IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT
FULTON COUNTY, ILLINOIS

MICHAEL GRIGSBY, WILLIAM LOTT, NAOMI LOTT, JOE COOK, BUD HUGHES, ROBERT WILLIAMS, TERESA GRIGSBY, MARGARET WILLIAMS, JOHN GRIGSBY, SR., LORRAINE GRIGSBY and RICHARD FULLER

Plaintiffs,

vs.

No. 07-L-21

THE ILLINOIS DEPARTMENT OF NATURAL RESOURCES, THE ILLINOIS DEPARTMENT OF NATURAL RESOURCES, SAM FLOOD, Acting Director, THE ILLINOIS DEPARTMENT OF NATURAL RESOURCES, OFFICE OF MINES AND MINERALS, JOE ANGLETON, Director, and THE ILLINOIS DEPARTMENT OF NATURAL RESOURCES, OFFICE OF MINES AND MINERALS, LAND RECLAMATION DIVISION, SCOTT K. FOWLER, Supervisor,

Defendants.

MEMORANDUM OPINION

FACTUAL BACKGROUND

1. That Permit Application No. 355 (to conduct mining operations) was on file and had its first newspaper notice published prior to December 12, 2005, with the Illinois Department of Natural Resources, Office of Mine and Minerals.
2. That on December 12, 2005, the Plaintiffs in this case, 07-L-21, filed with the Illinois Department of Natural Resources, Office of Mines and Minerals, their Petition to Designate Certain Lands as Lands Unsuitable for Surface Coal Mining under "Petition LU-005."
3. The lands described in Permit Application No. 355 and in LU-005 are the same lands.

4. That on or about April 25, 2007, The Department of Natural Resources, Office of Mines and Minerals by Joe Angleton, Director of Office of Mines and Minerals, rendered a thirty-one page decision finding that LU-005 was both untimely and incomplete as defined by *62 Ill. Adm. Code 1764.13(b)(1), 1764.15(a)(6), and 1764.15(a)(3).*

5. That Plaintiff filed a timely Complaint for Administrative Review in this Court on May 30, 2007.

ANALYSIS

First Issue: Whether LU-005 was timely filed.

62 Illinois Administrative Code Section 1764.15 entitled "Initial Processing, Record Keeping, and Notification Requirements" provides as pertinent the following provisions:

(a) Processing of Petition

(3) If the Department determines that the petition is incomplete, frivolous, or that the petitioner does not meet the requirements of Section 1764.13(a), it shall return the petition to the petitioner with a written statement of the reasons for the determination and the categories of information needed to make the petition complete. A frivolous petition is one in which the allegations of harm lack serious merit.

(6) The Department shall not process any petition received insofar as it pertains to lands for which an administratively complete permit application has been filed and the first newspaper notice has been published. Based on such a determination, the Department may issue a decision on a complete and accurate permit application and shall inform the petitioner why the Department cannot consider that part of the petition pertaining to the proposed permit area.

This Court notes that Section 1764.15(a)(3) and (a)(6) are under the Code provision entitled, *"(a) Processing of Petitions."* It appears that Code provisions (a)(3) concerning whether a petition is incomplete, or frivolous is part of the "processing of petition."

Section 1764.15(a)(6) provides, *"The department shall not process any petition received insofar as it pertains to lands for which an administratively complete permit application has been filed and the first newspaper notice has been published."* (Underlining by Court) This Court finds that Section 1764.15 (a) (6) to be mandatory and not permissive. The Department of Natural Resources, Office of Mines and Minerals had no administrative authority to perform any other processing of LU-005, including processing under 1764.15 (a) (3) due to the prohibition of processing under Section 1764.15(a)(6).

Without proper, administrative authority, the determination of the Department that LU-005 is incomplete or frivolous is void and of no effect. This determination by this Court does not imply that any future Petition for Land Unsuitable for Mining Purposes, if timely filed, is not subject to review under Section 1764.15(a)(3).

This Court finds that pursuant to 62 Ill. Adm. Code, Section 1764.15(a)(6), that LU-005 was untimely filed and the Department of Natural Resources determination that the petition was untimely filed is affirmed.

Second Issue: Whether 62 Ill. Adm. Code, Section 1764.15(a)(6) which prohibits the processing of a Land Unsuitable for Mining Purposes Petition if an administratively complete permit application has been filed and the first newspaper notice has been published is more stringent than the Federal Surface Mining Control and Reclamation Act of 1977 and its associated federal regulations.

The Federal Surface Mining Control and Reclamation Act of 1977 and its associated regulations at 30 C.F.R. Section 764.15 (a)(6) provides as follows:

> *"The regulatory authority may determine not to process any petition received insofar as it pertains to lands for which an administratively complete permit application has been filed and the first newspaper notice has been published..."*

The counterpart Illinois regulation, 62 Ill. Adm. Code 1764.15(a)(6) provides as follows:

> *"The Department shall not process any petition received insofar as it pertains to lands for which an administratively complete permit application has been filed and the first newspaper notice has been published."*

The Court finds that the permissive "may" used in the Federal regulation grants to the State of Illinois the permissive ability to adopt its regulations prohibiting the processing of a petition for lands unsuitable for mining purposes as stated in 62 Ill. Adm. Code 1764.15 (a) (6). This Court finds that 62 Ill. Adm. Code 1764.15 is not more stringent than the federal statutory provision and its associated federal regulations.

Third Issue: Whether the determination by the Illinois Department of Natural Resources, Office of Mines and Minerals that the petition in LU-005 was incomplete is a valid determination.

This Court, in this decision, under the First Issue has found that the Department of Natural Resources, Office of Mines and Minerals, was without administrative authority to process the petition to determine if it was incomplete or frivolous under 62 Ill. Adm. Code 1764.15 (a)(3) due to the prohibition of processing such petition if an administratively complete permit application has been filed and the first newspaper notice has been published under 62 Ill. Adm. Code 1764.15(a)(6). The determination is the Department that the petition in LU-005 is incomplete or frivolous is void due to the effect of 62 Ill. Adm. Code 17641.5(a)(6).

SUMMARY

The Department of Natural Resources, Office of Mines and Minerals' determination that the petition in LU-005 is untimely is affirmed.

The Department of Natural Resources, Office of Mines and Minerals' determination that the petition in LU-005 is incomplete or frivolous is void for want of appropriate administrative authority to make that determination.

Mr. Fruehling is directed to submit an Order consistent with this Memorandum Opinion.

Entered this 5th day of April, 2010.

Edward R. Damm
JUDGE

cc: Keith E. Fruehling
David L. Wentworth, II

PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing instrument was served upon Keith E. Fruehling and David L. Wentworth by enclosing the same in an envelope addressed to said person(s) properly addressed as disclosed by the pleadings of record herein and as stated below with postage fully prepaid and by depositing said envelope in a U.S. Post Office Mail Box in Lewistown, Illinois, on the 5th day of April, 2010.

M. Thomas

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