

ORIGINAL

IN THE SUPREME COURT OF OHIO

CHESAPEAKE EXPLORATION, LLC,

Relator,

v.

OIL AND GAS COMMISSION, *et al.*,

Respondents.

: Case No. 2012-1207
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Original Action in Prohibition

MERIT BRIEF OF RESPONDENTS

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INTRODUCTION

Relator Chesapeake Exploration, LLC (“Chesapeake”) is litigating this suit to win something it has already won—a permit to drill an oil and gas well on land owned by Summitcrest—where (1) the order of the Oil and Gas Commission (“the Commission”) that upheld the issuance of the permit is no longer appealable, and (2) the jurisdictional statute has since been amended to clearly preclude the Commission from hearing future appeals from the issuance of such permits. With its permit secured and not subject to further appeal, Chesapeake’s continued pursuit for a writ of prohibition is an academic exercise to interpret an obsolete statute.

Chesapeake has not shown that the Commission patently and unambiguously lacked jurisdiction to hear the Summitcrest appeal. At the time of that appeal, R.C. 1509.36 provided that any person adversely affected by an order of the Division of Oil and Gas Resources Management (“the Division”) may appeal to the Commission to vacate or modify the order. Also, R.C. 1509.03(B) provided that an order by the Division that issues a permit is an adjudication order. These statutes, when read *in pari materia*, gave the Commission basic jurisdiction over the Summitcrest appeal. Moreover, the 2012 amendment to R.C. 1509.03(B), which took effect after Summitcrest appealed and provided that the statute does not apply to a drilling permit, suggests the General Assembly meant to resolve jurisdictional inconsistencies and ambiguities within the relevant statutes.

Even if the Commission patently and unambiguously lacked jurisdiction over the Summitcrest appeal, this Court should not issue a writ of prohibition. The writ is not needed to prevent the future unauthorized exercise of jurisdiction because the 2012 amendment to R.C. 1509.03(B) clearly precludes the Commission from hearing future appeals from the Division’s

issuance of drilling permits. Also, prohibition will not “correct the results” of the Commission’s action because the result of deciding, versus dismissing, the Summitcrest appeal is the same: Chesapeake keeps its permit. The Commission’s order upholding the issuance of the permit cannot be reversed on appeal because the appeal deadline has long since expired.

Accordingly, Chesapeake’s request for a writ of prohibition should be denied.

STATEMENT OF THE CASE AND FACTS

This case is presented on agreed facts pursuant to S. Ct. Prac. R. 10.7. *See* Agreed Statement of Facts, filed Oct. 30, 2012 (“Agreed Facts”). Chesapeake applied to the Division to drill an oil and gas well on property pursuant to a lease that was later assigned to Summitcrest. Agreed Facts # 1-2. The Division Chief granted the application and issued Chesapeake a permit to drill on the land included under the lease. Agreed Fact # 3 & Ex. 1. On April 19, 2012, Summitcrest appealed to the Commission to reverse and vacate the Division Chief’s issuance of the permit. Agreed Fact # 4 & Ex. 2.

The Division moved to dismiss the Summitcrest appeal, Agreed Fact # 7 & Ex. 4. Chesapeake intervened and joined the Division’s motion to dismiss. Agreed Facts # 6, 8 & Exs. 3, 5. The Commission denied the motion to dismiss and scheduled the Summitcrest appeal for a hearing, Agreed Fact # 9, based on the following:

- R.C. 1509.36, which provides in part that “[a]ny person adversely affected by an order of the [Division Chief] may appeal to the [Commission] for an order vacating or modifying the order”;
- R.C. 1509.03(B), which provided in part that an order by the Division Chief that issues, denies, or modifies a permit is an adjudication order under R.C. Chapter 119;

- the Commission's history of hearing and deciding appeals from issuances of drilling permits by the Division Chief; and
- provisions in R.C. 1509.36 and the Ohio Adm.Code 1509-1-01 thru -26 that govern the Commission's jurisdiction.

Order of the Commission Denying Appellee's Motion to Dismiss, Agreed Facts Ex. 6.

Chesapeake then filed this prohibition action to prevent the Commission from hearing the Summitcrest appeal. Agreed Fact # 10. Chesapeake moved the Commission (but not this Court) to stay further proceedings. Agreed Fact # 11 & Ex. 7. The Commission denied Chesapeake's motion to stay and heard the Summitcrest appeal. Agreed Facts # 11, 12. On August 8, 2012, the Commission denied the Summitcrest appeal and affirmed the Division's issuance of the drilling permit to Chesapeake. Agreed Fact # 13 & Ex. 8. No party appealed the Commission's final order. Agreed Fact # 14.

ARGUMENT

Respondents' Proposition of Law No. 1:

The Commission did not patently and unambiguously lack jurisdiction because (a) both R.C. 1509.36, and former R.C. 1509.03(B) in effect on the date Summitcrest appealed, gave the Commission basic jurisdiction, and (b) the 2012 amendment to R.C. 1509.03(B), which states that the statute does not apply to a drilling permit, did not take effect until after Summitcrest appealed.

Because Chesapeake seeks to prohibit an act (the Commission's adjudication of the Summitcrest appeal) that has occurred, its prohibition claim is moot unless it shows the Commission *patently and unambiguously* lacked jurisdiction. See *State ex rel. Rogers v. McGee Brown*, 80 Ohio St. 3d 408, 410 (1997). "[U]nless jurisdiction is patently and unambiguously lacking, a tribunal having general subject-matter jurisdiction can determine its own jurisdiction,

and a party challenging that jurisdiction has an adequate remedy in the ordinary course of law by appeal.” *State ex rel. Scott v. Cleveland*, 112 Ohio St. 3d 324, 2006-Ohio-6573, ¶ 16.

Moreover, prohibition is an extraordinary writ that is granted only in limited circumstances with great caution and restraint. *State ex rel. Corn v. Russo*, 90 Ohio St. 3d 551, 554 (2001). It should not issue in borderline or doubtful cases. *State ex rel. Merion v. Court of Common Pleas of Tuscarawas Cty.*, 137 Ohio St. 273, 277 (1940).

The Commission did not patently and unambiguously lack jurisdiction over the Summitcrest appeal. Contrary to Chesapeake’s arguments, multiple statutory grounds supported the Commission’s exercise of jurisdiction. R.C. 1509.36 governs appeals to the Commission and provides that “[a]ny person adversely affected by an order of the [Division Chief] may appeal to the [Commission] for an order vacating or modifying the order.” Also, on the date Summitcrest appealed, R.C. 1509.03(B) provided as follows:

Any order issuing . . . a permit . . . required to be made by the [Division] chief pursuant to this chapter shall be made in accordance with Chapter 119. of the Revised Code *Every order issuing . . . a permit under this chapter and described as such shall be considered an adjudication order* for purposes of Chapter 119. of the Revised Code. (Emphasis added.)

These statutes, when read *in pari materia*, gave the Commission basic jurisdiction over the Summitcrest appeal. Under former R.C. 1509.03(B), the Division’s issuance of the permit to Chesapeake was an adjudication order, while R.C. 1509.36 provides that the order may be appealed to the Commission by any person adversely affected by the order. Prohibition will not issue where a tribunal has basic statutory jurisdiction to proceed. *State ex rel. Natalina Food Co. v. Ohio Civ. Rights Comm.*, 55 Ohio St. 3d 98, 100 (1990).

Chesapeake argues the issuance of its drilling permit was not appealable to the Commission because R.C. 1509.06(F) says in part that “[t]he issuance of a permit shall not be

considered an order of the [Division] chief.” While that sentence standing alone supports Chesapeake’s position, both R.C. 1509.36 and R.C. 1509.03(B), as they existed when Summitcrest appealed, support the Commission’s contrary position.

Moreover, in denying the motion to dismiss the Summitcrest appeal, the Commission also noted the appellate purposes for which it was created and its history of adjudicating appeals from issuances of drilling permits. Order of the Commission Denying Appellee’s Motion to Dismiss, Agreed Facts Ex. 6 at 5-6 & fn. 2. Finally, the 2012 (Am. Sub. S.B. 315) amendment to R.C. 1509.03(B), which states that R.C. 1509.03(B)(1) does not apply to a drilling permit issued under R.C. 1509.06, took effect *after* Summitcrest appealed. *Id.* at fn. 1.¹ That amendment suggests the General Assembly intended to resolve jurisdictional inconsistencies and ambiguities within the relevant statutes. If the Commission’s jurisdiction was as lacking as Chesapeake contends, then the General Assembly had no need to amend the jurisdictional statute.

Chesapeake has not met its high burden of showing that the Commission *patently and unambiguously* lacked jurisdiction over the Summitcrest appeal. Without such a showing, the Commission’s completed action (that is no longer appealable) also renders Chesapeake’s prohibition action moot.

¹ The Commission’s order denying the motion to dismiss erroneously states the amendment to R.C. 1509.03(B) took effect on June 11, 2012. The amendment was enacted on that date, and it took effect on September 10, 2012. The error is harmless because under either scenario the statutory amendment took effect after Summitcrest appealed to the Commission on April 19, 2012.

Respondents' Proposition of Law No. 2:

Even if the Commission patently and unambiguously lacked jurisdiction over the Summitcrest appeal, prohibition should not issue because (a) the jurisdictional statute has since been amended to clearly preclude the Commission from hearing such appeals, and (b) the result of the Commission's action is the same as if the Commission had not acted: Chesapeake keeps its drilling permit.

Generally, a prohibition action is not mooted when the act sought to be prevented occurs where the tribunal patently and unambiguously lacked jurisdiction. *State ex rel. Rogers v. McGee Brown*, 80 Ohio St. 3d 408, 410 (1997). This is because prohibition both prevents the future unauthorized exercise of jurisdiction and corrects the results of previous jurisdictionally unauthorized actions. *Id.*

Neither of these reasons, however, exists in this case. Prohibition is not needed to prevent the future unauthorized exercise of jurisdiction by the Commission. The 2012 amendment provides that R.C. 1509.03(B)(1) does not apply to a drilling permit issued under R.C. 1509.06. The statutory amendment thus clearly precludes the Commission from hearing future appeals from the Division's issuance of drilling permits. The former version of R.C. 1509.03(B), in effect when Summitcrest appealed to the Commission, is now obsolete.

Prohibition also will not "correct the results" of the Commission's previous action. A "result" is "[t]he effect, consequence, issue, or outcome of some action, process, or design." The New Shorter Oxford English Dictionary (1993) 2570. It is a forward-looking term. *United States v. Cienfuegos*, 462 F. 2d 1160, 1164 (9th Cir. 2006). Thus, the result of an action is broader than the action itself. Whether or not the Commission heard the Summitcrest appeal, the result is the same: Chesapeake keeps its drilling permit. Had the Commission dismissed the Summitcrest appeal instead of denying it on the merits, Chesapeake would still have its drilling permit. Likewise, issuing a writ of prohibition to vacate the Commission's adjudication order

will not “correct” the result of the Summitcrest appeal. Further, the Commission’s order cannot be reversed or vacated on appeal because the appeal deadline has long since expired. *See* R.C. 1509.37 (thirty days to appeal after receipt of the Commission’s order).

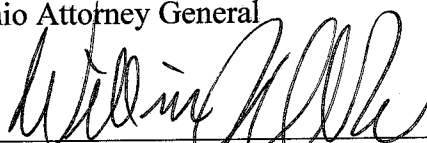
Chesapeake’s unnecessary pursuit of the prohibition writ is a waste of this Court’s and the parties’ time and resources. Since prohibition is not needed to prevent the future unauthorized exercise of jurisdiction (because the jurisdictional statute has changed), and will not correct the result of the Commission’s previous action (because the result is the same), the writ should not issue.

CONCLUSION

For the foregoing reasons, Chesapeake’s request for a writ of prohibition should be denied.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served by regular and electronic mail on November 28, 2012, upon John K. Keller, Robert J. Krummen, and Daniel E. Shuey, VORYS, SATER, SEYMOUR AND PEASE LLP, 52 E. Gay St., P.O. Box 1008, Columbus, OH 43216-1008.



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