

BEFORE THE
OIL & GAS COMMISSION

A.W. TIPKA OIL & GAS, INC. ,	.	
	:	
Appellant,	:	Appeal No. 761
	:	
-vs-	:	
	:	
DIVISION OF MINERAL RESOURCES	.	Review of Chief's Order
MANAGEMENT,	:	2006-80
	:	
Appellee,	:	
	:	
and	:	<u>ORDER OF THE</u>
	:	<u>COMMISSION GRANTING</u>
	:	<u>MOTION TO DISMISS</u>
RODNEY G. McFREDERICK, <i>et al.</i> ,	:	
	:	
Intervenors,	:	
	:	
and	:	
	:	
AMERICAN ENERGY CORP., <i>et al.</i> ,	.	
	:	
Interested Persons.	.	

Appearances: John K. Keller, W Jonathan Airey, Gregory D Russell, Michael J Settineri, Counsel for Appellant A.W Tipka Oil & Gas, Inc., Mark G. Bonaventura, Assistant Attorney General, Counsel for Appellee Division of Mineral Resources Management; Kevin L. Sykes, Counsel for Intervenors Rodney McFrederick, *et al.*, Mark S. Stemm, Counsel for Interested Persons American Energy Corporation, *et al.*

This appeal arises from Appellant A.W Tipka Oil & Gas, Inc.'s ["Tipka's"] permit applications (PATTI 8043, 8044, 8045, and 8046) to drill four natural-gas wells in a coal-bearing township. The Chief of the Division of Mineral Resources Management ["DMRM"] disapproved the applications pursuant to R.C. 1509.08 upon finding the objections of coal mine owner American Energy Corporation to be "well-founded."

The Chief initially memorialized his disapproval in Order No. 2006-76. This Order contained instructions for appeal, which specified that an appeal of the Chief's Order could be taken to the Oil & Gas Commission, pursuant to R.C. 1509.36. Tipka filed an appeal of Order No. 2006-76 with the Oil & Gas Commission, which was designated as appeal #760. On July 14, 2006, the Chief vacated Order No. 2006-76. Thereafter, on August 10, 2006, Tipka voluntarily withdrew its appeal of this Order, and on August 28, 2006, appeal #760 was closed. The Chief then memorialized his disapproval in Order No. 2006-80, dated July 14, 2006. This Order expressly stated that any person with an interest that is or may be adversely affected could appeal to the Reclamation Commission. Nonetheless, Tipka filed its Notice of Appeal of the Chief's Order No. 2006-80 with this Commission pursuant to R.C.1509.36.

On August 7, 2006, the Division moved to dismiss this appeal on the basis that the Oil & Gas Commission lacks subject matter jurisdiction over the permitting issues here presented. Interested parties American Energy Company and Consolidated Land Company filed a memorandum supporting the position of the Division that this appeal should be dismissed, as did the Ohio Coal Association, in the capacity of *amicus*. Appellant Tipka filed a memorandum opposing the Division's motion, and the Ohio Oil and Gas Association filed an *amicus* brief that also opposed the motion to dismiss.

On August 24, 2006, the Commission conducted a hearing on the Motion to Dismiss. A quorum of the Commission participated in the hearing, consisting of members Taylor, Gray, and McNutt being physically present and member Cameron participating by telephone by agreement of all parties and in accordance with the Commission's rules. Member Petricoff recused himself and did not participate.

Appearing before the Commission and participating in this hearing, through counsel, were the movant Division of Mineral Resources Management, interested parties American Energy Company and Consolidated Land Company, Appellant Tipka, the Ohio Oil and Gas Association, and Rodney G. McFrederick, Charles J. Schaefer, and Richard S. Westfall, who are landowners upon whose property Tipka desires to drill oil and gas wells.

The specific jurisdictional question raised by the Motion to Dismiss is whether the subject matter of Tipka's appeal is within the exclusive jurisdiction of the Reclamation Commission under R.C. 1509.08, as the Division contends, or whether the Oil & Gas Commission has concurrent jurisdiction under R.C. 1509.36, as Tipka contends. The facts and issues of the jurisdictional question were thoroughly briefed by the parties and *amici*, and well argued at the oral hearing on the Motion to Dismiss.

Upon consideration of the Motion to Dismiss, the briefs filed in this proceeding and the arguments of counsel at the hearing, the Commission finds, as a predicate to its jurisdictional determination, that it is apparent upon the face of his Order regarding the Tipka permit applications, that the Chief of the Division of Mineral Resources Management was proceeding under R.C. 1509.08. While Tipka asserts that the determination of the Chief was erroneous in a number of respects, it concedes that the provisions of R.C. 1509.08 govern the permitting process under appeal here. See, Appeal From Order No. 2006-80 Filed by A.W Tipka Oil & Gas, Inc. at 3-4; Tipka's Preliminary Statement, at 4.

The language of R.C. 1509.08 pertaining to this appeal reads as follows: "...the applicant may appeal the disapproval of the application by the chief to the reclamation commission. * * * The reclamation commission shall hear any such appeal in accordance with section 1513.13 of the Revised Code.. " Under R.C. 1513.13(A)(1), the Reclamation Commission "has exclusive original jurisdiction to hear and decide such appeals." Additionally, R.C. 1513.13(B)(4) expressly refers to requirements for hearings before the Reclamation Commission concerning decisions of the Chief of the Division of Mineral Resources Management "regarding the location of a well in a coal bearing township under section 1509.08 of the Revised Code." Reading R.C. 1509.08 and R.C. 1513.13 *in pari materia*, it is apparent that the General Assembly intended for the Reclamation Commission to have jurisdiction over issues pertaining to oil and gas drilling permits in coal bearing townships, and that jurisdiction was to be both exclusive and original.

The recent legislative history of R.C. 1509.08 and 1513.13, which is very ably discussed in the memorandum filed by the American Energy Corporation and the Consolidated Land Company, and the language of the Ohio Supreme Court decision in *Redman v Ohio Department of Industrial Relations, et al.* (1996), also support this conclusion, but they are merely persuasive authority on the issue of subject matter jurisdiction now before us. The clear, precise and unambiguous language of R.C. 1509.08 and 1513.13, on the other hand, is dispositive of that issue.

Tipka and other interested parties opposing the Division's Motion to Dismiss rely upon the language of R.C. 1509.36, which states in relevant part: "[a]ny person claiming to be aggrieved or adversely affected by an order by the chief of the division of mineral resources management may appeal to the oil and gas commission for an order vacating or modifying such order." However, there is no language in R.C. 1509.36, or in any other statute brought to our attention by the Appellant, that provides for the concurrent jurisdiction of the Oil & Gas Commission over issues of drilling permits in coal bearing townships in terms as specific, clear and unambiguous as those used in R.C. 1509.08 and 1513.13.

ORDER

WHEREFORE, the Commission finds that R.C. 1509.08 and 1513.13 are controlling for the jurisdictional issue before us and, therefore, finds that the Reclamation Commission has exclusive and original jurisdiction over the issues raised by Tipka's appeal. The Motion to Dismiss of the Division of Mineral Resources Management is hereby **GRANTED**. **This is a final and appealable order.**

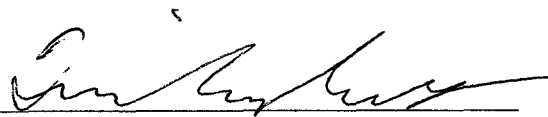
Date issued 10/12/06


WILLIAM J. TAYLOR, Chairman


JOHN A. GRAY


JAMES H. CAMERON

RECUSED
M. HOWARD PETRICOFF, Secretary


TIMOTHY C. McNUTT

INSTRUCTIONS FOR APPEAL

This decision may be appealed to the Court of Common Pleas for Franklin County, within thirty days of your receipt of this decision, in accordance with Ohio Revised Code §1509.37

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BEFORE THE OIL & GAS COMMISSION

A.W TIPKA OIL & GAS, INC. ,

Appellant,

Appeal No. 761

-vs-

DIVISION OF MINERAL RESOURCES
MANAGEMENT,

Review of Chief's Order
2006-80

Appellee,

and

RODNEY G. McFREDERICK, *et al.*,

Intervenors,

and

AMERICAN ENERGY CORP., *et al.*,

Interested Persons.

PRE-HEARING ORDER

Appearances: John K. Keller, W Jonathan Airey, Gregory D Russell, Michael J. Settineri, Counsel for Appellant A.W Tipka Oil & Gas, Inc., Mark G. Bonaventura, Assistant Attorney General, Counsel for Appellee Division of Mineral Resources Management; Kevin L. Sykes, Counsel for Intervenors Rodney McFrederick, *et al.*, Mark S. Stemm, Counsel for Interested Persons American Energy Corporation, *et al.*

Pursuant to notice, the parties to this appeal were contacted for Pre-Hearing Conference on August 25, 2006 and September 1, 2006. All persons participated freely in the conference. Items discussed and determined were as follows:

1. The hearing in this matter will be scheduled for **November 27, 2006** and **December 5, 2006**, in Columbus, Ohio.
2. The parties may file proposed orders addressing the Division's Motion to Dismiss. The proposed orders should be filed with the Commission on or before **September 12, 2006**. The proposed orders may be filed in person, by mail, by fax or by e-mail. The proposed orders shall also be served upon all identified parties to this appeal (see above list of appearances).

- 3 The Ohio Oil & Gas Association and the Ohio Coal Association have entered appearances as *amicus curiae* in this matter, via filing briefs addressing the Division's Motion to Dismiss. Should this matter proceed to hearing, these *amicus* filers will be permitted to submit briefs on the merits of this appeal. However, the *amicus* filers will not be permitted to offer evidence at the merit hearing. The *amicus* filers may attempt to establish themselves as "interested persons." If the *amicus* filers seek "interested person" status, the Commission will formally determine whether the *amicus* filers qualify as "interested persons."
- 4 The Commission will attempt to decide the pending Motion to Dismiss as expeditiously as possible. The Commission intends to deliberate upon the Motion to Dismiss at its next-scheduled meeting, set for September 28, 2006.

If any of the above statements do not substantially represent the agreements or discussions of the parties made at the pre-hearing conference, please contact the Assistant to the Commission Secretary.

9/6/06
DATE


LINDA WILHELM OSTERMAN
Assistant to Commission Secretary
(614) 262-1269
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linda.osterman@dnr.state.oh.us

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**ORDER OF THE
COMMISSION GRANTING
INTERVENTION OF
RODNEY G. McFREDERICK,
CHARLES J. SCHAEFER &
RICHARD S. WESTFALL
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COMPANY AS INTERESTED
PERSONS**

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On July 17, 2006, Appellant A.W. Tipka Oil & Gas, Inc. ["Tipka"] filed with the Oil & Gas Commission, a notice of appeal from Chief's Order 2006-80. This Chief's Order denied four drilling permit applications sought by Tipka. The denial was based upon the Chief's finding that objections to the permit applications made by American Energy Corporation ["AEC"], were "well founded." AEC, and its affiliate Consolidated Land Company ["CLC"], own coal reserves in the area where Tipka sought drilling permits. AEC claimed that its coal reserves were minable, and that the drilling of wells within the reserve would interfere with AEC's coal mining operations.

On August 16, 2006, Rodney G. McFrederick, Charles J. Schaefer and Richard S. Westfall filed a Motion to Intervene into this appeal. These individuals own interests in the surface estates in the area where Tipka proposed to drill its wells. These individuals also own the underlying oil & gas, and other underlying mineral estates, excluding the underlying coal reserves held by AEC or CLC. On August 24, 2006, during a hearing before the Oil & Gas Commission, Messrs. McFrederick, Schaefer and Westfall asserted their interests in being intervenors in the immediate appeal. No objections were heard from the identified parties or from any other persons attending the Commission's hearing.

On August 21, 2006, American Energy Corporation identified itself to the Commission as the owner of the "affected mine" addressed in Chief's Order 2006-80. Consolidated Land Corporation, an affiliate of AEC, identified itself to the Commission as the coal lessor for the area at issue. On August 24, 2006, during a hearing before the Oil & Gas Commission, AEC and CLC asked to be recognized as "interested persons" in the immediate appeal. No objections were heard from the identified parties or from any other persons attending the Commission's hearing.

O.R.C. §1509.36 articulates the procedures to be applied in appeals before the Oil & Gas Commission. This statute provides in pertinent part:

Either party to the appeal or any interested person who, pursuant to commission rules has been granted permission to appear, may submit such evidence as the commission considers admissible.

(Emphasis added.) The rules of the Oil & Gas Commission also provide, at O.A.C. §1509-1-14.

Any person, partnership, corporation, board or other entity having a pecuniary or proprietary interest directly affected by an appeal is deemed an interested person in such appeal and may appear before the commission . . . In the event a question arises concerning whether a person, partnership, corporation, board or other entity is an interested person in an appeal, the commission may decide whether such person, partnership, corporation, board or other entity is an interested person in such appeal.

(Emphasis added.)

The Commission **FINDS** that Messrs. McFrederick, Schaefer and Westfall, as surface and mineral owners in the area at issue, have pecuniary or proprietary interests in the matters to be addressed in the immediate appeal. Therefore, these individuals qualify as "interested persons."

The Commission further **FINDS** that American Energy Corporation and Consolidated Land Company, as the owner of the potentially affected mine and the owner of coal reserves in this area, have pecuniary or proprietary interests in the matters to be addressed in this appeal. Therefore, these entities qualify as "interested persons."

WHEREFORE, the Commission **FINDS** that Messrs. McFrederick, Schaefer and Westfall, and that American Energy Corporation and Consolidated Land Company, have significant, direct and compelling interests in the outcome of this litigation. Further, the Commission **FINDS** that the participation of these individuals and entities will assist the Commission in a full and fair review of the Chief's Order at issue. Therefore, the Commission hereby **GRANTS** Messrs. McFrederick, Schaefer and Westfall's Motion to Intervene. The Commission also **ACCEPTS** the requests of American Energy Corporation and Consolidated Land Company to appear as "interested persons" in this appeal. These individuals and entities shall be permitted to participate in this proceeding.

Date Issued: 9/5/06

see attached
WILLIAM J. TAYLOR, Chairman

see attached
JOHN A. GRAY

see attached
JAMES H. CAMERON

RECUSED
M. HOWARD PETRICOFF, Secretary

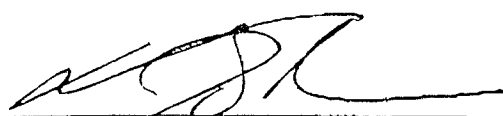
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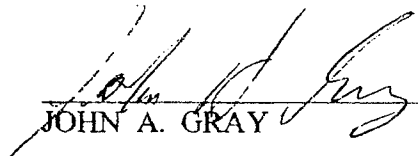
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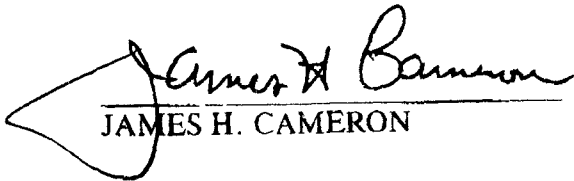
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RECUSED
M. HOWARD PETRICOFF, Secretary

TIMOTHY C. McNUTT

A.W Tipka
Appeal #761

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