

**BEFORE THE PUBLIC SERVICE COMMISSION
OF NORTH DAKOTA**

Falkirk Mining Company)	Case No. RC-08-640
Revision No. 13, Permit NAFK-9601)	
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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, 222 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 support the land use change because the agreement between them to transfer and manage the land is contingent on Falkirk obtaining final bond release on the subject acreage. DRC objects to the land use change for the 86 acres

of cropland 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. Mr. Ziegler also indicated that the Department of Transportation would have no objection to the 86 acres at issue being reclaimed and proven to be as productive as it was prior to mining. The primary concern from the Department of Transportation was assuring that the land transfer occur, and if the post-mine land use for 86 acres at issue were not revised to recreational and remained as agricultural, Falkirk would not be able to get the land released from bond and therefore could not transfer it to the Department of Transportation.
3. Mr. Terry Steinwand, Director of the Game and Fish Department, testified in support of the post-mining land use change indicating wildlife habitat will be managed for use and enjoyment by the public. 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 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, although there are no contractual requirements toward this end. 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. Mr. Steinwand also indicated that he would have no objection to the 86 acres in question being reclaimed such that it can be proven to be at least as productive as it was prior to mining.

4. Mr. Steven Lee, Chairman of the McLean County Commission, spoke in support of the land transfer. 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. Mr. Lee also indicated that he would have no objection to the 86 acres in question being reclaimed such that it can be proven to be at least as productive as it was prior to mining.
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. He further indicated that Falkirk would not have any objection to testing the productivity of the 86 acres, even if the revision were granted, in order to determine whether the land is as productive as it was prior to mining.

6. The Director for DRC, Mr. Mark Trechock, spoke in opposition to the post-mining land use change for the 86 acres in question. DRC has members in the area who farm and would be interested in farming the land at issue, and the issues raised by DRC in these proceedings are germane to its purpose and mission. Mr. Trechock indicated that to grant the post-mining land use change from agricultural to recreation would violate NDCC Chapter 38-14.1 which requires land to be restored to pre-mining uses, or higher or better uses. Additionally, DRC opposes the land use change because Falkirk's obligation to prove reclamation of the land is less stringent when the post-mining land use is recreational rather than agricultural. Mr. Trechock further indicated that while 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. Mr Deutsch explained that in reviewing and making a recommendation on the application, that Reclamation Division staff did not take a position on or consider whether the recreational use was a "higher or better" use than an agricultural use. Mr Deutsch further indicated that the "recreational" use designation required the least stringent reclamation standards, and that there were other designations that could apply to the land at issue, such as "cropland" and "fish and wildlife habitat." Mr. Deutsch explained that these other designations would have more stringent requirements for reclaiming and proving reclamation of the lands at issue.
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.
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, and according to Falkirk and the Department of Transportation, this is necessary in order to effectuate the transfer as agreed upon by Falkirk and the Department of Transportation, and is the basis for Falkirk's request that all lands involved in the land transfer at issue be revised to a recreational post-mine land use.
 10. The 86 acres at issue will be used as cropland for its post-mine land use.
 11. Falkirk, the Department of Transportation, Game and Fish Department and McLean County have no objections to this 86 acres being used as cropland subsequent to the land transfer.

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 not appropriate or justified.
3. The actual post-mine land use of the 86 acres at issue will be cropland, and therefore the most appropriate post-mine land use designation for the land is cropland.

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 all but the 86 acres in question.
2. The conditional approval of Revision No. 13 to Permit No. NAFK-9601 is sustained in part, and denied in part as to the post-mine land use for the 86 acres of cropland at issue.

PUBLIC SERVICE COMMISSION

Tony Clark, Commissioner

Kevin Cramer, Commissioner

Brian Kalk, Commissioner