code, provides for the preserving of such map as a part of the records of the land upon which the mine is located.

Section 4153.43, Revised Code, requires that notice be given to the chief of the division of mines when a mine is abandoned, or the workings thereof are discontinued.

The above mentioned requirements make neither specific nor general reference to water drainage and appear to prescribe no requirements in the form of terminal activities which have a direct effect on water pollution.

In the area of strip mining, Section 1513.16, Revised Code, imposes various duties relating to the reclamation of the land affected by the mining operation which have an effect on water pollution. A failure to perform these duties results in the forfeiture of the surety bond or other security deposited with the state as one of the conditions which must be met in order to acquire a license to strip mine under Section 1513.07, Revised Code.

Section 1513.16, Revised Code, reads in part as follows:

“Prior to the expiration of two years after filing with the chief of the division of reclamation a report as required by section 1513.09 of the Revised Code, showing the area of land affected by the operation covered by such report, the operator filing such report shall reclaim such area of land. This duty to reclaim shall require the operator to:

* * *

“(C) Grade the loose coal, mine refuse and other debris on the bottom of the last cut of an operation in such area of land so as to reduce the piles of such materials for the purpose of promoting their possible submergence by water or for the purpose of reducing depressions in the bottom of such last cut and creating a more uniform topography in the bottom of such last cut;

“(D) Construct earth dams in the last cut of an operation in such area of land to aid in creating lakes and ponds for the

purpose of increasing the supply of available water, flood control, erosion control, or water pollution control, where such dams will not seriously interfere with existing mining operations, nor preclude the practical operation of the business of mining in the future; * * *”

The above quoted statute appears to be the only section of the Ohio mining laws which has a direct effect on water pollution.

Therefore, for the reasons herein stated, it is my opinion and you are advised that:

1. Neither the Ohio statutes nor case decisions contain a legal definition as to what is an abandoned mine, but there is no reason to suppose that the term should encompass anything other than its usual connotation.

2. When Section 6111.04, Revised Code, which, with certain exceptions, declares the act of polluting any of the waters of the state to be a public nuisance, is read in connection with Sections 3767.01 to 3767.02, Revised Code, it is apparent that both the owner and lessee of the leased premises are guilty of maintaining a nuisance and both are responsible for the abatement thereof.

3. When a nuisance is created on leased premises by a lessee under an existing lease, the owner of the land is solely responsible for its abatement after the expiration of the lease.

4. Discharge of mine drainage constitutes an industrial waste over which the water pollution control board has jurisdiction as provided in Section 6111.04, Revised Code.

5. When discharges and drainage from abandoned mines pollute any waters of the state, such condition is the responsibility of any of the various state agencies having jurisdiction over the pollution of waters.

6. Sections 4153.39 to 4153.99, inclusive, Revised Code, regarding the process of abandoning a mining operation prescribe no requirements in the form of terminal activities which have an effect on water pollution.

7. Section 1513.16, Revised Code, imposes reclamation duties on strip mine operators which have a direct effect on water pollution.

Respectfully,

WILLIAM SAXBE

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