

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

FALKIRK MINING COMPANY
REVISION 13, PERMIT NAFK-9601
APPROVAL

CASE NO. RC-08-640

JULY __, 2010

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

PRELIMINARY STATEMENT

On August 1, 2008, the Public Service Commission (“Commission”) received the application for Revision No. 13 to Surface Coal Mining Permit NAFK-9601 from the Falkirk Mining Company (“Falkirk”). As a part of this revision, Falkirk proposes a post-mining land use change to recreational use on 428 acres located in the W½ of Section 25, SE¼ of Section 26, and the N½NE¼ of Section 35, Township 146 North, Range 82 West, McLean County, North Dakota.

On March 10, 2010, the Commission conditionally granted the revision changing the post-mining land use to recreational use. Falkirk was directed to submit additional documents for the land use change to become effective.

As a part of the Commission’s conditional approval of the revision, it was stated such approval is subject to the right of any person with an interest who is or may be adversely affected to request a formal hearing.

On April 9, 2010, the Commission received an “Application for Hearing by Dakota Resource Council” requesting a formal hearing with respect to 86 acres of the 428 acres included in the land use change. The Dakota Resource Council (“DRC”) asserted that the land use for the 86 acres should not be revised to recreation post-mining, and should instead remain agricultural land use.

On May 12, 2010, the Commission issued a Notice of Formal Hearing scheduling the hearing at 9:00 CDT on July 1, 2010, in the Public Service Commission’s Hearing Room on the 12th Floor of the State Capitol in Bismarck, North Dakota.

On April 15, 2010, the Commission requested the designation of an Administrative Law Judge (“ALJ”) to preside as hearing officer at the formal hearing. On April 16, 2010, the Honorable Allen C. Hoberg was designated as the ALJ to preside at the formal hearing.

Subsequently, petitions to intervene were filed by the North Dakota Department of Transportation, North Dakota Game and Fish Department, and McLean County, North Dakota. By Order Granting Interventions, dated June 16, 2010, the Commission granted the Petitions of the three interveners to intervene.

The hearing was held as scheduled.

APPEARANCES

Commissioners Kevin Cramer, Tony Clark and Brian P. Kalk.

Brian R. Bjella, Attorney-at-Law, 400 East Broadway, Suite 600, Bismarck, North Dakota 58501, on behalf of Falkirk.

Annette Bendish, Legal Counsel, Public Service Commission, State Capitol, Bismarck, North Dakota 58505, on behalf of the Reclamation Division of the North Dakota Public Service Commission.

Derrick Braaten, Attorney-at-Law, 224 North Fourth Street, Bismarck, North Dakota 58501-4004, on behalf of the DRC.

Zachary Smith, Assistant Attorney General, 500 North Ninth Street, Bismarck, North Dakota 58501-4509, on behalf of the North Dakota Department of Transportation and the North Dakota Game and Fish Department.

Ladd Erickson, State’s Attorney, P.O. Box 1108, Washburn, North Dakota 58577-1108, on behalf of McLean County, North Dakota.

Allen C. Hoberg, Administrative Law Judge, Office of Administrative Hearings, 1701 North Ninth Street, Bismarck, North Dakota 58501-1882, as Procedural Hearing Officer.

FINDINGS OF FACT

1. Falkirk submits that it has met all the requirements of NDCC Chapter 38-14.1 with respect to satisfying all criteria to change the post-mining land use on the 86 acres in question to recreational use. The Department of Transportation, Game and Fish Department and McLean County, all concur that Falkirk has complied with all laws and regulations pertaining to change of post-mining land use on the 86 acres, and support the

land use change. DRC objects to the land use change and requests that the land use remain as it was prior to mining, being agricultural use.

2. The Director of the Department of Transportation, Mr. Francis G. Ziegler; the Director of the Game and Fish Department, Mr. Terry Steinwand; and the Chairman of the McLean County Commission, Mr. Steven Lee; all testified in support of the land use change. Mr. Ziegler indicated that the Department of Transportation supported the land use change as the method by which the Department of Transportation can satisfy what is known as its “no-mow” obligation. The no-mow obligation arose as a result of federal regulations which required the mitigation of impacts to wetlands and natural wildlife habitat from highway construction. In response to opposition to creating no-mow acres within highway rights-of-way, the Department of Transportation has sought to acquire lands in the vicinity of the highways for mitigation acreage. The Department of Transportation approached Falkirk regarding possible no-mow mitigation acres. Falkirk indicated that it did have lands within the mine which may be appropriate adjacent to Coal Lake Coulee, and subsequently agreed to donate the lands to the State of North Dakota for the benefit of the Department of Transportation. Mr. Ziegler indicated that an Agreement dated June 29, 2009, had been executed between Falkirk, and the State of North Dakota, acting through the Department of Transportation, regarding the donation of 729.40 acres of land as mitigation acreage. One of the covenants of the agreement was that the lands be managed in perpetuity as a wildlife management area open for public access and use. Mr. Ziegler further indicated that the Game and Fish Department would manage the lands for such purposes.
3. Mr. Terry Steinwand, Director of the Game and Fish Department, testified in support of the post-mining land use change indicating a valuable and unique area of wildlife habitat will be managed for use and enjoyment by the public, and will be a permanent asset to the local community and neighboring farmer producers. He stated that the Game and Fish Department will manage the area as part of the statewide wildlife management area system. He further indicated that the department will pay property taxes on the land as required by law. He indicated that most of the area was undisturbed during mining operations and is in native prairie, woodlands, wetlands or other idle lands. He deemed this land to be exceptional wildlife habitat. He further stated that the 86 acres in question

are scattered in smaller tracts which makes them less than ideal for standard farming and ranching operations, but are nearly perfect as wildlife food plots and grazing areas. He stated it was the intention of his department to work with area farmers and ranchers to keep these areas in production as a source of food for wildlife. He indicated that a typical crop share agreement allows the farmer operator to harvest 70% of the crop while leaving the remaining 30% standing as a food source for wildlife.

4. Mr. Steven Lee, Chairman of the McLean County Commission, spoke in support of the project. He noted that the County had previously considered this matter as part of its zoning authority, and had approved a land use change for the 86 acres from agricultural to recreational zone for primitive recreational use. He indicated while the County Commission often opposes additional public land acquisitions in the County, that this particular project offered a number of benefits which is why it was approved by the County Commission. Some of the benefits he listed included that the Game and Fish Department had assured the County that the cropland involved in the project would remain cropland available to the area farmers for their use; and that the project will allow for mitigation of the no-mow acres. On behalf of the County, he requested that the revision be approved allowing this post-mining land use change.
5. A representative of Falkirk testified in support of the post-mining land use change for the 86 acres, indicating that the company wished to donate the land to the State of North Dakota for the public benefits as described by Director Ziegler, Director Steinwand and Commissioner Lee. The Falkirk representative, being the environmental manager for the mine, testified that in his opinion the 86 acres have been successfully reclaimed for agricultural purposes.
6. The Director for the DRC, Mr. Mark Trechock, spoke in opposition to the post-mining land use change for the 86 acres in question. He indicated that to grant the post-mining land use change from agricultural to recreation would violate what the DRC believes is the intention of NDCC Chapter 38-14.1 to restore lands for agricultural purposes. Additionally, the DRC opposes the land use change as he further asserted that Falkirk's obligation to reclaim the land is less stringent when the post-mining land use is recreational rather than agricultural. Mr. Trechock further indicated that while the DRC

does not object to the land ownership transfer to the State of North Dakota, that it opposes changing the post-mining land use on these 86 acres.

7. Mr. James Deutsch, Director of the Reclamation Division of the Public Service Commission, testified as to the Division's review process of the revision with respect to changing the post-mining land use on said 86 acres.
8. The applicable statutes and regulations governing this matter are as follows:

NDCC § 38-14.1-24(2)

Environmental protection performance standards. General performance standards are applicable to all surface coal mining and reclamation operations and must require the permittee at a minimum to:

2. Restore the land affected to a condition capable of supporting the uses which it was capable of supporting prior to any mining, or higher or better uses approved by the commission, which may include industrial, commercial, agricultural, residential, recreational, or public facilities. In approving the post-mining land use, or changes thereto, the commission shall establish by regulation post-mining land use criteria that must be demonstrated by the permittee and considered by the commission in making its decision.

NDAC § 69-05.2-23-01(1)

Performance standards – Post-mining land use – Determining pre-mining land use.

1. The post-mining land use must be compared to those uses the land previously supported under proper management unless the land has been previously mined and not reclaimed.

NDAC § 69-05.2-23-02

Performance standards – Post-mining land use – land use categories. Land use is categorized as follows:

1. Cropland.
2. Tame pastureland.
3. Native grassland.
4. Woodland.
5. Fish and wildlife habitat.
6. Developed water resources.
7. Recreation.
8. Residential.
9. Industrial and commercial.
10. Shelterbelts.

NDAC § 69-05.2-23-03

Performance standards – Post-mining land use – Criteria for approving alternative post-mining land uses. An alternative post-mining land use may be approved by the commission, after consulting the landowner or the land management agency having jurisdiction over state or federal lands, if the following criteria are met:

1. There is reasonable likelihood the use will be achieved.
2. The use does not present an actual or probable hazard to public health or safety, or threat of water diminution or pollution.
3. The use will not:
 - (a) Be impractical;
 - (b) Be inconsistent with applicable land use policies or plans;
 - (c) Involve unreasonable delay in implementation; or
 - (d) Cause or contribute to violation of federal, state, or local law.

NDAC § 69-05.2-29.13

Permit applications – Reclamation plans – Post-mining land use.

1. Each reclamation plan must contain a post-mining land use map and detailed description of the post-mining land use explaining:
 - (a) How the post-mining land use will be achieved and the support activities needed.
 - (b) The detailed management plan for native grassland or tame pastureland during the liability period including any plans for livestock grazing prior to final bond release.
 2. If land changes are proposed, the description must be accompanied by materials needed for alternate land use approval under chapter 69-05.2-23.
 3. The applicant shall submit a copy of the surface owner's preference statement and comments by the state and local authorities who would have to initiate, implement, approve, or authorize the land use following reclamation.
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9. Changing the post-mining land use on the 86 acres in question from agricultural to recreational will allow said lands to be released from bond earlier than should said lands remain in agricultural land use.
 10. Neither the mining law or the regulations set forth a priority for post-mining land use, but rather indicate that recreation is one of ten possible "higher or better uses" if approved by this Commission.
 11. As a part of the revision process, Falkirk has satisfied the criteria for approving an alternative post-mining land use by demonstrating there is a reasonable likelihood the use will be achieved; the use does not present an actual or probable hazard to public health or safety or threat of water diminution or pollution; the use will not be impractical, and will

be consistent with applicable land use policies or plans; will not involve unreasonable delays in implementation or cause or contribute to violation of federal, state or local law.

12. Changing the post-mining land use on the 86 acres in question is appropriate and justified by the multiple public benefits to be derived therefrom as articulated by Directors Ziegler and Steinwand and Commissioner Lee; which include but are not limited to wetlands mitigation, satisfaction of the State of North Dakota's no-mow obligation, the 86 acres will be available to local farmers for cropping purposes, and that a valuable and unique area for wildlife habitat will be created and managed for use and enjoyment by the public.

From the foregoing Findings of Fact, the Commission now makes its:

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over Falkirk's mining and reclamation operations in North Dakota.
2. The evidence shows, by the greater weight of the evidence, that changing the post-mining land use on the 86 acres in question from agricultural to recreational is appropriate and justified, and that Falkirk has satisfied all criteria and other obligations imposed by law in order to implement the land use change.
3. The North Dakota Supreme Court in its decision of *Coteau Properties Co. v Oster*, 606 N.W.2d 876, 2000 ND 23 (N.D. 2000) is somewhat instructive, though not directly on point. In that case, the Supreme Court affirmed the Commission's approval of a permit revision which in part changed post-mining land use on approximately 630 acres in order to develop a proposed recreational project which included a lake. The Court applied the preponderance of evidence standard indicating that it must "decide only whether a reasoning mind could reasonably have decided the agency's factual conclusions were approved by the weight of the evidence from the entire record." The Supreme Court found that this Commission's findings were supported by the preponderance of the evidence and affirmed this Commission's decision approving the permit revision to change the post-mining land use in order to develop a recreation area.
4. That one of the possible post-mining land uses, deemed to be a "higher or better use" under mining law and regulations is recreation. Neither the statutes nor the regulations set forth a priority of land uses, but rather set forth a list of ten possible uses, any of which can be approved by this Commission.

5. Substantial public benefit will be achieved by changing the post-mining land use on the 86 acres to recreational.
6. That in this instance, the higher or better use for this 86 acres is recreational.

FROM THE FOREGOING Findings of Fact and Conclusions of Law, the Commission now makes its:

ORDER

The Commission orders that:

1. Falkirk has met the statutory requirements set forth in North Dakota Century Code Chapter 38-14.1 and corresponding regulations with respect to satisfying the criteria for changing the post-mining land use on the 86 acres in question from agricultural to recreational.
2. The conditional approval of Revision No. 13 to Permit No. NAFK-9601 is sustained.

PUBLIC SERVICE COMMISSION

Tony Clark, Commissioner

Kevin Cramer, Commissioner

Brian Kalk, Commissioner